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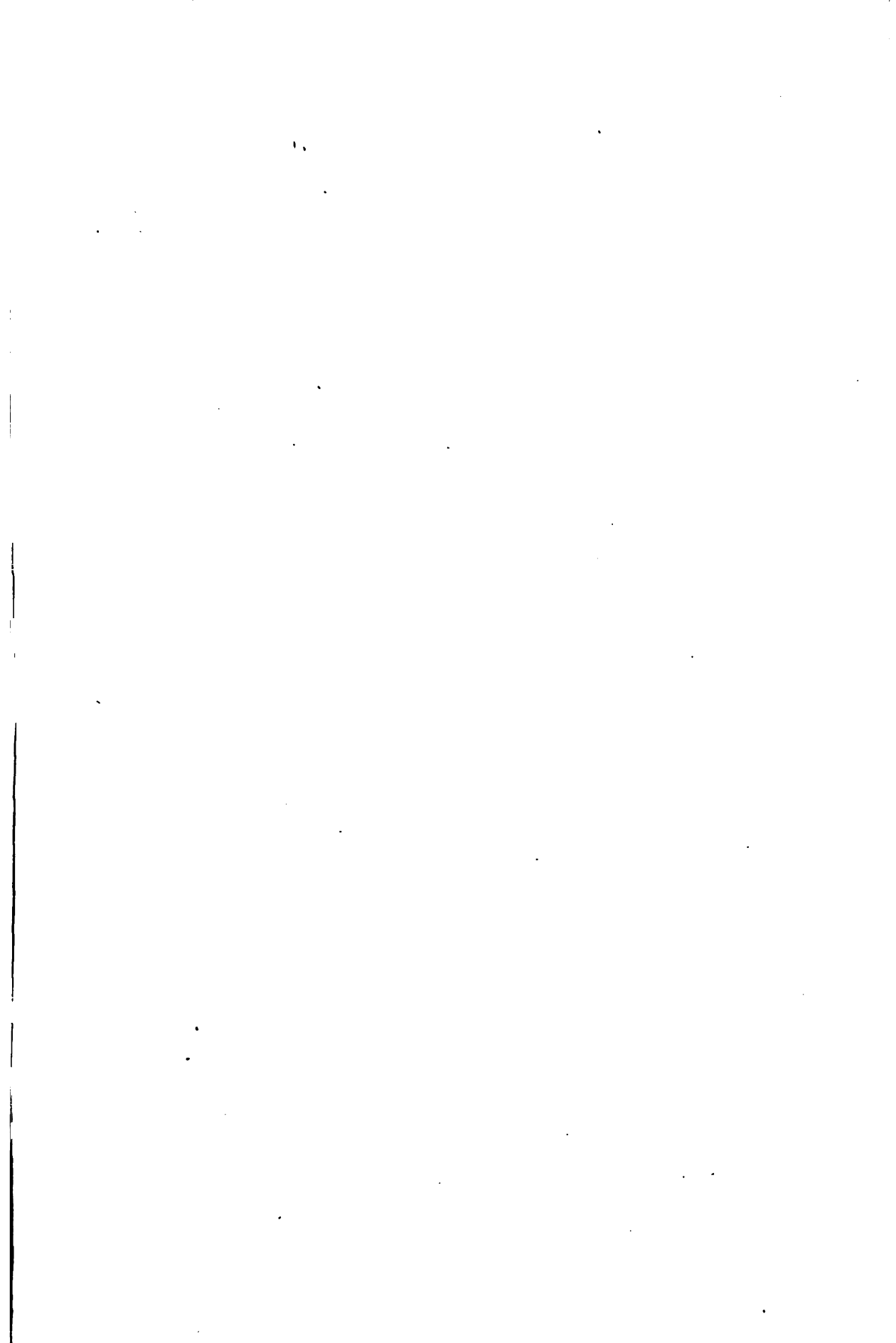
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NATIONAL REPORTER SYSTEM—STATE SERIES

THE
SOUTHEASTERN REPORTER

VOLUME 111
PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF
THE SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST
VIRGINIA, THE SUPREME COURTS OF NORTH CAROLINA
AND SOUTH CAROLINA, AND THE SUPREME
COURT AND COURT OF APPEALS
OF GEORGIA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF SOUTHEASTERN CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

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In the argument of causes one hour and fifteen minutes will be allowed each side, and no more, without special leave of the court. The time thus allowed may be apportioned between the counsel on the same side, at

their discretion; provided always, that a fair opening of the case shall be made by the party having the opening and closing arguments, in which he shall cite all the authorities intended to be relied on by him.

April 5, 1917, amended June 4, 1921.

¹ For other rules, see 71 S. E. viii; 94 S. E. vi.

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THE

SOUTHEASTERN REPORTER

VOLUME 111

(183 N. C. 240)

HOBBY v. FREEMAN. (No. 259.)

(Supreme Court of North Carolina. March 29, 1922.)

Landlord and tenant ⇨62(4)—Tenant in possession after expiration of term cannot dispute landlord's title.

In summary proceeding under C. S. § 2365, to eject a tenant holding over, defendant cannot dispute plaintiff's title either by setting up an adverse claim or by evidence that the property rightfully belonged to a third person, without first surrendering possession.

Appeal from Superior Court, Wake County; Bond, Judge.

Summary proceeding in ejectment by S. M. Hobby against Mrs. Pattie D. B. Freeman. Judgment for plaintiff, and defendant appeals. No error.

Pattie D. B. Freeman, in pro. per.

J. L. Emanuel and E. P. Maynard, both of Raleigh, for appellee.

STACY, J. This was a summary proceeding in ejectment, commenced in the court of a justice of the peace, and tried de novo on appeal to the superior court of Wake county. From the judgment of the latter court the case comes to us for review.

The tenancy and the expiration of the term are both admitted (C. S. § 2365); but defendant refuses to vacate the premises upon the ground that, although having taken possession under a lease, she has now acquired an outstanding claim to the property superior to the plaintiff's right and superior to her original landlord's title. It has been the uniform holding with us that, where the relation of landlord and tenant exists, and the latter takes possession of the demised premises under a lease from the former, the tenant will not be permitted to dispute the title of the landlord, either by setting up an adverse claim to the property or by undertaking to show that it rightfully belongs to a third person, during the continuance of such tenancy. *Clapp v. Coble*, 21 N. C. 177. Before the defendant here

could avail herself of this position, it would be necessary for her, first and as a condition precedent, to surrender the possession which she had thus acquired under the lease. The reasons in support of the wisdom of such a policy are fully set out by Hoke, J., in *Lawrence v. Eller*, 169 N. C. 211, 85 S. E. 291, L. R. A. 1916E, 696, Ann. Cas. 1917D, 546, where the question is discussed at some length with citation of numerous authorities.

We may add, however, that this principle does not go to the extent of denying to the tenant the right to dispute the derivative title of one claiming under the landlord. *Hargrove v. Cox*, 180 N. C. 360, 104 S. E. 757, and cases there cited; 16 R. C. L. 670. But this is not our case, and there is no exception calling in question the original jurisdiction of the justice of the peace. *Hausser v. Morrison*, 146 N. C. 248, 59 S. E. 693; *McLaurin v. McIntyre*, 167 N. C. 350, 83 S. E. 627.

Upon the instant record, we have found no error, and the judgment of the superior court must be upheld.

No error.

(188 N. C. 203)

CITY OF GOLDSBORO v. HOLMES et ux. (No. 101.)

(Supreme Court of North Carolina. March 22, 1922.)

1. Appeal and error ⇨82(3)—Order reversing clerk's judgment of voluntary nonsuit not appealable as final judgment.

An order of the judge reversing a judgment of voluntary nonsuit signed by the clerk was interlocutory, and not final, and would not support an appeal.

2. Appeal and error ⇨105—Refusal to dismiss action or proceeding not appealable.

No appeal lies from a refusal to dismiss an action or proceeding.

Appeal from Superior Court, Wayne County; Cranmer, Judge.

Proceeding by the City of Goldsboro against Thomas H. Holmes and wife. A judgment of voluntary nonsuit signed by the clerk was reversed by the judge, and plaintiff appeals. Appeal dismissed.

On November 17, 1919, the plaintiff made an order for the extension of Ash street, and thereafter instituted a proceeding for the condemnation of the defendant's property. On November 26, 1920, the clerk made an order condemning a strip of the defendant's land 50 by 420 feet, and appointed three commissioners to appraise the land and the benefits. On January 24, 1921, the commissioners made report assessing the defendant's damages at \$35,000, and finding no special benefits. To this report no exceptions were filed. On March 7, 1921, without notice to defendant, the clerk, at the instance of the plaintiff, signed a judgment of nonsuit; and a few days afterward, upon learning of this judgment, the defendant made a motion before the clerk to set it aside. The motion was denied, and upon appeal his honor reversed the judgment signed by the clerk. From his honor's judgment, the plaintiff appealed. The plaintiff has not paid the damages assessed nor taken possession of the land.

D. C. Humphrey, E. M. Land, and Dickinson & Freeman, all of Goldsboro, for appellant.

Langston, Allen & Taylor, of Goldsboro, for appellees.

ADAMS, J. [1, 2] The record presents an interesting and important question, but we are precluded from giving it consideration at this time. His honor's order was interlocutory, not final. The trial should determine all matters at issue, so that a final judgment may be rendered. An appeal that is fragmentary will not be entertained. In addition we have repeatedly held that no appeal lies from a refusal to dismiss an action or proceeding. *Capps v. Railroad*, 182 N. C. 758, 108 S. E. 800; *Farr v. Lumber Co.*, 182 N. C. 725, 109 S. E. 833; *Cement Co. v. Phillips*, 182 N. C. 438, 109 S. E. 257. The appeal therefore must be dismissed.

Appeal dismissed.

(183 N. C. 204)

STANDARD OIL CO. v. BANKS et al.
(No. 185.)

(Supreme Court of North Carolina. March 22, 1922.)

I. Appeal and error 6-1004(1)—Findings of fact by jury not disturbed on appeal.

In a suit on account where the only dispute was the amount thereof, *held*, that the

finding of the jury was conclusive and would not be disturbed on appeal.

2. Partnership 6-55—Finding of partnership between defendants sustained.

Evidence *held* sufficient to support a finding that defendants were partners.

Appeal from Superior Court, Pamlico County; Lyon, Judge.

Action by the Standard Oil Company against M. Banks and others. From a judgment for plaintiff, defendants appeal. No error.

Civil action to recover balance due on open account for oils and gasoline sold and delivered to the defendants during the year 1920.

F. C. Brinson, of Bayboro, for appellants.
Z. V. Rawls, of Bayboro, for appellee.

STACY, J. [1] This action is brought to recover the balance due on an open account for oils and gasoline sold and delivered by the plaintiff to the defendants during the year 1920. The question of indebtedness was not denied; the amount, only, was in dispute. Plaintiff sued for \$910.65, contending that such was the correct amount of its claim. M. Banks, one of the defendants, admitted an indebtedness of \$395.49, but denied that any larger sum was due. Upon the issue thus joined, the jury answered in favor of the plaintiff. This was purely a question of fact and has been settled by the verdict.

[2] There was also an issue as to whether J. N. Potter was a partner and interested with his codefendant in the firm of M. Banks & Co. Plaintiff's local agent testified:

"I got a statement from the company saying that M. Banks & Co. owed them a large account. I saw Mr. Banks and also Mr. Potter, and Mr. Potter said, 'Great Lord, why didn't you let me know before it got so large!'"

There was also evidence tending to show that Potter owned the garage—though it was contended that he and Banks bore to each other the relation of landlord and tenant only—and that he stated to plaintiff's agent he would get after Banks about the account; and further he is quoted as having said:

"We will have to straighten it up, and I wish you had let me know about it before it got so large."

From this evidence, we think the jury was fully justified in finding with the plaintiff on the second issue. The defendant Potter did not testify.

The whole controversy narrowed itself to questions of facts, and we have found no error in the trial.

No error.

(183 N. C. 242)

Ex parte McCade. (No. 258.)

(Supreme Court of North Carolina. March 29, 1922.)

Habeas corpus §113(1)—Except when relating to custody of children, a habeas corpus judgment is reviewable only on certiorari.

Except in cases concerning the care and custody of children, no appeal lies from a judgment in habeas corpus proceedings; but the same must be reviewed, if at all, on writ of certiorari.

Appeal from Superior Court, Wake County; Bond, Judge.

Application by Blanche McCade for writ of habeas corpus to secure release from imprisonment, and, from a judgment denying her prayer and remanding her to custody, the petitioner excepts and appeals. Appeal dismissed.

Charles U. Harris, of Raleigh, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. It appears that the petitioner, Blanche McCade, being imprisoned in the common jail of Wake county under a sentence in a criminal action, sued out the writ of habeas corpus, alleging the invalidity of the judgment against her for causes specified. His honor, on inspection of the record, and other evidence offered, being of opinion that petitioner was under a lawful sentence, entered judgment in denial of the prayer of the petitioner and that she be remanded to jail.

It is the law of this state that, except in cases concerning the care and custody of children, no appeal lies from a judgment in habeas corpus proceedings; but the same must be reviewed, if at all, on writ of certiorari, duly applied for and resting in the sound discretion of the court. In *re Lee Croom*, 175 N. C. 455, 95 S. E. 903, citing *Ice Co. v. R. R.*, 125 N. C. 17, 34 S. E. 100; and in *re Holley*, 154 N. C. 163, 69 S. E. 872.

In deference to these and other like decisions, we must hold that the appeal of the petitioner be dismissed.

Appeal dismissed.

(183 N. C. 206)

DEES v. LEE. (No. 189.)

(Supreme Court of North Carolina. March 22, 1922.)

1. Trial §295(10)—In action involving purchaser's right to rescind contract, instructions stating contentions of parties held not prejudicial to purchaser.

In vendor's action for breach of contract to purchase land, and to recover amount of

check given vendor on execution of contract on which defendant stopped payment, and in which defendant claimed that he agreed to purchase the land only on the condition that he would be able to collect certain notes, and that on discovery that the notes could not be collected he promptly informed the vendor thereof and rescinded the contract, instructions, stating the contentions of the parties, when considered as a whole, held not erroneous as constituting an expression of opinion of the court.

2. Trial §273—Objections to statement of contentions must be made during charge or at its conclusion.

Objections to statement of contentions must be made at some appropriate time during the charge or at its conclusion, so that the trial court may be given an opportunity to correct any error in the respect indicated.

Appeal from Superior Court, Pamlico County; Lyon, Judge.

Action by Julius G. Dees against R. H. Lee. Judgment for plaintiff, and defendant appeals. No error.

This is an action to recover damages for breach of contract to buy land and to recover amount of check given by defendant to plaintiff on execution of contract, on which the defendant had stopped payment, and in which the defendant claimed that he agreed to buy the land on the condition that he would be able to collect certain notes due him, and that upon discovery that he would not be able to collect the notes, he promptly notified plaintiff thereof and rescinded the contract.

The charge complained of follows:

"Gentlemen of the jury, this is an action brought by Mr. Dees against R. H. Lee on a contract for the sale of land. The plaintiff alleges that the evidence shows that on the 6th day of November, 1920, he sold the defendant 56 acres of land for \$200 per acre, and that the contract was closed on that day; that he was to pay one-fourth cash, but when they went to execute the papers Mr. Lee did not have the one-fourth cash, and after some conversation and negotiation he agreed to give him a check for \$400 and to have the deed from Dees to him and the mortgage from Lee to him (Dees) and the notes all deposited in the Bank of Pamlico until about the 1st of January; and contends it was an absolute sale without any conditions whatever, except what was set out in the paper writing signed by Mr. Lee; and contends that Mr. Lee asked him to hold that check a day or two, and that he held it until the following week, this being on Saturday; that the trade was made, and the following week he deposited the check in the bank for collection, and the next week the bank returned it to him unpaid; that is, returned it to Dees, saying that the defendant stopped the payment of it. He contends that defendant thereby broke the contract for the purchase of this land, and contends that he never agreed subsequent to that time to rescind the contract and to take up the papers. He con-

tends that defendant thereby broke the contract for the purchase of this land. He contends that the price agreed upon was \$200 per acre, and that when defendant broke his contract by refusing to pay the \$400 check the land had gone down and had depreciated at least \$25 per acre, 12½ per cent. from the value of it at the time of the contract, and contends he is willing to have you answer the first issue 'Yes,' and contends that he has been at all times ready, able, and willing to comply with his contract, and asks you to answer the third, 'Yes,' and the fourth 'Yes,' and contends that he is entitled to the difference between what the land was worth at the date of the contract and what it was worth on the day the defendant broke his contract.

Now these are the contentions of the plaintiff: He contends that you should, on all of this evidence, answer the first issue, 'Yes,' that there was a contract; that you should answer the second, 'No'; that you should answer the third, 'Yes,' and the fourth, 'Yes,' and contends that you should answer the fifth issue, '\$1,400.' He says that is the difference between the contract price and the value of the land at the date of the breach. Now, the defendant contends this paper writing does not set out the price of the land; that it does not say that the land was to be worth \$200 per acre; that it just deals with the cash payment of the check and the placing of the mortgage and notes in escrow. He contends that the written contract does not contain the entire contract. He contends it was understood and agreed at the time of the contract that the price of the land was to be \$200 per acre, and that the contract was not completed unless Grantham, who had bought his home place, would pay the amount due the 1st of January, and contends that on Thursday before the contract was made the agent of the plaintiff, Mr. Rawls, informed him that Grantham was ready and would pay the amount, and that the contract was predicated on that, and that this check for four hundred dollars was given only as evidence of good faith to carry out the contract. He contends that Grantham has never paid the \$4,000, and has not paid it up to this time, and by reason of that failure the contract was not carried out on his part, and that he countermanded payment of this check when he found out that Grantham would not pay him. I do not remember the date he says this check was to be paid, but he contends that if you should find there was a contract as contended for by the plaintiff, and not as contended for by him, you should answer the second issue in his favor. He contends that after the payment of the check had been countermanded he saw Mr. Dees, and Mr. Dees said he had an opportunity to sell the land and that they would rescind the contract. He contends further that, if you should find all the other issues against him, between the time of making the contract and the breaching the land had not depreciated." (Exception No. 1.)

Here the court reads issue.

"If you find from the evidence and by the greater weight of the evidence that this is the contract and all of the contract made on that occasion, and that there was nothing said about Grantham, you would answer that issue, 'Yes,' but if you find that was only a part of the contract and that contract was conditioned

upon Grantham's paying \$4,000 the 1st of January, you would answer that, 'No.' If you answer that, 'No,' you will not answer the other, but if you answer that, 'Yes,' you will answer the next issue, which is as follows."

Here the court read the next issue and charged as follows:

"The burden is on the defendant to satisfy you by the evidence and the greater weight of the evidence that the plaintiff agreed with the defendant that the contract might be rescinded, and, if you find that they did so agree, you would answer that 'Yes'; otherwise you would answer it, 'No.'"

Here the court read the third issue, and charged as follows:

"He contends that he has been, and is willing to perform it now, and, if you find from the evidence that he has been ready, able, and willing at all times, you will answer that issue, 'Yes.' If you do not so find, it would be your duty to answer that, 'No.'"

Here the court read the fourth issue and charged as follows:

"If you find from the evidence that the defendant made the contract alleged in the complaint and was not rescinded by him and the plaintiff, and you find that he broke his contract by failing to give this check, then it would be your duty to answer the fourth issue, 'Yes,' that the defendant wrongfully broke his contract, but if you find that he did, you would answer it 'No.' Now, if you answer these issues in favor of the plaintiff, you would answer the last. If you find the contract has been broken, the plaintiff is entitled to recover at least nominal damages. If you find that the defendant breached this contract, the plaintiff would be entitled to nominal damages and whatever damage you find from the evidence he has sustained. Now the burden is upon the plaintiff as to that. He says he has sustained damages to the amount of \$1,400. The defendant contends no difference in the value of the land between the date of the contract and the date of the breach. The defendant contends that there was no difference. (Exception No. 2.)

"Now the rule of damage is the value of the land at the date of the contract and the value of it at the date of breach of the contract. (Exception No. 3.)

"Now the difference is what the plaintiff would be entitled to recover, if you find that he is entitled to recover. Now the evidence was the contract price of \$200 per acre, and the plaintiff contends that the land had depreciated up to the time of the breach of the contract 12½ per cent., which would make \$1,400 in the value of the land between the time of the contract and the time of the breach. (Exception No. 4.)

"Take the issues, gentlemen, and answer them as you may find the facts to be."

Upon denial of liability and issues joined, the jury returned the following verdict:

"(1) Did the plaintiff and defendant contract, as alleged in the complaint? A. Yes.

"(2) If so, did plaintiff and defendant rescind said contract? A. No.

"(3) If so, has plaintiff been at all times ready, able, and willing to perform the contract on his part? A. Yes.

"(4) Did defendant wrongfully breach the contract, as alleged in the complaint? A. Yes.
 "(5) What damage, if any, is plaintiff entitled to recover? A. \$400.00."

Judgment on the verdict in favor of plaintiff, from which the defendant appealed.

Z. V. Rawls, of Bayboro, for appellant.

D. L. Ward, of Newbern, and F. O. Brinson, of Bayboro, for appellee.

STACY, J. [1, 2] Three of the four exceptions, appearing on the record, are directed to portions of his honor's charge in which he undertakes to state the contentions of the parties. Defendant says the contentions of the plaintiff were stated in such a manner as to amount to an expression of opinion from the court. We have examined the charge with a view of determining whether the defendant could have been prejudiced in any degree by the method or form in which the contentions were given, but we have found nothing upon which to base any criticism. The charge as a whole seems to have been fair, impartial, and free from error. Furthermore, these exceptions come within the well-settled rule that objections to the statement of contentions must be made at some appropriate time during the charge, or at its conclusion, so that the trial court may be given an opportunity to correct any error in the respect indicated. *State v. Hall*, 181 N. C. 527, 106 S. E. 483; *McMahan v. Spruce Co.*, 180 N. C. 636, 105 S. E. 439, and cases there cited.

The other exceptions are without special merit, and must be overruled. We have discovered no sufficient reason for disturbing the verdict and judgment.

No error.

(183 N. C. 226)

In re MCKAY'S WILL (No. 93.)

(Supreme Court of North Carolina. March 29, 1922.)

1. Evidence \S 251(2)—Evidence of statement of executor concerning testamentary capacity of testatrix held inadmissible.

In a will contest, the admission in evidence of a statement made by the executor prior to the beginning of his executorship, and who was not called as a witness, concerning the testamentary capacity of the testatrix, was error, since it was not binding as an admission against interest as to those claiming under the will; the interest of the executor being of a different character than that of the legatees.

2. Evidence \S 106(1)—Evidence of character of parties cannot be considered as substantive evidence.

In a will contest, an instruction that evidence of the good character of the witnesses

should be considered as substantive evidence was error, since evidence of the character of parties and witnesses is admissible only as affecting their credibility, and not substantive proof.

Appeal from Superior Court, Lee County; Cranmer, Judge.

In the matter of the last will and testament of Susan McKay. From a judgment for the caveators, the propounders appeal. New trial.

Issue of devisavit vel non raised by a caveat to the will of Susan McKay. Alleged mental incapacity and undue influence are the grounds upon which the caveat is based. The jury returned the following verdict:

Is the paper writing propounded, and every part and clause thereof, the last will and testament of Susan E. McKay? Answer: No.

Judgment on the verdict from which the propounders appealed.

Hoyle & Hoyle, of Sanford, and Gavin & Jackson, for appellants.

Baggett & Mordecai, of Lillington, and A. F. Seawell, of Sanford, for appellees.

STACY, J. There are two fatal errors, appearing on the record, which entitle the propounders to a new trial or to a venire de novo.

[1] John Yarborough, one of the caveators, was allowed to testify, over objection, to an alleged conversation which he had had with M. M. Draughan in regard to the mental capacity of the testatrix. This conversation is alleged to have taken place during the lifetime of the deceased and was offered as an admission or declaration against interest; the said Draughan later having qualified as executor of the will, though not named as a beneficiary therein. Up to this time the executor, who was one of the propounders, had not gone upon the witness stand; and, in fact, he did not testify at all. We think the evidence was incompetent and that its reception was hurtful and prejudicial.

As a general rule, statements or admissions of an executor, or administrator, are not competent or admissible as against the heirs or devisees. *Davis v. Gallagher*, 124 N. Y. 487, 26 N. E. 1045; *Marshall v. Adams*, 11 Ill. 37. Especially would this rule be applicable when the alleged declarations, as here, were made prior to the beginning of the executorship. The executor could not then, in a representative capacity, have been engaged in the performance of a duty, pertaining to the estate, so as to make his declarations pertinent and admissible as constituting a part of the *res gestae*. *Church v. Howard*, 79 N. Y. 415. As against the bene-

ficiaries under the will, this testimony would fall in the category of hearsay evidence. Furthermore, admissions are received on the principle that they are statements against the interest of the party making them; but, in the instant case, statements made by Draughan, during the lifetime of the testatrix, could not be binding as against those claiming under the will. *Jones v. Jones*, 21 N. H. 219; *Jones on Evidence*, vol. 2, § 253. True, the personal representative may propound and defend the will in common with others including the legatees; but, in law, his interest is of a different character from theirs. The mere fact that several persons may have a common interest, as contradistinguished from a joint interest, in a given subject-matter, does not ipso facto render their admissions competent against each other. This is the modern rule, and it is approved by a number of decisions in this and other jurisdictions. *Daugherty v. Taylor*, 140 N. C. 446, 53 S. E. 296; *Belding v. Archer*, 131 N. C. 287, 42 S. E. 800; *Dean v. Rosa*, 105 Cal. 227, 38 Pac. 912; *Eakle v. Clarke*, 30 Md. 322; *Hyman v. Wheeler* (C. C.) 29 Fed. 347.

[2] Again, with reference to the evidence of the good character of some of the witnesses, his honor charged the jury as follows:

"There has been, gentlemen of the jury, evidence tending to show the good character of witnesses who have testified, and if I recall correctly, as to the caveators, some of them at least, and I instruct you that this is substantive evidence and will be so regarded by you in your consideration and deliberation."

Propounders excepted.

This charge was erroneous. Ordinarily, in civil actions, evidence of the character of parties and witnesses is admissible only as affecting the credibility of their testimony. *Lumber Co. v. Atkinson*, 162 N. C. 301, 78 S. E. 212, 49 L. R. A. (N. S.) 733, and cases there cited. Such evidence may be corroborative or impeaching in its effect; but as a general rule, it is not to be considered by the jury as substantive proof. The rule may be otherwise in actions for libel and slander, seduction, and the like, where the character of one or more of the parties or principals is directly involved; but this is not one of those cases. For exceptions to the general rule, see *Norris v. Stewart*, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 917, and cases there cited.

In all criminal prosecutions, certainly those involving moral turpitude, the defendant may elect to put his character in issue, and thus produce evidence of his good reputation and standing in the community (*State v. Hice*, 117 N. C. 782, 23 S. E. 357); but, if this be not done, the state cannot offer evidence of his bad character unless and until

he has been examined as a witness in his own behalf, and even then—the defendant not electing to put his character in issue—the impeaching testimony is permitted to affect only his credibility as a witness and not the question of his guilt or innocence (*Marcom v. Adams*, 122 N. C. 222, 29 S. E. 333; *State v. Traylor*, 121 N. C. 674, 28 S. E. 493). Of course, in proper instances, in criminal cases, where the defendant chooses to put his character in issue, the pertinent evidence, pro and con, then becomes substantive proof and may be considered by the jury as such. *State v. Morse*, 171 N. C. 777, 87 S. E. 946; *State v. Cloninger*, 149 N. C. 567, 63 S. E. 154.

For the errors, as indicated, there must be another trial; and it is so ordered.

New trial.

(183 N. C. 743)

STATE v. FREEMAN. (No. 241.)

(Supreme Court of North Carolina. March 22, 1922.)

Criminal law § 1169(1)—Admission of irrelevant evidence held prejudicial.

Though there was some evidence for the jury to consider on the question of defendant's guilt of theft of tobacco, admission without explanation of an undorsed canceled check, payable to another, or bearer, with the drawing or possession of which defendant was in no way shown to have been connected, and which was therefore irrelevant evidence, will be held prejudicial, as it might have been used by the state, and considered by the jury, to account for the shown fact that on a certain day defendant had money, while the night before he was impecunious.

Clark, C. J., dissenting.

Appeal from Superior Court, Franklin County; Devin, Judge.

Hugh Freeman was convicted of larceny and receiving stolen property, and appeals. New trial.

The defendant was indicted for the larceny of 238 pounds of leaf tobacco, the property of E. R. Grissom. There was a count for receiving the tobacco knowing it to have been stolen. The following is the material part of the state's testimony:

F. G. Avent testified: That he was in Raleigh on the 3d day of November, 1921, at the union warehouse. Had carried a load of tobacco there for sale; that he got there the night before. That he lived at his father-in-law's, John Allen, in the "Hurricane." That he, John Allen, and Jesse Jackson drove in a wagon by Grissom's home and went to Raleigh by the Falls of Neuse road. That this was not the nearest road to Raleigh.

That some one asked him to help him pack a pile of tobacco in baskets in a warehouse, and that he helped a man to straighten out a pile of tobacco. That it was placed in baskets in four grades; some of it was lugs or sorry tobacco. The man told him he might have the sticks, as he was not going to plant any the next season. He lived in Warren county, and does not know who the man was, but he thinks it was the defendant. That defendant and his uncle, Mr. Allen, came to his house, and asked him if he could recognize the defendant as the man who got him to help him pack the tobacco in Raleigh. He told them he thought he could.

E. A. Grissom testified: That he lived on Ike Winston's land, and cultivated a crop of tobacco, and had a lot of 238 pounds ready for market on the night of the 2d of November. Somebody entered his pack house and carried it off. That there were three tracks that led from the pack house to the woods, where a horse had trampled the ground. That he traced the tobacco by scraps until within 30 feet of the woods. That he went to Raleigh on Friday and found one pile of his tobacco and recognized it, but did not claim it. That he also recognized the sticks, six of them he found at Avent's. Young testified that he was in a garage on Friday evening when defendant came in and paid a small bill, about \$3.25, and said he did not mind paying garage bills if he could make money as easy as he made that last night. Defendant had other money besides that he paid the bill with.

W. C. Young testified that he saw defendant in Raleigh on Friday at the tobacco warehouse about 12 o'clock.

John Young testified that he saw a man asleep early in the morning November 3, in a pile of tobacco, whom he took for defendant.

Latta Harris testified that he ran a garage at Youngsville, and on Thursday evening, the 3d of November, he repaired an auto for defendant, and he pawned his pistol as security, and Friday evening he did more work for him, and he paid him all, about \$7, Friday evening.

Jesse Jackson testified that he went in a wagon with Avent and Allen to Raleigh Thursday night; that they passed the woods near Grissom's and went the Falls road to Raleigh.

A. D. Dickerson testified: That E. A. Grissom, the prosecutor, married his daughter. That about seven hours after Grissom missed his tobacco, the witness went down to the woods where the tracks led from the pack house, and in the woods he found a brown piece of paper, on which was written in pencil the words "Hue Freeman" and "Miss Ever Hackody," "Creekmore," "1921." To the introduction of this paper defendant objected, objection overruled, and defendant excepted.

Exception No. 1:

"The state introduced a canceled check for \$123, payable to H. B. Allen or bearer, with no indorsement on the back. To the introduction of this paper writing defendant objected. Objection overruled, and defendant excepted."

Exception No. 2: Defendant demurred to the evidence, and himself offered no evidence. There was a verdict of guilty. Defendant moved to set aside the verdict as being against the weight and contrary to the evidence. Motion denied, and defendant excepted.

Assignments of error:

(1) To the introduction of the paper writing with the names "Hue Freeman" and "Miss Ever Hackody," "Creekmore," "1921," on it, because there was nothing connecting defendant with said paper writing; no proof that it is in the defendant's handwriting, or that it was ever in defendant's possession.

(2) To the introduction of canceled check payable to H. B. Allen or bearer, because there was no evidence to connect defendant with it, or that he ever owned it or received the proceeds of it.

(3) The failure of the court to set aside the verdict because the evidence was not sufficient to convict the defendant.

The jury convicted the defendant, and from the judgment he appealed.

N. Y. Gulley, of Wake Forest, and B. T. Holden and W. M. Person, both of Louisville, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. There is one exception by the defendant which we think is well taken. The state introduced in evidence a canceled check for \$123, payable to H. B. Allen, or bearer, which was not indorsed. The defendant's objection to this paper as evidence was overruled, and he duly excepted. We are unable to conceive in what way or for what purpose this evidence was competent or relevant. There is nothing on the check showing that it had any connection with the case. It was not drawn by the defendant, so far as appears, and his name is not on it. Why it was allowed to be considered by the jury we were not informed. It was wholly irrelevant to the controversy. But it was contended by the state that, if it was wholly irrelevant, the effect would be, in law, that it was harmless, and not therefore ground for reversal. But we are not sure of this conclusion. Having been admitted by the court over the defendant's objection, it was capable of being used by the state as some evidence of the defendant's guilt, in connection with the other evidence, and was no doubt so used. It was argued before us that it was so used and very effectively. This is not in the record, but we

are at liberty to infer that, as the court held it to be relevant and competent evidence of guilt, the state made use of it, as such, to further a conviction. It does not appear to us that it was harmless or did not prejudice the defendant. While there is nothing to connect the defendant with the drawing of the check, or the possession of it at any time, it was no doubt used for the purpose of showing that, as he had money on Thursday, when he had none on the day before, he must have received the money in some way by means of the check, but this is not a warrantable inference. There is no evidence that the check was found in defendant's possession and taken from him. There is nothing more in the proof than the bare check itself, without the least explanatory evidence, and it should have been excluded by the court as prejudicial to the defendant. It cannot be said that irrelevant evidence, though generally so, is always harmless. We have held otherwise. *State v. Jones*, 93 N. C. 611; *State v. Mickle*, 81 N. C. 552. It may sometimes, even though rarely, be very prejudicial to the party against whom it is admitted, as it was held to be in *State v. Jones*, supra. Considering the nature of the other evidence in this case, that relating to the check, though technically irrelevant, might have been used to account for defendant's having money at one time when the night before he was impecunious, and we have no doubt it was so used by the state and considered by the jury.

There was evidence upon which the jury could have convicted the defendant, apart from the check, but they should have been confined to the competent and relevant proof in considering the case. He was the man who was seen at the tobacco warehouse the day after the theft was committed, and was recognized as the man who had the tobacco there and asked the witness F. G. Avent to help him to straighten it out and pack it, and gave him the sticks, as he was not going to plant tobacco the next season. The evidence was sufficient to identify the defendant as the one who had the tobacco at the warehouse. *State v. Carmon*, 145 N. C. 481, 59 S. E. 657; *State v. Lytle*, 117 N. C. 803, 23 S. E. 476; *State v. Costner*, 127 N. C. 566, 37 S. E. 326, 80 Am. St. Rep. 869; *State v. Lane*, 166 N. C. 333, 81 S. E. 620. But the evidence as to identity is stronger here than it was in those cases. There was evidence as to the identity of the tobacco found in the warehouse with that which was stolen.

While we hold that there was some evidence for the jury to consider upon the question of defendant's guilt, that in regard to the check was incompetent, and should not have been admitted, and was sufficiently prejudicial to entitle the defendant to another trial.

The other exceptions may not be again presented.

New trial.

CLARK, C. J. (dissenting). I concur in the statement in the opinion of the court that "there was evidence, upon which the jury could have convicted the defendant, apart from the check." This also clearly appears upon the summing up of the evidence as set out by Mr. Justice WALKER. The evidence in regard to the check may have had slight probative force, and the jury may have thought that it would add none. But the evidence was not incompetent, but merely irrelevant. It could have had no prejudicial effect.

The defendant was not entitled to a new trial for the mere admission of irrelevant testimony. The admission of merely irrelevant testimony cannot be held for error unless it is shown to be prejudicial. *Ruffin*, C. J., in *State v. Arnold*, 35 N. C. 189; often cited since; *Bynum*, J., in *State v. Gallor*, 71 N. C. 92, 17 Am. Rep. 3; *Smith*, C. J., in *Com'rs v. Lash*, 89 N. C. 165, as in *Gaylord v. Respass*, 92 N. C. 557, and in *Jones v. Call*, 93 N. C. 170; *Deming v. Gainey*, 95 N. C. 532; and there are numerous other cases to this well-settled principle.

It cannot be shown that this evidence was prejudicial; for, if it does not tend to show the guilt of the defendant, it proves nothing, and is harmless. It is not enough that the defendant should assert that the evidence, if irrelevant, was hurtful, but that must be pointed out, and this has not been done.

(183 N. C. 243)

PETERSON et al. v. TIDEWATER POWER CO. (No. 287.)

(Supreme Court of North Carolina. March 29, 1922.)

1. Gas \S 20(2)—Evidence as to manner of connecting gas pipes held competent in action for burning building.

In an action against a gas company for damages for the burning of a cottage to which defendant supplied gas, the fire starting shortly after the connections had been made, evidence as to how the work of connecting the pipes and testing them was done held competent in support of plaintiff's contention that the fire originated through the negligence of defendant's employees.

2. Evidence \S 113(19)—Tax lists held inadmissible as to value of property destroyed by fire.

In an action for the destruction by fire of plaintiff's cottage, due to the alleged negligence of the employees of defendant gas company in connecting the gas pipes, it was not error to exclude tax lists as evidence of the value of the

property destroyed; another owning the property when the lists were made up.

3. Evidence ¶113(19)—Tax lists held competent to show estimate of value of property destroyed.

In an action for destruction of a cottage by fire, tax lists would be competent to show any estimate of the value of the property made by plaintiffs.

4. Evidence ¶501(7)—Opinion evidence as to the value of cottage destroyed by fire held competent.

In an action for the destruction of plaintiff's cottage by fire, alleged to be due to the negligence of the servants of the gas company in connecting gas pipes, an estimate of a witness, based on reconstruction cost, as to the value of the property destroyed, was properly considered on question of amount of loss, where identity in construction of the cottage destroyed and of new cottage on the same site was first established.

5. Appeal and error ¶1048(5)—Where question not answered, error, if any, harmless.

Where a witness is asked a question, but fails to answer it, and there is no showing what the answer would have been, the error, if any, is harmless.

6. Gas ¶20(2)—Rules of insurance company as to insurance held irrelevant as to destruction of property by fire.

In an action for the destruction by fire of a summer cottage through the alleged negligence of the employees of a gas company supplying the cottage with gas, the rules of insurance companies relative to placing insurance on beach property held irrelevant and incompetent.

Appeal from Superior Court, New Hanover County; Connor, Judge.

Action by Emily T. Peterson and others against the Tidewater Power Company. Judgment for plaintiffs, and defendant appeals. No error.

This was a civil action, brought by the plaintiff to recover damages of the defendant for the alleged negligent burning by the defendant of the feme plaintiff's cottage and furniture at Wrightsville Beach. The action was tried before his honor, Judge Connor, and a jury, at the October term, 1921, of the superior court of New Hanover county, which trial resulted in a verdict and judgment for the plaintiff, and the defendant appealed.

At the trial the defendant admitted the plaintiff's ownership in fee simple of the lands and premises described in the complaint, but required the plaintiffs to put in the deed, which showed the purchase price of the property alleged to have been destroyed through the negligence of the defendant.

The defendant admitted in the pleadings: That it was a corporation engaged in the business of supplying the town of Wrights-

ville Beach and persons along its system with electricity for lights, power, and gas for lighting, heating, cooking, and other purposes, charging its usual rates for gas and electricity. That upon the tract of land described in the complaint was a summer residence or cottage, which was not occupied during the winter months, but occupied only during the summer months, and that the plaintiff had household and kitchen furniture for living purposes in said cottage, and was preparing to move down and occupy said cottage for the summer season, expecting to begin such occupancy on the 3d day of June, 1920.

That it was the custom of the company to cut off its supply of electricity and gas to cottages in the early fall by disconnecting, in some manner, the supply of gas and electricity from such cottages at the main pipe and wires feeding said cottages, and that before gas and electricity were turned into the cottage they required the owner, or person expecting to occupy such cottage, to make application to the defendant for connecting up and turning on the gas and electricity, and required the keys to the cottage to be surrendered to the defendant so that they might enter the same and inspect the meters and connect with the supply of electricity and gas, which had been disconnected the previous fall.

That on the 31st day of May, 1920, application was made for gas service for the plaintiffs' cottage, and the keys to the same were turned over to the defendant, to enable it, or its agents, or servants, to enter such cottage and connect up the gas fixtures so that the plaintiffs could use and consume gas according to their needs for cooking and heating purposes, and that the plaintiffs paid the defendant its charges for such service. That it was the custom of the defendant, immediately after making the necessary connections, to turn on the flow of gas and light the same, in order to ascertain whether or not its patrons would be able to receive the expected service. That in disconnecting the gas in the fall the defendant's custom was to disconnect the metal or iron pipe which conducted the gas through the meter at some point inside the building, near where the pipe entered the meter, and this was the method used in the plaintiffs' cottage.

That on the 1st day of June, 1920, between the hours of 11 and 12 o'clock a. m., before the plaintiffs had moved into said cottage, the defendant's servants, or employees, entered said cottage to connect up, test out, and put in proper condition the gas fixtures for use by the plaintiff, and that in a very short time after the defendant's employees had left the cottage fire was discovered in the kitchen or rear part of the cottage, at and around where the defendant's employees had been working

and connecting the gas, and that gas from the defendant's pipe was pouring out into said cottage a burning flame, and the plaintiffs' cottage and furnishings were completely destroyed and consumed by the said fire.

The foregoing facts are substantially admitted in the pleadings, the only denials of the defendant being that as to negligence and the value of the property destroyed by the fire; the defendant stating, in the ninth paragraph of its answer, that it was probably more than an hour after defendant's employees left the house before the fire was discovered.

The evidence tended to show, in addition: That when Mr. Peterson moved out of the cottage the previous fall all matches and combustible materials had been removed from the cottage. That Mr. Peterson, about a week previous to the fire, and before he surrendered the keys to the defendant company, for the purpose of connecting up the gas and electricity, visited the cottage and left the same securely locked and fastened, and that there was no fire in the cottage. That the defendant's employees, during the morning about 12 o'clock, entered the cottage with the keys to install the meter and connect the gas in the kitchen, and this they did, and, after doing so, lighted the gas to test it out. There is no evidence that any other person from that time until the fire was discovered was in, at, or around the plaintiffs' cottage. That Mrs. Peterson left Lumina on the 1:15 car, and went to visit Mrs. Colucci, who was occupying the cottage next to Peterson's, and after she had been on the porch for a few minutes she heard a noise in the Peterson cottage, which sounded like that made when she turned on the gas in her gas range and put the match to it, when it does not catch, making a "sizzling noise," and she called the attention of Mrs. Colucci to the same. A few minutes thereafter she saw fire coming out of the weatherboarding, where a few minutes before she had seen smoke coming from the cottage. She tried the doors and found them locked, and could not get in. The kitchen door was then forced open, and flames were found burning around the gas meter. The noise which she heard when she first called Mrs. Colucci's attention to it was like that of gas coming out of a pipe.

John Cowan testified that when the door was broken open, all he could see was an arm of flame coming out with a hissing sound.

Mrs. Jacobs testified that the meter was near the gas stove, and a long flame was coming out, making a "sizzling sound," and that she heard the noise before the cottage was broken into.

The cottage and its contents were totally destroyed by the fire.

Rountree & Carr, of Wilmington, for appellant.

E. K. Bryan, of Wilmington, for appellees.

WALKER, J. We are of the opinion that the testimony of the witnesses tended to show that before the defendant's servants entered the cottage for the purpose of connecting the house fixtures with the main outside, so as to furnish a supply of gas for domestic uses, Mr. Peterson, one of the plaintiffs and owners of the cottage, had gone into it, and upon leaving the cottage he securely locked and fastened the same, and there was no fire in there. It further appears by the testimony that there was nothing in the house that would cause a fire, until the defendant's employees entered it to do the work the defendant had ordered them to do. Soon after the workmen had finished—or supposed they had—fire broke out and consumed the cottage. No one, so far as appears, entered the building from the time the workmen left it until the fire was first discovered, by neighbors, coming through the weatherboarding and the roof. A door of the kitchen, where defendant's servants had been working an hour or two before, at the gas meter, was broken open, and flames "were coming out of the gas pipe of the meter in the kitchen," with a hissing sound. The kitchen was so full of smoke that another witness could not tell where the flame was coming from. The fire was in that part of the house, or kitchen, where the work had been done an hour or so before. How long it was after the workmen left the building and the first appearance of the fire was not definitely fixed, but it was not so long as to exclude altogether the reasonable inference, which the jury could draw, that the cause of the fire, and the only probable cause, under the circumstances, was some negligent act committed by the workmen in connecting the pipes. *McRainey v. Railroad*, 168 N. C. 570, 84 S. E. 851. There was some evidence that they used matches in making tests to discover if there was any escaping gas, and the jury, under the evidence, would be warranted in finding that the fire was started by the careless handling of the matches.

[1] It was competent and proper for the jury to consider the testimony of Hufham and Burt Kite, and other testimony of a similar kind, as to how the work of connecting the pipes, and especially the testing of them, was done, as affording some evidence in support of plaintiffs' allegation and contention that the fire originated in the house from some cause attributable to the manner in which the work was done by defendant's employees, or to their negligent conduct.

We are fully aware of the rule stated in *Byrd v. Express Co.*, 139 N. C. 273, 51 S. E. 851, that the proof of negligence causing

damage must be of such a nature as to reasonably warrant an inference of the fact required to be established, and must be more than merely conjectural, but we do not think that the evidence in this case falls within the class which we there excluded as insufficient to be considered by the jury, as there is some testimony here which reasonably tends to prove the act of negligence. There is evidence from which the jury could reasonably infer that all other causes for the fire had been eliminated, leaving none but those attributable to defendant's want of care, or that of its employees, which is the same thing.

Our last observation is an adequate answer to the position taken by the defendant that there is no proof of the origin of the fire or any which tends reasonably to show that it is imputable to the defendant's negligence, or that of its servants engaged, at the time, in doing the work of connecting the pipes in the house for it, and the cases cited by the defendant in its brief to sustain its position are not applicable to the facts of this case, while the principle of law stated in them is admitted to be correct.

[2, 3] There was no error in the ruling of the court by which the tax lists, as evidence of the true value of the property, were excluded. Williams owned the property when the lists were made up, and not the plaintiffs. It would be competent to show any estimate of its value made by the plaintiffs, but that was not what was proposed to be done. It was therefore hearsay (*res inter alios acta*) and incompetent. *Ridley v. Railroad*, 124 N. C. 37, 32 S. E. 379; *Railroad Co. v. Land Co.*, 137 N. C. 330, 49 S. E. 350, 68 L. R. A. 333; *Hamilton v. Railroad Co.*, 150 N. C. 193, 63 S. E. 730; *Powell v. Railroad Co.*, 178 N. C. 243, at page 249, 100 S. E. 424. What is said in the case last cited (178 N. C. at page 249, 100 S. E. at page 427) is pertinent:

"The court excluded the circumstance that where the official board of valuation had assessed property at a higher rating after the alleged injury, the then owner, ancestor in title of the present plaintiff, appeared before them and endeavored to have same reduced. So far as the action of the board of assessors was concerned, it has been generally ruled irrelevant on the question of valuation. *Hamilton v. Railroad*, 150 N. C. 193. And as to the action of plaintiff's predecessor in title, his action as indicated tended to favor his own position on the issue, and its exclusion could in no sense be held to have prejudiced defendant's case."

This fits our case exactly.

[4, 6] The estimate of the witness Peterson as to the value of the property destroyed was permitted to be considered by the jury, not for the purpose of showing that the old cottage and the new cottage built on the same site were of the same value, but, a

substantial identity in the construction of the two having been first shown, it was allowed to go to the jury merely as a circumstance to be considered by them in finding the amount of loss, or damage; and, admitted, as it was, with this restriction, we think it was competent. The learned judge carefully guarded his ruling by requiring that the two buildings must have been substantially alike, in order for them to consider the value of the one as a circumstance bearing upon the value of the other, and not as being of the same value. This evidence was allowed to be considered by the jury, we suppose, upon the authority of *Belding v. Archer*, 131 N. C. 287, 42 S. E. 800, and *Powell v. Railroad Co.*, 178 N. C. at pages 248, 249, 100 S. E. 424, citing *R. O. L.* pp. 175, 176. Such evidence, when confined within its proper limits, should not be objectionable, as said in the last-cited case. But the witness did not answer the question, nor are we informed what his answer would have been if he had been permitted to answer the same. It was therefore harmless, as we have so often held.

[6] We do not see how the rules of the insurance companies relative to placing insurance on beach property was at all relevant or competent.

The other exceptions are without any merit, and, upon the whole case, after a careful review of it, we find no ground for disturbing the judgment of the court below.

No error.

STACY, J., took no part in the consideration and decision of the case.

(183 N. C. 222)

ALLEN v. SMITH et al. (No. 257.)

(Supreme Court of North Carolina. March 22, 1922.)

1. Wills §638—Death of devisee before happening of contingency held to cause devise of contingent life estate to lapse.

Where a devise was to the testator's wife for life and then to his son for his life, the death of the son, before the death of the testator caused the devise of the contingent life estate to him to lapse.

2. Wills §637—Failure of intermediate devise of life estate to take effect held to cause vesting of title in fee in children of testator.

Where a testator devised land to his wife for her life and to his son for his life, with remainder in fee to his children and their heirs, surviving after the death of his son, the death of the son during testator's life caused the life estate devised to him to fail, and the remainder vested in the children of the testator in fee.

3. Wills — 616(1)—Devise held to convey life estate without right of disposal.

A devise, "I give all my estate, both personal and real, and wherever situated, to my wife for and during her natural life to do with as she pleases and have the income therefrom," did not give the widow a right to convey or dispose of the estate."

Appeal from Superior Court, Wake County; Devin, Judge.

Action by W. G. Allen against Rachel S. Smith and others. From a judgment finding that defendants were able to convey to plaintiff good title to certain land, and requiring plaintiff to accept a deed and to pay the purchase price of the land, plaintiff accepts and appeals. Affirmed.

This is a controversy as to the ownership of and title to the tract of land containing 242.5 acres in Swift Creek township, Wake county, which is particularly described in the record. The ability of the defendants to convey a good and perfect title to the plaintiff in compliance with their contract depends upon the true construction of Bryant Smith's will, hereinafter set forth; Arthur E. Smith, the son of Bryant Smith, named therein, being dead, and the widow of said Bryant Smith being still alive. The defendants are the children of the testator and their husbands or wives, as the case may be.

By agreement of the parties, the case was submitted to the court (Judge Devin presiding) to find the facts and declare the law thereon and enter judgment accordingly. The facts were found by the court, and the following judgment entered, which contains a recital of the facts thus found:

"The above-entitled action duly and regularly coming on to be heard, and being heard, and it appearing to the court that all the defendants above mentioned have been either served with summons or have accepted service of summons, and have all been duly and properly made parties to this action and are in court, and that all of the parties, plaintiff and defendants, have waived a trial by jury and consented that the court shall find the facts and determine the law concerning the matters in controversy, and that the same may be done by the undersigned judge, either in term or out of term, and either within or out of Wake county, and the court having heard the evidence offered by the parties, hereupon the court doth find and adjudge as follows, to wit:

"(1) That the defendants executed the option to the plaintiff, dated December 6, 1921, copy of which is attached to the answer.

"(2) That Rachel S. Smith is the widow of Bryant Smith, deceased, and D. C. Smith, C. E. Smith, Evie Morgan, Bessie Jordan, and Mollie F. Morris, are the children of said Bryant Smith, deceased, and that the said Bryant Smith left a last will and testament in the words and form set forth in paragraph 4 of the complaint, as follows:

"Raleigh, N. C., April 23, 1907.

"This is my last will and testament:

"I give all my estate both and real, and where ever situated to my wife for and during her natural life to with as she pleases and have the income therefrom.

"At the death of my wife if my son Arthur E. Smith should survive his mother—I give all my estate both real and personal to him during his life, and at his death then to be equally divided among my children who then may be living—if any of my children should be dead, their heirs to inherit their share.

"I want all my just debts paid and my body to have a decent burial.

"I nominate and appoint my son, David C. Smith and T. A. Smith executors hereto without bond.

his
"Bryant X Smith."
mark

"(3) That the said Bryant Smith died seized and possessed of the land described in paragraph 3 of the complaint, and being the land described in the said option hereinbefore referred to.

"(4) That the said Bryant Smith left him surviving his widow, the said Rachel Smith, and five children, to wit, D. C. Smith, C. E. Smith, Evie Morgan, Bessie Jordan, and Mollie F. Morris.

"(5) That Arthur E. Smith, the son of Bryant Smith, mentioned in the will of the said Bryant Smith, predeceased his said father.

"(6) That the defendants, D. C. Smith, C. E. Smith, Evie Morgan, Bessie Jordan, and Mollie F. Morris, are now seized of an indefeasible estate in fee simple in the said land, subject only to the life estate of their mother, the said Rachel S. Smith, therein.

"(7) That the defendants are able to convey to the plaintiff a good title to the said land, and have offered to the plaintiff a valid deed conveying to him a good, sure, and indefeasible title to the said land in fee simple.

"(8) That the plaintiff be and he is hereby required to accept said deed and pay to the defendants the purchase price of said land mentioned in said option, to wit, the sum of \$6,300, with interest thereon from the — day of —, 1921.

"(9) That the defendants recover of the plaintiff and his surety, Daniel Allen, their costs in this action to be taxed by the clerk of the court.

W. A. Devin, Judge."

To the foregoing judgment, the plaintiff excepted and appealed.

Templeton & Templeton, of Raleigh, for appellant.

R. N. Simms, of Raleigh, for appellees.

WALKER, J. (after stating the facts as above). [1, 2] As Arthur E. Smith's life interest was contingent upon his surviving his mother it never has, and never can, vest in him as he failed to survive his mother. He also died before his father and by reason of that fact the devise to him lapsed. This is conceded by the plaintiff. The contingency upon which the estate in the land was lim-

ited to the children can never happen, as it has become impossible by Arthur's death in the lifetime of his mother and even of his father. Either one of two results must follow, the estate was thereby vested absolutely in the testator's children under the will, or they took it by inheritance from their father, and in either case they can convey a good title. The intermediate devise for life to Arthur, the son, having failed to take effect, either by lapse or by his death, in the lifetime of his mother, or before the happening of the contingency upon which it was limited, that is, his survival of his mother, it is the same as if it had never existed, and was no obstacle to the complete vesting of the remainder in the children in fee. It matters not, as we have before said, how the remainder, after the death of the widow, Mrs. Rachel Smith, vests in them, whether under the will of their father or by inheritance from him, for in either view they have the vested estate, subject only to their mother's life interest. We cannot adopt the plaintiff's contention that the contingency which would have affected the children's interest if Arthur had lived and survived his mother, should be transferred by construction of the terms of the devise to her life estate so that only those children who outlive her will take, as they only could take had Arthur continued to live and survived his mother. At the time of Arthur's death, all the children were living, and are still living. Arthur's estate never took effect, as he did not survive his mother, and because of this contingency annexed to it, namely, that he should survive her in order for the life estate to vest in him, it never can take effect, or vest in him.

This view has the advantage of executing the intention of the testator as manifestly declared in his will; his object being that his wife should have the first life estate, and, if Arthur survived her, he was to have the second life estate, with remainder at his death to the testator's children who then may be living. A limitation somewhat similar to the one contained in this will, will be found in 2 Underhill on Wills (Ed. of 1900) p. 731, § 557, and note 2. The testator evidently intended to provide for a life estate in the land to Arthur, if he outlived his mother, and, if he did not, that his children should then have the remainder in fee at the death of their mother, which would be a vested one.

[3] There is nothing in the contention that, by the terms of the will and especially by the expression, "I give all my estate both [personal] and real, and where ever situated to my wife for and during her natural life to [do] with as she pleases and have the income therefrom," the widow has the right to convey or dispose of any part of the estate; her interest being restricted to an estate during her life. *Herring v. Williams*, 158 N. C. 1,

73 S. E. 218. In the passage quoted above the testator referred to her life estate and to no greater interest, as being in her, or intended to be vested in her, nor to her right to dispose of any such interest in the land.

As to the interest originally acquired by Arthur E. Smith being contingent in its nature, see *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011, 22 L. R. A. 598, and *Richardson v. Richardson*, 152 N. C. 705, 68 S. E. 217.

We agree with the court below that a deed, properly executed by the defendants, and sufficient in form and legal effect to convey the interests of the parties to it, will, when properly proved and registered, pass to the plaintiff a good and indefeasible title to the land in question.

There was no error in the judgment upon the findings of fact.

Affirmed.

(118 S. C. 466)

HERNDON v. SOUTHERN RY. CO. (No. 10773.)

(Supreme Court of South Carolina. Dec. 13, 1921.)

1. Continuance \Leftrightarrow 31—Motion because defendant not prepared to meet issue held addressed to court's discretion.

In a passenger's action for the loss of her trunk and contents, a motion for a continuance after introduction of testimony, because defendant was not prepared to meet testimony raising the issue of an intrastate transaction, was within the discretion of the presiding judge, and its refusal was not an abuse of discretion.

2. Carriers \Leftrightarrow 405(1) — Journey decided on after reaching destination of interstate trip held intrastate, and not controlled by interstate limitation as to loss of baggage.

Where an interstate passenger, after reaching her destination, decided because of the failure of a friend to meet her to go to another place within the state, and rechecked her trunk without physical delivery, such journey was intrastate, and not controlled by the interstate limitation of liability as to loss of baggage.

3. Carriers \Leftrightarrow 408(6)—Where evidence supporting recovery was uncontradicted, verdict properly directed.

In a passenger's action for the loss of her trunk and contents, where her evidence showed that the journey was an intrastate one, and defendant offered no evidence on that point, a verdict was properly directed.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by Mrs. M. E. Herndon against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Barnett & McDonald, of Columbia, for appellant.

Graydon & Graydon, of Columbia, for respondent.

COTHRAN, J. Action for \$556.21, the value of a trunk and contents belonging to the plaintiff, and alleged to have been lost in transit.

The main point of contention is in reference to the character of the shipment, interstate, or intrastate, and the applicability of the limitation of \$100 recovery in case of loss of baggage. The facts are as follows:

The plaintiff, then unmarried, but engaged to a young man in the army at Camp Jackson, lived at Bristol, Va. It had been arranged between them that she should meet him at Spartanburg, where they would be married. She accordingly left Bristol, Va., on January 22, 1921, buying a ticket and having her trunk checked from Bristol, Va., to Johnson City, Tenn. At the latter point she bought a ticket and had her baggage rechecked to Spartanburg. She arrived at Spartanburg via the Carolina, Clinchfield & Ohio Railroad at 6:20 p. m., and, not meeting her fiancé there, as was expected, she decided to go on to Columbia. Accordingly she bought a ticket from Spartanburg to Columbia over the defendant's line, and had her trunk checked to Columbia. The trunk was in good order when it was rechecked at Spartanburg, according to plaintiff's testimony, as she says she saw it there at that time. The trunk was not delivered to her physically when she surrendered the other check and had it rechecked to Columbia. She left Spartanburg at 7:20 p. m., remaining there only one hour. On arrival at Columbia a trunk bearing the corresponding check was offered to her, but, not being her trunk, it was refused. Subsequently her trunk was located at Sumter, having been entered and robbed of her entire outfit.

Upon the trial, after the plaintiff and her husband had testified, defendant's counsel, apprehending that the plaintiff's testimony was directed to establishing an intrastate and not an interstate transaction, and not being prepared to meet this issue, moved for a continuance, which was refused. The defendant offered in evidence the baggage tariff limiting recovery to \$100, and at the close of the testimony moved that the court direct a verdict in favor of the plaintiff for \$100. This was refused, the presiding judge holding that the transaction was an intrastate one, and not controlled by the interstate limitation. He directed the jury to find for the plaintiff the value of the lost property. The jury returned a verdict for \$550. Defendant appeals, and raises these questions: (1) Error in refusing the motion for a contin-

uance; (2) error in not granting the motion for a directed verdict; (3) error in not leaving the issue of interstate or intrastate character of the transaction to the jury.

[1] 1. As to the motion for continuance: This was a matter within the discretion of the presiding judge, which does not appear to have been abused.

[2] 2. As to the character of the transaction, interstate or intrastate: If the testimony of the plaintiff be true, the journey originally interstate, from Bristol, Va., to Spartanburg, S. C., terminated upon her arrival in Spartanburg. She had the right there to present the check and receive her trunk. Instead of doing this, she decided to make another journey, separate and distinct from her original journey, for it was superinduced by an incident which happened after the original journey had terminated, namely, the failure of her fiancé to meet her in Spartanburg. If she had called for her trunk, received it at Spartanburg, left it on the platform until she bought a ticket to Columbia, and then called for a check to Columbia, we do not apprehend that there would be any dispute of the proposition that she had undertaken a new journey, an intrastate one; she did what was equivalent to this when she bought a new ticket and had her baggage rechecked to Columbia. Upon the facts, therefore, testified to by the plaintiff the presiding judge was right in holding that the journey was intrastate.

[3] 3. The third question is embarrassing—the right of the presiding judge to assume that the plaintiff's testimony was true. Upon principle, it would seem that that was an issue to be determined by the jury, and not by the judge, and that the absence of conflicting testimony should not affect the question. It is entirely possible that the jury may have concluded that, in view of the vital importance to a full recovery of damages that the character of the journey as an interstate one should be established, some doubt was cast upon the truth and reasonableness, under the circumstances, of the plaintiff's narrative, and declined to accept it as true; a right which the jury unquestionably had. But until the court is prepared to overrule the cases of *Uzzell v. Horn*, 71 S. C. 426, 51 S. E. 253, *Bank v. Inman Mills*, 74 S. C. 76, 53 S. E. 951, and *Slaughter Co. v. Lumber Co.*, 79 S. C. 338, 60 S. E. 705, they are binding authority, holding that, where the defendant offers no evidence, and the evidence of the plaintiff points all one way, the judge may direct a verdict.

The judgment of this court is that the judgment appealed from be affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

(118 S. C. 470)

JOHNSTON-CREWS CO. v. FOLK et al.
(No. 10841.)

(Supreme Court of South Carolina. Feb. 27, 1922.)

1. Judgment \Leftrightarrow 715(3)—Decree in creditor's suit declaring a deed valid held not res adjudicata in a subsequent creditor's action.

A decree, holding a deed valid in a creditor's action to have it declared fraudulent and void, was not res adjudicata in a subsequent creditor's action to have it set aside under the recording act, wherein the validity of the deed as between grantor and grantee was conceded, as such matter was not, and could not have been, involved in the former action.

2. Judgment \Leftrightarrow 713(1)—Essential elements of res adjudicata.

The essential elements of res adjudicata are identity of the parties, identity of the subject-matter, and an adjudication in the former suit of the precise question sought to be raised in the second suit.

3. Judgment \Leftrightarrow 713(2)—Where former adjudication is conclusive of issues that might have been raised.

If identity of parties and identity of causes of action have been established, the former adjudication is conclusive, not only of the precise issues raised and determined, but of such as might have been raised affecting the main issue, but if the identity of the parties has been established, but the identity of the causes of action has not, any issue appearing to have been actually adjudicated in the former suit is conclusive upon the parties in the subsequent action.

Appeal from Common Pleas Circuit Court of Hampton County; J. W. De Vore, Judge.

Bill by the Johnston-Crews Company against Richie B. Folk and others. Judgment for plaintiff, and the defendants appeal. Affirmed.

The decree of Judge De Vore was as follows:

This matter comes before me on report of the referee herein. This is an action to declare invalid a deed from J. G. Folk to Richie B. Folk, née Chovin, as it affects the rights of plaintiff and other creditors in like situation and circumstance. The deed in question is dated December 24, 1912, and was recorded January 20, 1914. It purported to convey a one-third interest in 1,000 acres of land in Hampton county, S. C. The value of the land is between \$10 and \$30 per acre. On the executions on the various judgments proved, returns nulla bona have been made by the sheriff. The following claims have been proved: Johnston-Crews Company, judgment dated February 21, 1917, \$591.67; Southern Fertilizer & Chemical Company, judgment dated June 25, 1917, \$572.10; L. C. Peeples Clothing Company, judgment dated February 21, 1917, \$110.25; Crumley-Sharp Hardware Company, judgment dated February 21, 1917, \$83.67; W. L. Douglas Hat

Company, judgment dated February 21, 1917, \$133.75; International Shoe Company, judgment dated February 13, 1917, \$300; H. S. Meinhard & Co., \$513.44—all of which accrued during 1913.

In addition to the foregoing quite a number of creditors holding claims which were made between the date of the deed and the recording thereof were filed with the attorney for plaintiff and the referee.

There seems to be very little dispute regarding the facts of the case. J. G. Folk operated a store at Brunson during 1913, and made numerous accounts. So far as the records in the office of the clerk of court went, there was nothing to disclose the transaction of the deed in question. There is some testimony that credit was advanced him on faith of his ostensible ownership of one-third of a 1,000-acre plantation. He conveyed this in 1912, and the deed was not recorded by his wife, the grantee, until 1914. J. G. Folk testified that he was "broke" when he went in business. He was insolvent as the record shows. No apparent dispute has arisen between the parties or in argument as to the facts. Hence, in so far as this case is concerned, the prayer of the plaintiff must be granted.

The defendants, some of whom have been recently substituted for J. G. Folk, now deceased, mainly rely, and certainly in argument of counsel before me, relied upon the plea of res adjudicata set up in the answer. There was a suit brought by H. S. Meinhard & Co. for itself and others against J. G. Folk and his wife prior to the bringing of this suit by Johnston-Crews Company for itself and others against the same defendants. The Meinhard suit was an action to set aside the deed for fraud as the complaint discloses. The final order in that suit is short, and is as follows:

"The above-entitled case came up before me upon exceptions to the report of the special referee herein and after hearing argument, I find that there was not sufficient testimony to warrant me in setting aside the deed in question for fraud, the complaint stating but the one cause of action for fraud. The complaint was not drawn to set aside the deed under the recording act."

It will be observed that in the Meinhard suit it was adjudicated that the complaint there stated but the one cause of action for fraud, and that the court there specifically stated that the complaint was not drawn to set aside the deed under the recording act. If all other essentials in the establishment of the plea of res adjudicata were present, this court is of the opinion that judgment in the Meinhard case would prevent the successful interposition of the plea in the instant case. A reading of the two complaints clearly discloses that different causes of action are stated therein; the one being for fraud, the other for the recording act.

Therefore, it is ordered, adjudged and decreed that the title deed executed by J. G. Folk to Richie B. Chovin, dated December 24, 1912, and recorded January 20, 1914, in Book 22-D, at page 76, in the office of the clerk of court for Hampton county, S. C., be, and same is hereby, declared invalid, and is set aside as to those unpaid creditors hereinabove men-

tioned and those creditors whose accounts with J. G. Folk were created between the date of the said deed, to wit, December 24, 1912, and the date of the record thereof, to wit, January 20, 1914, and to those to whom J. G. Folk became indebted between said dates.

There are quite a number of creditors whose claims were filed with plaintiff's attorney at the commencement of this action, and also filed with the referee. In order that such creditors may participate in the benefit of this decree, it is ordered that E. M. Peebles be appointed special referee to herein determine the validity and dates of the said claims, and, if no appeal be taken from the decision of said referee, then such claims may be allowed to participate in the benefit of this decree.

It is further ordered that M. F. Thomas be, and he is hereby, appointed special master for the specific purpose of offering for sale and selling the property mentioned and described in the said deed and hereinafter described. It is ordered that the said M. F. Thomas, as special master, be, and he is hereby, required to offer for sale or sell the said property in front of the courthouse at Hampton, S. C., on some convenient sales day hereafter to the highest bidder for cash during the legal hours of sale, said sale to be made after three weeks advertisement of the time, place, and condition of said sale in the Hampton County Guardian, a newspaper, and by posting a copy of such advertisement on the courthouse door of Hampton, S. C.; that upon such sale the said special master shall make, execute, and deliver to the purchaser a good and sufficient title deed to the one-third interest of J. G. Folk, or his estate in and to all that piece, parcel, or tract of land in Hampton county, S. C., containing 1,000 acres, more or less, bounded on the north by lands of Gifford and Beach Branch Church, on the east by Greenleaf, Parnell and others, on the south by the estate of Franklin Johnson, and on the west by lands of Mears and estate of Lawton; that out of the proceeds of such sale the said special master shall first pay the costs and expenses of this action, and then pay to the creditors participating in the benefits of this decree as hereinabove set forth the amount of their respective claims, and, if there be any remaining funds in his hands as such special master, that such be held for disbursement subject to the further orders of this court.

Further ordered that either party shall have leave to apply at the foot of this order for such further orders as may be desired, provided such applicant shall give at least five days' notice to the adverse party of the grounds for such further order.

Let copies of this order be served upon counsel for the defendants forthwith.

W. B. De Loach, of Camden, for appellants.

George Warren, of Hampton, for respondent.

COTHRAN, J. A creditors' bill, seeking to have the court declare invalid, so far as their claims are concerned, a certain deed executed by the debtor to a young woman (afterwards his wife), not recorded within the stat-

utory period, and to subject the interest of the debtor to the payment of said claims.

The following facts appeared: In the year 1912, J. G. Folk, the debtor, was a farmer near Brunson, S. C. He testified that the grantee of the deed, Miss Richie B. Chovin, had been a member of his family since she was 8 years old; that he lost his wife in 1912, and the young woman, who was then about 18 years old and in school in Charleston, was induced to return to his home and assume the cares of his household, upon his promise to convey to her his one-third interest in a tract of land which belonged to his deceased wife, containing about 1,000 acres and valued at \$10 to \$30 per acre; that she did return, and on December 24, 1912, he executed and delivered the deed in compliance with his agreement; that he married the young woman in 1914. This deed though executed in 1912, was not put upon record until January 20, 1914. In the meantime, in August, 1913, Folk embarked in the mercantile business, and during the year of 1913, contracted debts to wholesale merchants and others to the aggregate amount of about \$2,500. Early in the year 1917 these claims were put in judgment, and nulla bona returns were entered upon the executions. At some time prior to February 13, 1918, exactly when does not appear in the record, an action was instituted by Meinhard & Bro., creditors of J. G. Folk—a creditors' bill, against him and his wife—for the purpose of having said deed declared fraudulent and void, under the statute of Elizabeth. This action was terminated in favor of the defendants by the following decree of Judge Spain:

"The above-entitled case came up before me upon exceptions to the report of the special referee herein, and, after hearing argument, I find that there was not sufficient testimony to warrant me in setting aside the deed in question for fraud; the complaint stating but one cause of action for fraud. The complaint was not drawn to set aside the deed under the recording act."

This decree was dated February 13, 1918. On February 20, 1918, a week thereafter, the plaintiff, Johnson-Crews Company, instituted this action for the purpose above stated.

The defendants insist that, the plaintiff having come into the Meinhard suit as a creditor, the decree in that case is res adjudicata, so far as the present cause of action is concerned. Judge De Vore in a decree, which will be reported, held against the contention of the defendants, and granted full relief as prayed for by the plaintiff. The debtor died after the present suit was instituted, and it has been continued against his heirs at law and administratrix, who have appealed from the decree of Judge De Vore. The decree of the circuit judge was right, and should be sustained.

The adjudication sought by the plaintiff to

be established in the action at bar is that in 1912, J. G. Folk executed a valid deed conveying his interest in the land to Miss Richie B. Chovan (afterwards his wife); that this deed was not recorded until 1914; that in the meantime Folk contracted debts, being apparently the owner of the land; that while Folk's title fully passed by the deed to his grantee, the latter holds the title subject to the claims of subsequent creditors.

The adjudication sought by the plaintiffs to be established in the former action was that in 1912 J. G. Folk executed an invalid deed, attempting to convey his interest in the land to Miss Richie B. Chovin; that this deed was executed with the intent to hinder, delay, and defraud his creditors, and was void; that the title of Folk never passed out of him; and that the land as the property of Folk was subject to the claims of his creditors. This adjudication was denied to the plaintiffs; the court on the contrary holding that the conveyance was not fraudulent, but was a valid transfer of Folk's title to his grantee, reserving expressly the question raised by the plaintiff in the action at bar.

[1] Tested by the principles of the doctrine of *res adjudicata*, we do not see how it is possible to decide that the second action, involving a diametrically opposite theory, is concluded by the adjudication established in the former action. The first action viciously attacks and denies the validity of the deed; the second, concedes its validity, as between grantor and grantee, and seeks to enforce the rights of subsequent creditors against the holder of the legal title under that deed, a matter which was not and could not have been involved in the former action.

[2] The following have been declared to be the essential elements of *res adjudicata*: (1) Identity of the parties; (2) identity of the subject-matter; (8) an adjudication in the former suit of the precise question sought to be raised in the second suit *Hart v. Bates*, 17 S. O. 35.

1. It may be assumed that the identity of the parties has been established. The former action, that of *Meinhard & Bro.* was a creditors' bill, in which *Johnston-Crews Company* intervened and participated by proof of their claim. The action at bar is a creditors' bill instituted by *Johnston-Crews Company*.

2. As to the identity of the subject-matter, or, as variously expressed the claims, demands, or causes of action: The causes of action in the two suits are essentially different. Entirely different allegations are made, requiring as different evidence. In the one, the validity of the deed is attacked as fraudulent and void; in the other it is conceded to be valid. In the one, the plaintiff could have succeeded only by proving that the deed was executed with the intention on the part of both grantor and grantee,

of hindering, delaying, and defrauding the creditors of the grantor. In the other the plaintiff can succeed by conceding what was in issue in the former suit, the validity of the deed, and by proving that the plaintiff was a bona fide creditor of the grantor, induced to extend credit to him upon the faith of his ownership of the land, the title to which apparently was in him, unaffected by the deed previously executed, but not recorded until after the debts were contracted.

The point cannot be better illustrated than by the case of *Whaley v. Stevens*, 21 S. O. 221. In that case the plaintiff brought an action against the defendant for obstructing his right of way, and obtained a verdict. Upon appeal (24 S. O. 479) this court held that, the plaintiff having alleged in his complaint that he was entitled to a right of way in gross, and not a right of way appendant or appurtenant to his land, and there being confessedly no evidence that the plaintiff was entitled to a right of way in gross, he could not recover, even though he may have proved that he was entitled to a right of way appendant or appurtenant to his land described in the complaint; and that, as there were essential and marked distinctions between the two kinds of rights, the violation of these rights present different and distinct causes of action, which would have to be asserted and established by different and distinct allegations and proofs, the plaintiff's application for leave to amend could not be granted under the provisions of the Code. Judgment was therefore rendered, dismissing the complaint. Thereafter the plaintiff brought a second suit, alleging that he was entitled to a right of way appendant or appurtenant and not in gross, as he alleged in the former action. The defendant pleaded that the first suit was an adjudication of the plaintiff's rights, and barred him, as *res adjudicata*, from maintaining the second. The plea was sustained by the circuit judge. Upon appeal this court (Justice McIver rendering the opinion of the court) held as follows:

"It is very manifest that the allegations in the complaints filed in the two actions were essentially different, and, as we think, it is equally manifest that the issues presented in the two actions were entirely different. It is true that the general object in both of the actions was the same; that is, to obtain damages for the same obstruction of what appears from the evidence to be substantially the same road, and an order of injunction to restrain defendant from continuing said obstruction. But to obtain the relief sought by the plaintiff, he was bound to establish the affirmative of two issues: First, whether he was entitled to a right of way, as alleged in his complaint; second, whether defendant had obstructed said way. Now, conceding that the second issue was the same in both of the cases, the first issue was certainly not. For, as this court held in the former case, the sole issue presented was whether the plaintiff is entitled to

a right of way in gross over the land of defendant, while the issue presented in the present action is whether the plaintiff is entitled to a right of way appendant or appurtenant to his plantation known as 'Caneslatch.' As was held in the former case: "These two rights differ substantially, not in form merely, but in their nature and results. The violation of these rights present different and distinct causes of action, which would have to be asserted and established by different and distinct allegations and proofs"—and it was for this reason that leave to amend was refused. It follows, therefore, that it has already been adjudged that the causes of action in the two cases are not the same, and certainly a judgment obtained on one cause of action cannot be pleaded as *res adjudicata* to an action upon another cause of action; for in such a case one of the identities, 'identity in the cause of action,' necessary to a successful maintenance of such a plea, would be lacking, and hence the plea could not be sustained. *Mauldin v. Gossett*, 15 S. C. 576.

"It seems to be supposed that the cause of action in both of the cases was the defendant's obstruction of the road, and, therefore, that it was the same in both cases. But this was only one of the elements going to make up the plaintiff's cause of action. As is said in *Pomeroy on Remedies*, section 519, pages 554, 555: 'Every action is based upon some primary right held by the plaintiff, and upon a duty resting upon the defendant corresponding to such right. By means of a wrongful act or omission of the defendant, this primary right and this duty are invaded and broken, and there immediately arises from the breach a new remedial right of the plaintiff, and a new remedial duty of the defendant. Finally, such remedial right and duty are consummated and satisfied by the remedy, which is obtained through means of the action, and which is its object. Now, it is very plain that, using the words according to their natural import and according to their technical legal import, the "cause of action" is what gives rise to the remedial right, or the right of remedy, which is evidently the same as the term, "right of action" frequently used by judges and text-writers. This remedial right, or right of action, does not arise from the wrongful act or omission of the defendant, the delict, alone, nor from the plaintiff's primary right, and the defendant's corresponding primary duty alone, but from these two elements taken together. The "cause of action," therefore, must always consist of two factors: (1) The plaintiff's primary right and the defendant's corresponding primary duty, whatever be the subject to which they relate—person, character, property, or contract; and (2) the delict, or wrongful act of omission of the defendant, by which the primary right and duty have been violated,' etc.

"From this, it follows that the wrongful act of the defendant (if, indeed, it was wrongful), in obstructing the road in question, did not constitute the cause of action in either case, but would be only one of the elements of such cause in both cases, and could only in combination with the other necessary element, the plaintiff's primary right, constitute a cause of action; and as the nature of the plaintiff's

right, as alleged in the first case, was essentially different from that alleged in the present action, it would seem to follow that the causes of action in the two cases could not be the same."

This case fully answers the suggestion that might possibly be made, that as the effort of the plaintiffs in each case was to subject the land to the payment of their debts, the causes of action were identical.

[3] 3. As to the third element as stated above: In the case of *Hart v. Bates*, 17 S. C. 35, the element is stated in rather tabloid form thus: "The precise point must have been ruled." This requires some amplification. If the identity of the parties and the identity of the causes of action have been established, the former adjudication is conclusive, not only of the precise issues raised and determined, but of such as might have been raised affecting the main issue. If the identity of the parties has been established, but the identity of the causes of action has not, any issue appearing upon the record or by extrinsic evidence to have been adjudicated in the former suit is conclusive upon the parties in a subsequent action. If the identity of the parties has been established, but the identity of the causes of action has not, the former judgment is conclusive only as to those issues actually determined; that is, the rule of conclusiveness as to matters which might have been litigated has no application. The last proposition is the only one of the three, applicable to the case at bar, and it only will be re-enforced by authorities.

"But the weight of authority is that, where the second action, although between the same parties, is on a different cause of action, the judgment is not conclusive on all matters which might have been litigated in the former action, but only as to such points or questions as were actually in issue and adjudicated therein." 23 Cyc. 1297, citing many cases from Supreme Court of United States and other jurisdictions; 15 R. C. L. 973.

"If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided, but of what might have been decided. If the second action was upon a different claim or demand, then the judgment is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'" *Bates v. Bodie*, 245 U. S. 520, 38 Sup. Ct. 182, 62 L. Ed. 444, L. R. A. 1918C, 355; *V-O Co. v. Kirven*, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179; *Troxwell v. Railroad Co.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586; *Radford v. Myers*, 231 U. S. 725, 34 Sup. Ct. 249, 58 L. Ed. 454; *Hart v. R. Co.*, 244 U. S. 204, 37 Sup. Ct. 508, 61 L. Ed. 1148.

"The language, therefore, which is so often used that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is

strictly accurate, when applied to the demand or claim in controversy. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. * * * On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action." *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195.

In a subsequent suit between the same parties on the same claim, a judgment in the former suit is conclusive as to every matter that might have been determined; but, where the second suit is upon a different claim, the former judgment is conclusive only as to those issues actually determined. *Lim Jew v. U. S.*, 196 Fed. 736, 116 O. C. A. 364; *Grider v. Groff*, 202 Fed. 685, 121 O. C. A. 95; *Savage v. Central Co.*, 59 Colo. 66, 148 Pac. 254; *Scott v. Scott*, 83 Conn. 634, 78 Atl. 314, Ann. Cas. 965; *Blackford v. Wilder*, 28 App. D. C. 535, certiorari denied 205 U. S. 541, 27 Sup. Ct. 788, 51 L. Ed. 922; *Prall v. Prall*, 58 Fla. 496, 50 South. 867, 26 L. R. A. (N. S.) 577; *State v. Center Creek Mining Co.*, 262 Mo. 490, 171 S. W. 356; *Tudor v. Kennett*, 87 Vt. 99, 88 Atl. 520; *Elk Graden v. Thayer Co.* (D. C.) 206 Fed. 212; *Campbell v. Martin*, 89 Vt. 214, 95 Atl. 494; *Hudson v. Land Co.*, 71 W. Va. 402, 76 S. E. 797; *Campbell v. Hammer*, 78 Or. 612, 153 Pac. 475; *Campbell v. Mims*, 161 Ky. 530, 170 S. W. 1176; *Reinkey v. Wilkins*, 172 Wis. 515, 179 N. W. 751.

"Bar of judgment in another suit for same cause of action between same parties, or those in privity, extends, not only to that which was litigated in earlier suit, but also that which might have been; but, if second suit is on different cause of action, bar of earlier judgment is limited to that which was actually determined." *Eastman v. Vermont Co.*, 236 Mass. 138, 128 N. E. 177.

"Where the second suit is upon a different cause of action, but between the same parties as the first, the judgment in the first action operates as an estoppel as to every issue actually litigated in the first action, but is not conclusive as to matters which might have been, but were not litigated." *Pierce v. Bank*, (O. C. A.) 268 Fed. 487.

"Where the second action is upon a different claim but between the same parties, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the findings or verdict was rendered." *In re Walsh Est.*, 80 N. J. Eq. 565, 74 Atl. 563.

"The rule that a judgment not only estops as to the matters actually litigated, but also as to those that might be litigated, applies to actions based on the same claim or demand." *McKimmon, Currie & Co. v. Caulk*, 170 N. C. 54, 86 S. E. 806.

Judgment of a court having jurisdiction of the cause and the parties held to estop the parties and their privies as to all issuable matters contained in the pleadings, and which were material, and were, in fact, determined, but not as to matters which might have been litigated or causes of action which plaintiff might have joined. *Whitaker v. Garren*, 167 N. C. 658, 83 S. E. 759.

"The rule that a judgment is conclusive, not only of the question actually determined, but of all matters which might have been decided in the suit, refers only to matters properly belonging to the subject of the controversy and within the scope of the issues." *Fourche Co. v. Walker*, 96 Ark. 540, 132 S. W. 451.

"A judgment in a prior action operates as an estoppel only as to those matters in issue or points controverted, on the determination of which a finding or verdict was rendered." *Schilstra v. Van Den Heuvel*, 82 N. J. Eq. 155, 90 Atl. 1056.

"A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered." *Sbarbero v. Miller*, 72 N. J. Eq. 248, 65 Atl. 472.

For a prior judgment to be an estoppel on an issue in a subsequent suit, it must appear from the record that the determination of such issue was necessary to the judgment, or it must be shown by extrinsic evidence that such issue was actually litigated. *Anderson v. Butterick*, 132 Minn. 30, 155 N. W. 1045.

"While a judgment is conclusive upon matters raised by the pleadings or which might have been properly adjudicated thereunder, it is not conclusive as to causes of action which plaintiff might have joined, but which were not, in fact, joined or included in the pleadings." *Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228.

In *Water Co. v. City*, 160 Fed. 41, 90 C. C. A. 547, 19 L. R. A. (N. S.) 219, the plaintiff sued on an express contract for light supplied the city, and judgment was rendered in favor of the city. He then brought a second suit based upon a quantum meruit. The defendant pleaded the first adjudication in bar, but the court held that the causes of action were different, and overruled the plea. They say:

"The fact that a party through mistake attempts to exercise a right to which he is not entitled or has made choice of a supposed remedy which never existed, and pursued it until the court adjudged that it never existed, does not preclude him from afterwards pursuing a remedy for relief, to which in law and good conscience he is entitled."

A judgment creditor, who has filed in a suit brought to have conveyances made by his debtor shortly prior to making a general assignment, declared fraudulent and void, may thereafter maintain a bill to have the conveyances adjudged part of the gen-

eral assignment. *Elgin Co. v. Meyer* (C. C.) 29 Fed. 225.

In the case last cited, a debtor being insolvent executed certain conveyances in payment of certain debts; the plaintiff brought an action to have them declared fraudulent and void and to subject the property to the payment of its judgment; the issues were found in favor of the defendant. Thereafter the plaintiff brought a second action, alleging that the conveyances, though made in payment and satisfaction of conceded indebtedness, should be treated as merely a part of the general assignment, under the rule by which all conveyances made at the same or nearly the same time by an insolvent of all of his property are adjudged parts of one general assignment. The plea of *res adjudicata* was interposed, but was overruled, in a decree by Circuit Judge Brewer, afterwards a justice of the Supreme Court, upon the ground that a plaintiff who mistakes his remedy is not merely estopped from thereafter asserting his real rights and pursuing his real remedy. There is no decided case in this state that states a doctrine contrary to this.

In *Maxwell v. Connor*, 1 Hill, Eq. 14, the defendant in an action at law upon a note to which he was surety failed to set up the defense that he had been discharged by an unwarranted extension of time to the principal debtor, and judgment went against him. It was properly held that in a subsequent action in equity, involving his liability on the same note, he was estopped by the former adjudication.

In *Trimmer v. Thomson*, 19 S. C. 247, the defendants were sued as executors upon a note of their testator; they pleaded *plene administravit*; judgment generally went against them. The second suit was against them individually, upon the same note; they attempted to establish the defense formerly interposed. The court held that they were estopped by the former adjudication, which necessarily adjudged the issue of *plene administravit*. The court reaffirms the case of *Hart v. Bates*, 17 S. C. 42, then but recently decided, and quote from that case as follows:

"This court has lately, in the case of *Hart v. Bates*, 17 S. C. 42, attempted to define the doctrine of *res adjudicata* as follows: 'It seems to be now settled that, though the proceeding is in another jurisdiction, the judgment will be conclusive provided the court had jurisdiction and the judgment was directly on the point. * * * It is claimed, however, as a sequence of this rule, that the defense of *res adjudicata* extends to every question which could have been made, whether it was considered or not. There are cases which seem to go to that extent, but we think the decided preponderance of authority sustains the more reasonable doctrine, "That a judgment is not, technically, conclusive of any matter, if the matter is not such that it had, of necessity, to be determined

before the judgment could have been given; that it was not merely collateral nor to be inferred by argument from the judgment.'" 6 Wait, Ac. & Def. 785, citing *Hunter v. Davis*, 10 Ga. 413, and other cases. Or, in the language of Mr. Justice Miller, of the Supreme Court of the United States: "The rule is, that when a former judgment is relied on it must appear from the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided.""

A very similar question arose in *Willis v. Tozer*, 44 S. C. 1,¹ where the *Trimmer Case* was cited with approval, the court declaring:

"A judgment is conclusive between the parties to it, not only as to those matters which were actually decided, but also all such as were necessarily involved in its rendition."

In *Drug Co. v. Bromonia Co.*, 81 S. C. 516, 62 S. E. 840, 128 Am. St. Rep. 929, the defendant in a former action had recovered judgment against the drug company upon an account. In that action fraud was not an issue. The drug company paid the judgment, and brought the second action against the Bromonia Company for damages on account of fraudulent misrepresentations in the sale of the goods. The court of course held that the former judgment, giving effect to the contract of sale, was conclusive evidence that it was free from fraud or illegality although such issue was not raised in the action; that the validity of the contract was necessarily implied in the adjudication; and that it was a bar to the second action. As the circuit judge announced in that case:

"The parties to the action are the same; the court is the same; the subject-matter, Bromonia, and the advertisement of it, is the same. The exact issue in the first case was: Did the Greenwood Drug Company owe the Bromonia Company for a lot of medicine, and for money paid out in the advertisement of the medicine? That, too, is the issue in the second case. It was decided in the first case, and that ends the controversy."

In *Cannon v. Cox*, 98 S. C. 185, 82 S. E. 390, the defendant has distrained upon the plaintiff's property; the plaintiff sued out claim and delivery proceedings and recovered judgment; he then brought an action for damages alleging an unreasonable and excessive distress; the defendant contended that the plaintiff could have presented in the claim and delivery proceedings her demand for damages, and, not having done so, the question is *res judicata*; a contention that appears to me to possess considerable force; but the court held upon the authority of *Hart v. Bates*, 17 S. C. 40, *Kirven v. V-C. Co.*, 77 S. C. 493, 58 S. E. 424, *Id.*, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179, and *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195, that the defense of *res adjudicata* could not prevail. This case is cited in the

¹ 21 S. E. 617.

leading opinion as authority for holding that the defense should prevail. It occurs to me that it sustains the opposite conclusion.

In *Woodmen v. Means*, 87 S. C. 127, 69 S. E. 85, the court held:

"As the questions sought to be made in this case by the present plaintiff against the defendant, Mollie Fincher Means, were necessarily involved in the decision in the former action brought by Mollie Fincher Means against the present plaintiff, the said former action is res judicata of the same questions now presented."

In *Davis v. Murphy*, 2 Rich. 560, 45 Am. Dec. 749, the principle of res adjudicata is limited to "that which was directly in issue" in the former suit.

In *Bradley v. McBride*, Rich. Eq. Cas. 202, the plaintiff brought an action to set aside a sheriff's deed conveying the property to the defendant, upon the ground of fraud. The defendant had previously brought an action against the plaintiff in trespass to try title and recover the land. In the later case the defendant set up the former adjudication as a bar, but it was denied by the court upon the ground that the issue of fraud was not involved in the first action. This case is cited with approval in *Hart v. Bates*, 17 S. C. 35, but it strikes me as of doubtful accuracy.

In *Willoughby v. R. Co.*, 52 S. C. 166, 29 S. E. 629, the point decided was that where an issue was distinctly adjudicated in an action, it became res adjudicata in a subsequent action between the parties whether the subsequent action was upon the same or upon a different cause of action.

In *Rhoad v. Patrick*, 37 S. C. 517, 16 S. E. 536, the court held that a point not adjudicated in a former suit, although raised there, was not res adjudicata, citing the *Hart and Roberts Cases*.

"A test of the identity of the cause of action is, Would the evidence adequate to recovery in the second have been sufficient to support the first?" *Sarson v. Maccia*, 90 N. J. Eq. 483, 108 Atl. 109.

In *Ex parte Roberts*, 19 S. C. 150, the plea was sustained upon the ground that the matter in dispute was necessarily involved and adjudicated in the former proceeding; and to the same effect is *Steen v. Mark*, 32 S. C. 286, 11 S. E. 93; *Dunsford v. Brown*, 23 S. C. 328, and *Newell v. Neal*, 50 S. C. 68, 27 S. E. 560.

Another reason for overruling the plea in this case is that it was practically reversed by the decree of Judge Spain in the former suit. *Hunter v. Hunter*, 63 S. C. 78, 41 S. E. 33, 90 Am. St. Rep. 663.

"The recognized principle that, where a general judgment is rendered, all matters that might have been interposed as a defense are considered as adjudicata between the parties, is not applicable when a decree specifically ex-

presses the issues determined, and upon which the relief is granted, in which case only such issues are res judicata." *R. Co. v. R. R. Co.* (D. C.) 205 Fed. 800.

Tested by another rule adopted by this court the plea of res adjudicata must fail. In *Fraser v. Charleston*, 19 S. C. 399, the court says:

"It does not appear clearly that proof was offered, and the point in question actually decided by the court; but that was not indispensable, provided the precise matter was involved in the issue, so that it had of necessity to be decided before the judgment could have been given." *Ruff v. Doty*, 26 S. C. 173, 1 S. E. 707, 4 Am. St. Rep. 709.

The question of the rights of creditors under the recording act, involved in the present action, was not before the court in the *Meinhard Case*. A decision of it was not at all involved in the issue of a fraudulent deed. In fact, an adjudication of the validity of the deed was entirely consistent with the establishment of the rights of the subsequent creditors. It was not necessary to adjudicate that they had no rights in order to sustain the deed. Consequently that question did not have "to be decided before the judgment [sustaining the deed] could have been given." In the *Ruff v. Doty Case* the court says, referring to *Fraser v. Charleston* and *Hart v. Bates*:

"These two cases, considered together, decide, briefly, that a matter not necessarily involved and not raised in a previous case, is not res adjudicata, but if necessarily involved and raised, or not, it is concluded, and especially so, if the party denying the adjudication knew of the matter and could have interposed it at the previous trial, either in support of a claim or as a defense."

In *Anderson v. Cave*, 49 S. C. 505, 27 S. E. 478, the court declares:

"Conceding, then, for the purposes of this case, that the court of probate had full jurisdiction in the proceeding before it, and that the question of the plaintiff's claim was there presented, or could have been presented, its adjudication was not necessary to enable that court to render judgment, and hence such judgment is not conclusive. (Citing authorities). From these authorities, it follows that, even if the proceeding in the court of probate be given full force and effect as a proceeding for partition, it was not necessary that the claim of the plaintiff should have been there adjudged; and, as there is not the slightest evidence that it was, in fact, adjudged, such proceeding cannot support the plea of res adjudicata."

The judgment of this court is that the judgment of the circuit court be affirmed.

FRASER, J., concurs.

GARY, C. J. I concur in the result, for the reason that his honor, Judge Spain,

ruled that the complaint in the first case was not drawn to set aside the deed, under the recording act.

(152 Ga. 745)

BRISENDINE v. BRISENDINE. (No. 2492.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 637—Writ not dismissed when bill of exceptions tendered 20 days after judgment, but for providential reasons not certified until later.

There was no effort to assign error in the bill of exceptions on any judgment other than one rendered November 5, 1920, awarding the wife temporary alimony and counsel fees in the proceeding under Civil Code 1910, \S 2986. The judge certified that the bill of exceptions was tendered to him on November 25, 1920, and for providential reasons not certified until January 28, 1921. Accordingly, the motion to dismiss the writ of error is without merit.

2. Divorce \S 219, 255—Temporary alimony terminated by decree against wife; decree against wife in divorce does not bar statutory proceeding for alimony.

A wife sued for divorce on the ground of cruel treatment, and in the petition prayed for an allowance of counsel fees, and for permanent and temporary alimony for herself and minor daughter. On a hearing counsel fees and temporary alimony were allowed pending the action. On the trial of the suit for divorce there was a verdict that the wife was not entitled to a divorce, and a decree was entered in accordance with the verdict. Subsequently, and while no suit for divorce was pending, the wife instituted a proceeding under Civil Code 1910, \S 2986, for permanent and temporary alimony for herself, and an allowance for counsel fees, alleging that she and her husband were living in a bona fide state of separation caused by his cruel treatment towards her; the acts of cruelty alleged being the same as those set forth in her petition as grounds for divorce. On a preliminary hearing she was allowed temporary alimony and counsel fees. *Held:* (a) The award of temporary alimony to the wife for herself and minor daughter pending her suit for divorce terminated with the conclusion of that action against her. *Bishop v. Bishop*, 124 Ga. 293, 52 S. E. 743; *Mason v. Mason*, 151 Ga. 468, 107 S. E. 331. (b) The verdict and decree against the wife in the suit for divorce was no bar to the allowance of alimony to her in the statutory proceeding. *King v. King*, 151 Ga. 361, 106 S. E. 906.

3. Husband and wife \S 283(2), 295—Alimony not allowable where wife deserts husband; abuse of discretion to allow alimony and counsel fees where wife abandoned husband without cause.

Alimony will not be allowed to a wife who abandons her husband without just cause. *Fuller v. Fuller*, 108 Ga. 256, 33 S. E. 865.

(a) This is a proceeding under Civil Code 1910, \S 2986, for the allowance of alimony and counsel fees, where the husband and wife are living in a bona fide state of separation. On the hearing the testimony of the wife clearly showed that she voluntarily abandoned her husband without just cause. It was therefore an abuse of discretion to allow her alimony and counsel fees. *Davis v. Davis*, 145 Ga. 56, 88 S. E. 566.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Proceeding by Naomi Brisendine against W. D. Brisendine. Judgment for plaintiff, and defendant brings error. Reversed.

T. C. Battle and W. I. Heyward, both of Atlanta, for plaintiff in error

James & Bedgood, of Atlanta, for defendant in error.

FISH, C. J. Judgment reversed.

All the Justices concur.

(152 Ga. 707)

SKELLIE v. SKELLIE. (No. 2684.)

(Supreme Court of Georgia. Feb. 17, 1922.)

(Syllabus by the Court.)

1. Divorce \S 27(1), 148—"Cruel treatment" defined; charge should not omit willfulness or fail to charge that it must reasonably justify apprehension of danger.

Cruel treatment within the meaning of the Civil Code 1910, \S 2946, relating to discretionary grounds for divorce, is the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justified the apprehension of danger to life, limb, or health. And in charging upon this subject the court should not omit reference to the element of willfulness in the offense against the complaining party, nor fail to instruct the jury that it must be such as reasonably justifies the apprehension of the injuries referred to.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cruelty.]

2. New trial \S 41(3)—Charge favorable to complaining party not sufficient cause.

A charge, though erroneous, if favorable to the complaining party, is not cause for the grant of a new trial.

3. Trial \S 193(2)—Charge that there was a great deal of feeling between the parties held the expression of an opinion.

The charge of the court, stating to the jury that there was a great deal of feeling on the part of the parties in this case, was in violation of the inhibition contained in section 4863 of the Civil Code 1910, relating to the expression of opinion by the judge on the facts of a case.

4. Appeal and error \S 302(3)—Exception to exclusion of testimony on particular point, without showing what it would have been, insufficient.

An exception to the ruling of the court in refusing to permit the defendant in the court below to testify as to the conduct of the other party, which does not indicate, except by a reference to the pleadings and other parts of the record, what would have been his testimony, is not sufficient to raise a question for decision here.

5. Appeal and error \S 730(2)—Assignment of error not showing what charges were requested held incomplete.

The ground containing an assignment of error upon the refusal of written requests in charge is incomplete, and fails to show what requests were submitted to the court.

(Additional Syllabus by Editorial Staff.)

6. Trial \S 234(4)—Instruction stating several contentions and telling jury to find for plaintiff if they believed her contention held erroneous.

In a divorce suit, an instruction that plaintiff contended that her husband's conduct was such that she feared serious injury to her life and her body, and that she had actually suffered injury to her health and body, and that she did not bring it on herself, and that if the jury believed "that contention" plaintiff would be entitled to a divorce, was erroneous, as it embraced several distinct contentions and did not require all to be established or point out which of the contentions would authorize a verdict.

7. Divorce \S 11 — Instruction that it was against public policy to divorce one party and not the other unauthorized.

In a divorce suit, an instruction that as a matter of public policy it was not wise to divorce one party and leave the other party undivorced was unauthorized; there being no statute declaring that such is public policy.

8. Divorce \S 184(12)—Instruction that it was not wise to divorce one party and not the other not hurtful to defendant who was asking a divorce.

Where each party asked a divorce in his or her own favor, an instruction that as a matter of public policy it was not wise to divorce one party and leave the other undivorced was not hurtful to defendant who was asking for a divorce.

Error from Superior Court, Houston County; Malcolm D. Jones, Judge.

Action by R. C. Skellie against W. A. Skellie. Judgment for plaintiff, and defendant brings error. Reversed.

R. N. Holtzclaw, of Perry, for plaintiff in error.

Hatcher & Smith, of Macon, for defendant in error.

BECK, P. J. Rochelle C. Skellie brought an action for divorce against William A. Skellie, alleging cruel treatment as a ground therefor, and showing that this cruel treatment consisted of actual violence and blows dealt by defendant toward and upon the plaintiff shortly after the separation of the parties and before an action for divorce was instituted; silent, morose, and sullen conduct on the part of the defendant for a period of 12 years prior to the separation; absenting himself from home during the serious illness of two of their children; and other acts alleged to be cruel treatment. It was also averred that willful acts and threatened acts of violence on the part of defendant caused petitioner great suffering in mind and body; so that she feared, and still fears, for her life and health. The respondent answered the suit, and prayed that a divorce be denied the plaintiff but be granted to himself. Upon the trial of the case the jury rendered a verdict granting a divorce to the wife, and removing the disabilities of the husband. The defendant made a motion for a new trial, which was overruled, and he excepted.

[1, 6] 1. The following charge of the court is brought under review:

"Mrs. Skellie in this case contends that the conduct of her husband has been such as that she fears serious injury to her life and to her body by reason of that conduct, and not only that she fears injury to her health and to her body, but that she has actually suffered injury, before the commencement of this divorce suit, to her health and to her body by reason of the defendant's conduct; and that she did not bring that on herself. If you believe that contention of the plaintiff, then she would be entitled to a divorce at your hands. If you do not believe it, then she would not be entitled to a divorce."

It will be noticed from the statement of the contentions of the wife appearing in this part of the charge that there were three distinct contentions, and the court charged the jury that, "if you believe that contention of the plaintiff, then she would be entitled to a divorce." This charge was error. The court did not point out which of these contentions, if supported by evidence, would authorize a verdict in favor of the plaintiff. He did not state that, if all these contentions were shown by a preponderance of the evidence to be true, the jury would be authorized to find for the wife, but used the expression, if they believed "that contention of the plaintiff," she would be entitled to a divorce. The jury might have believed that the expression "that contention" referred to either of the three contentions. Besides, the charge was not a correct statement of the law, in that it did not require the jury to find from the evidence, before they would be authorized to find in favor of the libellant, that the conduct of the

husband was such as to reasonably justify an apprehension of danger to her life, limb, or health. "Cruel treatment" within the meaning of the section of the Code upon which this case is based (Civil Code, § 2946) is the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies the apprehension of danger to life or limb or health. *Stoner v. Stoner*, 134 Ga. 368, 67 S. E. 1030. In the case of *Ring v. Ring*, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878, Justice Candler, in a full discussion of the prior decisions of this court, defined the expression "cruel treatment," and gave substantially the definition later employed in the case of *Stoner v. Stoner*, supra, and disapproved the ruling upon this subject in the case of *Myrick v. Myrick*, 67 Ga. 771. And not only is the charge defective in the respects pointed out, but it failed to make willfulness of conduct upon the part of the husband, which the wife sought to make a ground of divorce, an essential element of the offense against her, so as to render it a ground for finding in favor of the wife. In the case of *Miller v. Miller*, 139 Ga. 282, 77 S. E. 21, it was said:

"'Cruel treatment' within the meaning of Civil Code, § 2946, which provides that such treatment shall be ground for divorce, is the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of damage to life, limb or health."

[2, 7, 8] 2. Exception is also taken to the following charge of the court:

"I will state to you that, as a matter of public policy, it is, as a rule, not wise to divorce one party to a marriage contract and leave the other party undivorced. That it is simply a matter of public wisdom; and, as a matter of public policy, wisdom dictates that if one is divorced the other should be divorced also."

This charge was excepted to on the ground that there is no such public policy as stated by the court to be found in our statutes or elsewhere. We do not think the court was authorized to state that such a public policy exists. There is no statute on our books authorizing us to hold that such is our public policy. But the charge could not be hurtful to the defendant, who was asking for a divorce, and is not ground for a new trial.

[3] 3. The court also charged the jury, in part, that—

"There seems to be a great deal of feeling in this case by both these young people, but both will feel differently about it a hundred years

from to-day; and you have been selected to try this case for the reason that you are withdrawn entirely from that feeling, and it is your duty in this case to take all the evidence and pass on it impassionately without any regard for the one party or the other party, and simply ascertain the truth, and then let your verdict speak the result of that investigation."

The amount of feeling involved in the case cannot be regarded as entirely immaterial; for the existence of feeling might have shown the proper light in which the conduct of both the husband and wife should be regarded—might have aggravated or mitigated the acts of the husband complained of by the wife—and it was a question entirely for the jury to decide, were the acts of the husband and the wife, about which there is crimination and recrimination in the pleadings and evidence, the result of willful cruelty, or grew out of the impulse of the moment, and to that extent was material, and the court in expressing an opinion upon that fact committed an error which required the grant of a new trial. Civil Code, § 4863.

[4] 4. Complaint in the motion that the court erred in refusing to permit movant to testify as to the conduct of the plaintiff, Mrs. Skellie, towards designated individuals, "though said conduct was set out in movant's plea, and was the real cause of movant's being dismissed from plaintiff's home," is without merit, where it does not appear from the ground itself what movant would have testified in regard to these matters, and raises no question for decision.

[5] The assignment of error upon the refusal by the court of a written request to charge does not sufficiently show what request was made. There is the following statement in the motion, which constitutes the entire ground numbered 4: "Because the court refused to give in charge the following requests made in writing." Nothing follows that statement. There is an unnumbered ground of the motion preceding this, and it begins with the following language: "Now comes * * * and amends his motion for a new trial, as follows." To this succeed in order three distinct paragraphs numbered 1, 2, 3, stating legal propositions, and it is possible that the fourth ground related to this unnumbered ground; but we cannot assume that that is true, in the present shape of the record, and therefore do not pass upon whether it was error to refuse the request to charge.

Judgment reversed. All the Justices concur.

(152 Ga. 614)

WHELCHIEL v. WATERS. (No. 2418.)

(Supreme Court of Georgia. Feb. 15, 1922.)

(Syllabus by the Court.)

1. Vendor and purchaser \S 16(1, 4)—Offer must be accepted unconditionally and without variance; parties must assent to the same thing in the same sense; vendee's acceptance of offer held unequivocal and unconditional.

"The offer of a seller must be accepted by the purchaser unequivocally, unconditionally, and without variance of any sort. There must be mutual assent of the parties, and they must assent to the same thing in the same sense." Robinson v. Weller, 81 Ga. 704, 8 S. E. 447; Gray v. Lynn, 139 Ga. 294, 77 S. E. 156. Letters between contracting parties for sale and purchase of land were as follows: Letter from vendor to vendee, dated July 30, 1919: "My brother Randolph has written me in regard to your buying my place, where you now live. This is all the property I have there, * * * which is about seven acres, according to the division of my father's old home place. * * * I will take \$3,300 cash or \$3,500 on time. * * * Let me know as soon as you can whether you will take the place or not." Letter from vendee to vendor, dated August 5, 1919: "I accept your offer \$3,300 for the old Longstreet home, and inclose you herewith my certified check for \$25 to close the trade, and ask that you have the deeds made [to?] the Farmers' & Merchants' Bank here, and upon receipt of same the [bank] will mail you a check for the \$3,300." Letter from vendor to vendee, dated August 26, 1919: "Your letter inclosing check for \$25 was received. * * * As you did not give very clear instructions, I could not have deed drawn up until receiving them, as I could not understand whether the deed was to be made out to you as Mary A. Waters, and mailed to the bank, or to the [bank] in trust for you; so have my brother to draw up same and forward for signing." Held: (1) The letter of the vendee was an unequivocal and unconditional acceptance of the cash offer contained in the first letter of the vendor. The request that the vendor have the deeds made, etc., is not to be construed as in any sense qualifying the acceptance of the offer, and was not so construed by the vendor, as indicated in reply to the letter of acceptance. The letters were sufficient, within the meaning of the law quoted at the beginning of this note, to show mutual assent of the parties, and to form a valid contract in writing for sale and purchase of a definite tract of land.

2. Specific performance \S 114(3)—Description of land in petition held sufficient.

In a suit for specific performance by the vendee against the vendor, the petition as amended described the property definitely, and alleged that the property so described contained "10 acres, more or less," and was known as "the Longstreet * * * home place," and that it was "the only land then owned" by the vendor in that county. The petition further alleged that after the contract and before suit the defendant refused to make a deed to the land. Held: (a) The petition as amended

sufficiently described the land embraced in the contract, and alleged a cause of action for specific performance. (b) Amendments to the petition were largely in response to special demurrers; and if some allegations of the various amendments which were objected to upon demurrer were not strictly appropriate or necessary, they were not of such character as that their allowance would require a reversal.

3. Demurrers properly overruled.

The judge did not err in overruling the various demurrers to the petition as amended.

4. Specific performance \S 97(1) — Tender generally necessary, but offer in pleading sufficient, if vendor has proclaimed that he will not accept tender.

As a general rule, a vendee of land, before bringing his action for specific performance, should tender to the vendor the amount agreed to be paid by him before the execution of the conveyance; but tender by the vendee before suit is excused, if the vendor by declaration or conduct proclaims that, if a tender should be made, its acceptance would be refused. In the latter instance it is sufficient to offer in the pleadings to pay the amount due, or which may be found to be due by the decree of court. Miller v. Watson, 139 Ga. 29(2), 76 S. E. 685; Burkhalter v. Roach, 142 Ga. 344(2), 82 S. E. 1059.

5. Specific performance \S 120—Evidence that vendee had dissuaded third persons from buying at higher price held not admissible.

A ground of the motion for new trial complains as follows: In response to a notice duly served, the plaintiff produced an original letter from the vendor to the vendee, which the defendant offered in evidence. The court allowed to be read to the jury so much of it as stated: "I will have to call the sale off, and am inclosing check for \$25 which you inclosed me," but refused to admit the entire letter, which complained of the price that was being paid, and of the withdrawal of other bidders on the ground that they did not wish to bid against a widow, etc., and reoffering the property at a higher price, which two other persons had expressed a willingness to give. Another ground of the motion for new trial complains of the ruling of the court refusing to allow the counsel for the defendant to ask the plaintiff, on cross-examination, "Did you try to dissuade them from buying it?" and "Didn't you know that Mr. Phelix Jackson was trying to buy the place at the time you traded for it?" Counsel stated that he expected the witness to answer the first question that "she did approach" certain persons, and in answer to the second question "that he expected to prove by the witness that Mr. Phelix Jackson wanted to buy the place and was willing to pay \$4,000 for it, and that she either approached him personally or had others approach him, * * * and told him that she was a widow woman and asked him not to bid on the place." No question of public sale or fiduciary relation was involved. Held, that there is no merit in these grounds of the motion for new trial.

6. Appeal and error \Leftrightarrow 1171(4)—Verdict for plaintiff, requiring her to pay amount tendered, which did not include interest, held not to require reversal.

The original petition alleged a tender of \$3,275 as a balance of the purchase price, having theretofore paid \$25. Without striking such allegation as to tender, another tender was alleged by amendment of \$3,485.25 being the principal and interest from the date of said contract at 7%." The jury returned a verdict: "We, the jury, find for the plaintiff, and that she pay three thousand, two hundred and seventy-five dollars (\$3,275.00), and that defendant make deed." Held, the jury being authorized to find that the delay in making the deed was the fault of the defendant, the discrepancy between the amount tendered and contract price as stated in the verdict will not require a reversal.

7. New trial \Leftrightarrow 70—Properly refused, when evidence sufficient.

The evidence was sufficient to support the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Suit by Mrs. M. P. Waters against Mrs. L. L. Wheelchel. Judgment for plaintiff, and defendant brings error. Affirmed.

J. O. Adams and H. H. Perry, both of Gainesville, for plaintiff in error.

W. B. Sloan, of Gainesville, for defendant in error.

ATKINSON, J. Judgment affirmed.
All the Justices concur.

(152 Ga. 646)

PAULK v. SOUTH GEORGIA BLDG. & INV.
CO. et al. (No. 2495.)

(Supreme Court of Georgia. Feb. 16, 1922.)

(Syllabus by the Court.)

1. Appeal and error \Leftrightarrow 883—Trial \Leftrightarrow 2—Distress and dispossessory proceedings should not be tried together; parties consenting cannot except to trial together.

The issues formed by counter affidavits filed, respectively, to a distress warrant and to a proceeding to dispossess tenants holding over, are separate cases, and should not be tried together; but if parties consent that this be done, they cannot except thereto. Mitchell v. White, 74 Ga. 327(1).

2. Trial \Leftrightarrow 331—Verdict in distress and dispossess cases tried together held not vague and uncertain.

A verdict rendered on the trial of these consolidated issues, finding for the plaintiff a given sum, was not so vague, indefinite, and uncertain as to render the judgments entered therein void. A verdict must be given a reasonable intendment, and is not to be avoided unless from necessity. Civ. Code 1910, § 5927. The verdict for the plaintiff in a given sum

must be construed to mean that the plaintiff was entitled to that sum as rent, and that the tenants were holding over beyond their term.

3. Principal and surety \Leftrightarrow 145(1)—Sureties on distress and dispossess bonds held bound by principals' agreement for consolidation.

The respective sureties on the bonds given in these proceedings were bound by the agreement of their principals for the consolidation of these cases, and by the judgments rendered on the verdict in the consolidated cause, in the absence of collusion or fraud. Price v. Carlton, 121 Ga. 12, 48 S. E. 721.

4. Appeal and error \Leftrightarrow 1033(9) — Landlord and tenant \Leftrightarrow 310(1)—Liability of surety in dispossess proceeding held not increased by consolidation with distress proceeding; landlord entitled to judgment for amount of penalty; surety cannot complain that judgment rendered for less than appellee entitled to.

The liability of a surety on the bond in the dispossessory warrant proceeding was not increased by the consolidation of these issues, nor by the verdict and judgment rendered therein. On the verdict finding against the tenants the landlord was entitled to have judgment against the tenants and the surety on their bond for the amount of the penalty recovered. Civil Code 1910, § 5389; Latham v. Perryman, 77 Ga. 579; Bennett v. Farkas, 126 Ga. 228, 54 S. E. 942; Jones v. Blackwelder, 143 Ga. 402, 85 S. E. 122. The liability of the surety was decreased, it seems, by the judgment rendered in this case, as the judgment was rendered against him for single rent only, and not double rent. Of this the plaintiff cannot complain.

Error from Superior Court, Ben Hill County; O. T. Gower, Judge.

Suit for injunction by J. B. D. Paulk against the South Georgia Building & Investment Company and others. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

The South Georgia Building & Investment Company sued out a distress warrant against J. R. and Dorothy Wilcox, for the rent of the Lee-Grant Hotel building. The Wilcoxes filed their affidavit, denying that the rent distrained for was due, and gave bond for the eventual condemnation money, with G. W. McLean, H. D. Vaughn, J. C. Peavy, and Will S. Halle as sureties. Thereafter the Georgia Building & Investment Company sued out a warrant against these tenants to dispossess them, on the ground that they were holding over beyond the term for which said hotel was rented by them. The tenants filed a counter affidavit, denying that their term had expired; and gave bond as required by law, upon which Paulk became surety.

At the January term, 1920, of Ben Hill superior court these two cases, by consent of the plaintiff and the defendants, were consolidated and tried as one cause. The jury returned a verdict for the plaintiff for

the principal sum of \$2,700 and \$78.75 interest, total \$2,778.75. On said verdict two judgments were rendered, one for the sum of \$2,778.75 against J. R. and Dorothy Wilcox as principals, and Paulk as surety, in the dispossessory warrant proceeding; and the other judgment for the same sum was rendered against J. R. and Dorothy Wilcox as principals and the above-named sureties on their bond for the eventual condemnation money in the distress warrant case. The execution, which was issued on the judgment in the dispossessory warrant proceeding, was levied on the property of Paulk as surety. Thereupon he filed his petition in this case against the plaintiff and the sheriff, to enjoin the sale of his property under said levy, on the ground that the verdict and the judgments thereon were void, and that the execution issued upon the judgment against himself as surety and his principal is likewise void, on the grounds: (a) That the verdict was too vague, indefinite, and uncertain to form any basis upon which a legal judgment could be rendered; (b) because his liability had been increased by a consolidation of said cases; and (c) because the consolidation of the cases was illegal, and he was not bound by the verdict and judgment rendered in said consolidated cause.

The defendants demurred to the petition, on the grounds: First, that it set forth no cause of action; second, because there was no equity in the petition; and, third, because the defendant had a full and adequate remedy at law. The court sustained the demurrer and dismissed the petition. This is the error assigned.

Myer Goldberg, of Atlanta, and Quincey & Rice, of Ocilla, for plaintiff in error.

Wall & Grantham, and A. J. & J. C. McDonald, all of Fitzgerald, for defendant in error.

HINES, J. Judgment affirmed.
All the Justices concur.

(152 Ga. 648)

PICKENS CO. v. THOMAS. (No. 2498.)

(Supreme Court of Georgia. Feb. 16, 1922.)

(Syllabus by the Court.)

1. Corporations §407(5) — General manager held without authority to employ counsel for employees charged with larceny.

The general manager of a mercantile and farming corporation is without authority, by virtue of his office alone, to employ counsel to represent employees thereof who are charged with larceny of property, alleged to be that of third persons, but claimed by such corporation as its own, in the absence of express authority from the corporation, or ratification by the corporation of his act in so employing coun-

sel, or by a previous course of dealing known to the corporation, from which such authority might be inferred; and this is true although prior to the indictments against these employees a third person who claimed one of the hogs alleged to be stolen had prosecuted a possessory warrant for the same against the corporation, and although the property alleged to be stolen by the employees was claimed by the corporation, and found upon its premises where the employees were working.

2. Attorney and client §137—General counsel for corporation held not entitled as of right to retaining fee in addition to compensation for specific services.

Where an attorney at law is employed by a corporation as its general counsel for one year, the position having no fixed salary attached, but the attorney is to be paid a separate fee for every specific legal service rendered the corporation, and there is no agreement between the attorney and the corporation as to any retaining fee, such attorney is not entitled, as a matter of right, at the end of his year's employment, to a retaining fee in addition to the fees paid him for specific services rendered his client during the period of his employment.

(Additional Syllabus by Editorial Staff.)

3. Corporations §405—General manager may do any act usual and necessary in ordinary course of corporation's business.

Unless specially restricted, the authority and power of a corporation's general manager are coextensive with its powers, and he may do any act on its behalf which is usual and necessary in the ordinary course of its business.

4. Attorney and client §137—"Retainer" defined.

A "retainer" is the act of the client in employing his attorney or counsel, and also denotes the fee which the client pays when he retains the attorney to act for him, and thereby prevents him from acting for his adversary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Retainer.]

Beck, P. J., and Atkinson, J., dissenting.

Certified Questions from Court of Appeals.

Action by J. R. Thomas against the Pickens Company. Judgment for plaintiff, and defendant brought error to the Court of Appeals, which certified questions to the Supreme Court. Questions answered.

Gibbs & Turner, of Jesup, and Wilson & Bennett, of Waycross, for plaintiff in error.
J. H. Thomas, J. W. Walker, and Jas. R. Thomas, all of Jesup, for defendant in error.

HINES, J. [1] 1. The Court of Appeals propounds this question:

"The Pickens Company is a private corporation chartered under the laws of this state, and engaged in merchandising and farming. Certain of the employees of the company were prosecuted and indicted by third persons for

hog stealing. These employees were defended in the courts by an attorney at law, and he subsequently presented a bill for his services to the Pickens Company, which refused to pay it, and the attorney brought suit against the company. Upon the trial of this suit the evidence authorized a finding of the following facts: The hogs which the employees were charged with stealing were claimed by the Pickens Company, and were found upon the company's premises where the indicted employees were working; prior to these indictments a third person, who claimed one of these hogs, prosecuted a possessory warrant for the hog against the Pickens Company; the attorney was employed to defend these employees by the general manager of the Pickens Company, who was also a director thereof, and who told the attorney at the time of his employment that the Pickens Company would pay his fees. It was not, however, shown upon the trial that the corporation itself, through its board of directors, had employed the attorney to defend these employees, or that the general manager had authority under the charter of the corporation or its by-laws to employ him, or that the action of the general manager in employing him had ever been ratified by the board of directors of the corporation, or that under the charter of the corporation or its by-laws such an employment was within the powers of the corporation. Under these facts, would a verdict finding the defendant liable be contrary to law?"

[3] Unless specially restricted, the authority and power of a general manager of a corporation are coextensive with the powers of the corporation itself; and he has authority to do any act on its behalf which is usual and necessary in the ordinary course of the company's business. *Georgia Military Academy v. Estill*, 77 Ga. 409; *Raleigh & Gaston R. Co. v. Pullman Co.*, 122 Ga. 700, 704, 705, 50 S. E. 1008. If a person imposes upon another the duties and responsibilities involving the management and control of a business, such person will be presumed to have authority to represent his employer in any matter within the scope of the business; and this rule applies peculiarly to corporations which act only through their officers and agents. *Southwestern R. v. Mitchell*, 69 Ga. 114; *Fulton Bldg. & Loan Ass'n v. Greenlea*, 108 Ga. 376, 29 S. E. 932; *Raleigh & Gaston R. Co. v. Pullman Co.*, supra.

So the question arises, Does the employment of counsel by the general manager of a mercantile and farming corporation, to represent certain of its employees who were charged with stealing hogs, claimed by the corporation, and found on its premises where these employees were working, fall within the scope of the business? It was not shown that the corporation, through its board of directors, had employed the attorney to defend these employees, or that the general manager had authority under its charter or by-laws to employ the attorney for this purpose, or that his employment of

the attorney had been ratified by the corporation. The employment of counsel to represent its employees for infractions of the criminal laws of the state does not come within the scope of the business of a mercantile and farming corporation. This principle is not varied by the fact that the employees are indicted on the charge of stealing hogs claimed by the corporation, nor by the fact that a third person, who claimed one of these hogs, had prosecuted a possessory warrant for its recovery against the corporation. It would be stretching the authority of a general manager to the snapping point to hold that, by virtue of his employment as general manager alone, he could employ counsel, at the expense of his corporation, to represent its employees when charged with the commission of crimes.

The case at bar is different from those cases which hold that a general manager of a railroad has authority to bind the corporation by contracts for medical and other services to an injured employee, passenger, or other person hurt on its road by any agency of the company. *Louisville, etc., Ry. Co. v. McVay*, 98 Ind. 391, 398, 49 Am. Rep. 770. In such cases the persons injured, and for whom medical services were procured, were hurt by agencies of the companies, and such companies were interested in their welfare, as they might be liable in damages for the injuries inflicted.

Under the facts recited in this question, a verdict finding the defendant liable would be contrary to law.

[2] 2. The Court of Appeals propounds this question:

"Where an attorney at law is employed by a corporation as its general counsel for one year, the position having no fixed salary attached, but the attorney to be paid a separate fee for every specific legal service rendered the corporation, and there being no agreement between the attorney and the corporation as to any retaining fee, is the attorney entitled, as a matter of right, at the end of his year's employment, to a retaining fee in addition to the fees paid him for his specific services?"

[4] A retainer is the act of the client in employing his attorney or counsel. The word is also used to denote the fee which the client pays his attorney when he retains him to act for him, and thereby prevents him from acting for his adversary. *Union Surety & Guaranty Co. v. Tenney*, 200 Ill. 349, 65 N. E. 688; *Bouvier's Law Dict. "Retainer"*; *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698; *Saulsbury v. American Vulcanized Fibre Co.*, 5 Boyce (Del.) 182, 91 Atl. 536; *In re Solicitor*, 22 Ont. L. E. 30, 19 Ann. Cas. 488.

A retaining fee is a preliminary fee given to an attorney or counsel to insure and secure his future services, and induce him to act for the client. *Agnew v. Walden*, 84 Ala. 504, 4 South. 672; *Union Surety & Guaranty*

Co. v. Tenney, 200 Ill. 349, 85 N. E. 688; Blair v. Columbian Fireproofing Co., 191 Mass. 336, 77 N. E. 762.

In cases of express contracts for the payment of retaining fees there can be no trouble. In this country express contracts between attorney and client as to compensation are generally recognized, and a contract to pay a retaining fee, though the contemplated services are not rendered, is valid and enforceable. See note, 1 Ann. Cas. 299; Agnew v. Walden, 84 Ala. 504, 4 South. 672; Union Surety & Guaranty Co. v. Tenney, 200 Ill. 349, 85 N. E. 688. The decisions are in conflict upon the question whether an agreement to pay a retaining fee is implied. Windett v. Union Mutual Life Ins. Co., 144 U. S. 581, 12 Sup. Ct. 751, 36 L. Ed. 551; Yates v. Shepardson, 27 Wis. 238; In matter of Schaller, 10 Daly (N. Y.) 57; Dumont v. Smith, 4 Denio (N. Y.) 319; Buckles v. Northeast Kan. Tel. Co., 79 Kan. 84, 99 Pac. 813.

A distinction has been made between the implied right of an attorney to recover a retaining fee where he has not been called upon to render the contemplated services and his right to such a fee in addition to the value of the contemplated services which are rendered. In the latter case it has been held that there is no implied contract to pay a retaining fee. The scope of the right to charge retainers is to remunerate counsel for being deprived, on account of being retained by one party, of the opportunity of rendering services for and receiving pay from the other, and not to swell the amount of the bill which accrues for services rendered in pursuance of the employment. In most jurisdictions it is held that the agreement to pay a reasonable retaining fee is implied in the retainer. Aldrich v. Brown, 103 Mass. 527; Perry v. Lord, 111 Mass. 504; Eggleston v. Boardman, 37 Mich. 14; Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956; Knight v. Russ, 77 Cal. 410, 19 Pac. 698. It has been said:

"The right to a retaining fee follows every retainer. When an attorney is engaged to prosecute or defend in an action, his entire services in that action are engaged for his client, and he cannot perform services for the adverse party. * * * All his skill and ability for that case are at the command of his client. A retainer of an attorney at law is presumably worth something to the client, and presumably a loss to the attorney, and whether the attorney is ever called upon to perform any service,

or not, in that case, he may when the case is terminated recover for whatever the evidence shows the retainer was worth." Blackman v. Webb, 38 Kan. 668, 17 Pac. 464.

So a general retainer of an attorney to represent a corporation would entitle the attorney to a retaining fee if he was never called upon to render any services. The retaining of an attorney under such circumstances is presumably worth something to the client, and presumably a loss to the attorney, and the attorney would be entitled to recover the value of such retainer in the event he was not called upon to render any service.

We think, however, that, when an attorney is generally retained and is employed by the client in all his cases, and is paid in full for services rendered in such cases, he gets all that he is entitled to under such general retainer, and should not be permitted to recover, in addition to the sums so paid for such services, an additional amount as a retaining fee.

But, however that may be, when an attorney is employed by a corporation as its general counsel for one year, without a fixed salary, but the attorney is to be paid a separate fee for each specific service rendered the corporation, and there is no agreement between the attorney and client as to the payment of a retaining fee, such attorney is not entitled, as a matter of right, at the end of his year's employment, to a retaining fee in addition to the fees paid him for his specific services rendered the corporation. The agreement by which the attorney is to be paid a separate fee for every specific legal service rendered the corporation excludes any implied agreement to pay him in addition to a retaining fee.

We answer this question in the negative.

3. The second question being answered in the negative, we are not requested to answer the third question propounded by the Court of Appeals.

All the Justices concur, except BECK, P. J., and ATKINSON, J., who dissent on the ground that the defense of the employee is so related to the property rights and protection of the property of the corporation that it would be authorized to employ an attorney for defending the employee under the circumstances stated, and, if the corporation had such authority, the general manager also had it.

(152 Ga. 654)

MANION v. VARN et al. (No. 2500.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Records \S 9(10)—Grounds for moving to recommit examiner's report in registration proceedings specified.

By section 20 of the Land Registration Act (Acts 1917, p. 108) it is provided that any of the parties to the proceeding may, within 20 days after the examiner's report is filed, file exceptions of law or of fact to the general findings of the examiner, and the judge may re-refer or recommit the record to the examiner "in like manner as auditor's reports may be recommitted in any equity cause." Within 20 days after the filing of the examiner's report, any party at interest may move to recommit the report for indefiniteness, lack of fullness, failure to properly separate and classify his findings of law and of fact, or other like causes. Powell's Land Reg. § 96.

2. Records \S 9(10)—Exceptions to auditor's report in equity applicable to land registration proceeding.

"While the Land Registration Act is not an equitable, but purely a statutory, proceeding, it in express terms makes the procedure as to exceptions to an auditor's report provided in equity applicable to exceptions provided by the act to an examiner's report." Bird v. South Georgia Industrial Co., 150 Ga. 420, 421, 104 S. E. 232, 233.

3. Reference \S 100(4)—Exceptions to report should set forth, refer to, or attach necessary evidence.

"The neglect of a party excepting to an auditor's report on matters of fact, or on matters of law dependent for their decision upon the evidence, to set forth, in connection with each exception of law or fact, the evidence necessary to be considered in passing thereon, or to point out the same by appropriate reference, or to attach as exhibits to his exceptions those portions of the evidence relied on to support the exceptions, is a sufficient reason, in an equity case, for refusing to approve the exceptions of fact and for overruling the exceptions of law." McCord v. City of Jackson, 135 Ga. 176 (4), 177, 69 S. E. 23.

4. Records \S 9(10)—Finding in registration proceeding held sufficient finding that deed was not security deed; objections to findings and failure to find held ground for exceptions, and not motion to recommit.

The findings of the examiner covered all the issues in the case. In brief of counsel for the plaintiff in error it is stated that "the only question in this case is whether or not the deed made by Mrs. John Manion to G. W. Varn on the 25th day of September, 1917, was an absolute sale." The examiner found that "on September 25, 1917, Mrs. John Manion [Mrs. Mar-

garet Manion] sold to the applicant, G. W. Varn, a one-half undivided interest in and to all the lots described in the applicant's petition. The examiner finds it as a fact that this deed is a deed of bargain and sale, and not a loan deed." This necessarily amounted to a finding that under all the evidence the deed in question was a deed of bargain and sale, and not a security deed. It was therefore not error to overrule a motion to recommit, based on grounds that the examiner had not considered and made specific findings upon portions of the evidence which it is claimed threw light upon the question at issue, or upon grounds that the examiner made erroneous findings upon certain phases of the evidence. Objections of this nature should have been made by exception, and not by motion to recommit.

5. Appeal and error \S 854(2)—Where approval of exceptions of fact should have been refused, it was immaterial that the court dismissed them for another reason.

None of the exceptions, either of law or of fact, was framed in compliance with the well-settled rule of practice set forth in the third head note; and this failure was a sufficient reason to overrule the exceptions of law and refuse to approve the exceptions of fact. While the trial judge "dismissed" the exceptions of fact for another reason, the right result was reached, without reference to the correctness of the reason given. There was no error in entering the final judgment in favor of the party in whom the examiner found the title was vested.

6. Continuance \S 20(1)—Denial because of absence of counsel held not abuse of discretion.

There was no abuse of discretion in overruling the motion for a continuance, based upon the absence of one of the attorneys for the objector, who, it was claimed, was the leading counsel. This attorney was in attendance upon another court, and had not procured leave of absence. The attorney appearing for the objector was first employed, and the objector did not make oath that she could not go safely to trial without the services of the absent counsel. Civil Code 1910, § 5718; Whitley v. Clegg, 120 Ga. 1038, 1040, 48 S. E. 406.

Error from Superior Court, Echols County; W. E. Thomas, Judge.

Suit between Margaret Manion and G. W. Varn and others. Judgment for the latter, and the former brings error. Affirmed.

R. A. Hendricks and J. P. Knight, both of Nashville, and H. W. Nelson, of Adel, for plaintiff in error.

J. B. Hicks, of Statenville, and Dan R. Bruce, of Valdosta, for defendants in error.

FISH, C. J. Judgment affirmed.

All the Justices concur.

(152 Ga. 619)

CLARKE et al. v. LONG et al. (No. 2506.)

(Supreme Court of Georgia. Feb. 15, 1922.)

(Syllabus by the Court.)

1. Quo warranto \S 34—May be maintained by citizen and taxpayer to declare office vacant.

Where the purpose is to declare a public office vacant, any citizen and taxpayer may file a proceeding in the nature of quo warranto.

2. Quo warranto \S 25—Membership in board of education is public office.

Membership of a county board of education is a public office.

3. Schools and school districts \S 48(2)—Member of board of education elected from same district as another member has no title to the office.

The provision in section 78 of the act approved August 19, 1919 (Acts 1919, p. 288), relating to the codification of the school laws of Georgia, that "the county board of education shall consist of five (5) members as now provided by law and selected by the grand jury as now provided by law, except that the grand jury in selecting such members shall not select one of their own number then in session, nor shall they select any two of those selected from the same militia district or locality," is mandatory, and the election of a member of the county board of education in violation of this provision creates no title to the office in the person thus selected; and quo warranto proceedings will lie for the purpose of declaring such office vacant.

Error from Superior Court, McIntosh County; W. W. Sheppard, Judge.

Suit by W. J. Long and others against J. K. Clarke, Jr., and others. Judgment against defendants, and they bring error. Affirmed.

Tyson & Tyson, of Darien, for plaintiffs in error.

Edwin A. Cohen, of Savannah, for defendants in error.

FISH, C. J. On January 18, 1921, the defendants in error presented to the judge of the superior court of McIntosh county their petition for leave to file an information in the nature of quo warranto, and for a writ of quo warranto against the plaintiffs in error as members of the board of education of the county, alleging that there was a resident member of the board in the 271st militia district, and that the grand jury at the December term, 1920, of the superior court had selected and elected the plaintiffs in error as members of the board of education to succeed themselves, and, both being residents of the 271st militia district, the election was null and void; and petitioners obtained a rule nisi calling upon the plaintiffs in error to show cause before the judge, on January 27, 1921, why the prayers of relators should

not be granted. The petition alleged that the plaintiffs in error, under the election by the grand jury, had qualified and were commissioned and were discharging the duties of their offices as members of the board of education; that relators were citizens and taxpayers of the county, and interested in the conduct of the affairs of the board of education, and that certain specified districts in the county were not represented on the board.

The defendants filed general and special demurrers to this petition. The petitioners offered certain amendments, one curative of the defects in the petition, and another descriptive of certain persons referred to in the petition. This last amendment was rejected by the court. The demurrers were overruled. After considering the case the court sustained the application for quo warranto, and declared the offices vacant. The respondents excepted.

[1, 2] "The writ of quo warranto may issue to inquire into the right of any person to any public office the duties of which he is in fact discharging, but must be granted at the suit of some person either claiming the office or interested therein." Civil Code, \S 5451. A member of a county board of education is a county officer. *Stanford v. Lynch*, 147 Ga. 518, 94 S. E. 1001. The purpose of the present application for leave to file proceedings in the nature of quo warranto was to declare the office in question vacant; and, where such is the purpose, any citizen and taxpayer may file such a proceeding. *Hathcock v. McGouirk*, 119 Ga. 978, 47 S. E. 563. The fact that the applicants were citizens and taxpayers of the county made them "interested" in the office, in the sense in which that word is used in the Code section above quoted, relating to the quo warranto. *Davis v. City Council of Dawson*, 90 Ga. 817, 17 S. E. 110; *Stanford v. Lynch*, supra.

[3] That, then, brings us to the inquiry into the right of the respondents to the office to which they had been elected by the grand jury. From the allegations of the application and the response it appears to be uncontroverted that the grand jury, so far as relates to the form of the proceedings, elected the respondents. But these respondents were residents of the 271st militia district and there was already on the board a resident of this district. In such a case, could the grand jury legally elect the respondents to the board? Section 78 of an act entitled "An act to codify the school laws of the state of Georgia," etc., approved August 19, 1919 (Acts 1919, p. 288), declares that—

"The county board of education shall consist of five (5) members as now provided by law and selected by the grand jury as now provided by law, except that the grand jury in selecting such members shall not select one of their

own number then in session, nor shall they select any two of those selected from the same militia district or locality."

This provision is mandatory; and an election of two members of the county board of education from one district, and especially where the district already has a member on the board, falls directly within the inhibition of the words, "nor shall they [the grand jury] select any two from the same militia district," and the selection of two members of the board in violation of this provision of the statute was void, and a member selected in violation of this provision has no title to the office to which he was thus called. That being true, upon the application of parties interested in the office as citizens and taxpayers, for the writ of quo warranto, the writ may issue for the purpose of declaring the office vacant. The judge did not err in overruling the demurrers to the application, and, the essential facts being uncontroverted, he properly passed upon the petition and the response thereto, and held that, under the facts shown, the office in question should be declared vacant.

Judgment affirmed.

All the Justices concur.

(152 Ga. 655)

DANIEL et al. v. MAYNARD et al.
(No. 2501.)

(Supreme Court of Georgia. Feb. 6, 1922.)

(Syllabus by the Court.)

I. Injunction ¶26(4)—**Partition** ¶55(1)—**Petition in suit to establish title held to sufficiently allege informal partition; ejectment suits properly enjoined, and plaintiffs required to set up rights in equity to prevent multiplicity.**

J. F. Daniel, Mrs. Martha L. Wilson, M. B. Daniel, each separately, and Mrs. Annie Johnson and Frank Sawyer jointly, filed ejectment suits in Wilcox superior court against Lillie Mae and Myrtle Maynard. The suit of each was for a one-seventh undivided interest in land lot 204 of Wilcox county, containing 490 acres. After the institution of such suits the defendants Lillie Mae Maynard and Myrtle Maynard filed an equitable petition against the plaintiffs in the ejectment suits, and R. S. Daniel, A. T. Daniel, J. S. Daniel, Olis Crump, Mrs. M. M. Mann, Mrs. L. M. Maynard, and J. D. Maynard, asking that such suits be enjoined and seeking other equitable relief, as will presently be indicated. The general purport of the allegations of the petition was as follows: The plaintiffs are owners in fee simple of all the land lot 204 in the first district of Wilcox county, except a certain tract containing about 70 acres in possession of A. T. Daniel, another tract containing about 90 acres in the possession of M. M. Mann, and another tract containing about 51 acres in possession of Olis Crump. The lot of land was formerly owned by Thomas C. Mitchell, who about the year 1880 executed

a deed conveying the entire land to Margaret L. Daniel, since deceased, for and during her natural life, and after her death to her seven children, to wit, Martha L. Wilson, John F. Daniel, M. B. Daniel, R. S. Daniel, A. T. Daniel, J. S. Daniel, and Mrs. Lilla Sawyer. The last-named child predeceased her mother, and was herself predeceased by her husband. There was no administration of her estate, and her sole heirs at law are her two children, Frank Sawyer and Mrs. Annie Johnson. There was an informal agreement between Mrs. Margaret L. Daniel and her seven children, made prior to her death, that a division of the land should be made between the children. The agreement was in parol, and was carried into effect, the land being divided and each child taking possession of the part allotted to him in severalty, except one who took other property as hereinafter stated. After the division each child receiving portions of the lot in severalty sold and received the proceeds from the sales of their respective allotments, except A. T. Daniel. An abstract of mesne conveyances is attached, showing warranty deeds from the several children, except that in one instance there was a judicial sale under a mortgage foreclosure. The division of the land gave each child 70 acres either in quantity or the equivalent in value, so as to equalize the distribution. John F. Daniel had a deed made directly from Margaret L. Daniel to J. D. Maynard, a purchaser, conveying his portion of the division. J. S. Daniel sold 25 acres of his portion to one person and the balance to another, and had his mother to make deeds directly to the purchasers; one of them being Olis Crump, who is now in possession. After the division had been made and six of the children had received their allotments in severalty, the balance of the lot would have belonged to M. B. Daniel, one of the plaintiffs in the ejectment suit, but he and his mother desired that he have "the old home place," being a part of a different lot; and in consideration thereof M. B. Daniel surrendered his interest in land lot 204 to his mother, who conveyed it to J. D. Maynard. This last deed does not accurately describe the land conveyed, but declares it to be the balance of land lot 204 not apportioned to the other children, and it is alleged that it was afterwards conveyed to plaintiffs. The petition further alleges that the deed from Margaret L. Daniel conveying to J. D. Maynard the land apportioned to John F. Daniel, and made at the request of John F. Daniel, does not accurately describe the property, but that John F. Daniel was in actual possession thereof, and that it was afterwards conveyed to plaintiffs. The plaintiffs claim title to all of the land except the separate parcels in possession of A. T. Daniel, M. M. Mann, and Olis Crump, as hereinbefore stated, under warranty deeds executed to them by Mrs. L. M. Maynard and J. D. Maynard, who themselves derived title either immediately or remotely from the children of Margaret L. Daniel, who had participated in the division hereinbefore mentioned. Other allegations were that, to avoid a multiplicity of actions, preserve and perpetuate the facts on which plaintiffs' title rests, quiet the title to the property, and do full and complete equity, it is proper that a court of equity take

jurisdiction of the entire matter, enjoin the plaintiffs in the ejectment suits, and compel them to assert in this suit such rights as they may have in the property. The prayers were: (a) That each of the plaintiffs in the ejectment suit be enjoined from prosecuting such suits, and be required to plead in the present suit. (b) That Mrs. Mann, J. S. Daniel, A. T. Daniel, and Ollis Crump be required to come into court and set up such title in the property as they have. (c) That, in the event it should be found there was no formal division, title be decreed in petitioners to all the land received by Lilla Sawyer, Martha L. Wilson, John F. Daniel, and all that was received by J. S. Daniel except that part which passed to Ollis Crump. (d) That J. D. Maynard and Mrs. L. M. Maynard, as immediate grantors to plaintiffs and warrantors of their title, be bound by whatever decree should be made in the case. (e) That it be decreed that R. S. Daniel has no further interest in the property. (f) That process issue, requiring all the defendants to answer the complaint. A demurrer was filed by John F. Daniel, Mrs. Martha L. Wilson, M. B. Daniel, R. S. Daniel, A. T. Daniel, Frank Sawyer, and Mrs. Annie Johnson; the demurrer being both general and special. Some of the grounds of the demurrer were sustained by an order striking certain portions of the petition, and others were overruled. The defendants excepted to the judgment in so far as it overruled any of the grounds of the demurrer. *Held:*

On the basis of an informal division among the children made by Margaret L. Daniel and acceptance by the children of the portions of the land allotted to them in severalty, and enjoyment and subsequent disposition thereof by them, some of the property finally passing by mesne conveyances to the plaintiffs and other parts of it to some of the defendants, the allegations of the petition were sufficient to state a cause of action. *Dixon v. Patterson*, 135 Ga. 183, 69 S. E. 21; *Reed v. Mathewson*, 146 Ga. 819, 92 S. E. 632, and cases cited. And inasmuch as the plaintiffs in the ejectment suits, suing for undivided interests in the land, were alleged to have participated in the division of the land and accepted the portions allotted to them in severalty, the allegations of the petition (in order to avoid a multiplicity of actions) were a sufficient basis for an injunction against the further prosecution of the common-law suits, and for an order requiring the plaintiffs in such suits to set up their rights in the equitable suit. Civ. Code 1910, § 5469, subd. 2.

2. Action \S 50(10)—Quieting title \S 30(1)—No misjoinder of causes or parties in suit to determine title to land informally partitioned.

As the children of Margaret L. Daniel were tenants in remainder as to the whole lot, as their shares in the land were transmitted in severalty by mesne conveyances until title to some portions thereof vested in plaintiffs, and all of the defendants are now interested either as owner of some part of the land or as warrantor of the title to some part of it, and the objects of the suit include quieting the title to the several portions by decreeing it to be in the parties to whom it rightfully belongs,

there was no misjoinder of parties defendant or improper joinder of causes of action.

3. Quieting title \S 30(3)—In suit to establish title to land informally partitioned, legal representative of former life tenant not necessary party.

The petition did not seek reformation of any deed executed by Margaret L. Daniel, and a legal representative of her estate was not a necessary party defendant.

4. Foregoing rulings sufficient.

The foregoing rulings sufficiently deal with all of the grounds of demurrer which were overruled by the trial court.

Error from Superior Court, Wilcox County; O. T. Gower, Judge.

Suit by L. M. Maynard and another against J. F. Daniel and others. Judgment overruling certain grounds of demurrer, and defendants bring error. Affirmed.

Crum & Jones, of Cordele, and Eldridge Cutts, of Fitzgerald, for plaintiffs in error.

M. B. Cannon and Hal Lawson, both of Abbeville, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(152 Ga. 658)

HILTON v. ROGERS. (No. 2504.)

(Supreme Court of Georgia. Feb. 16, 1922.)

(*Syllabus by the Court.*)

1. Set-off and counterclaim \S 35(2)—Injunction \S 26(8)—Damages ex delicto cannot be set off against cause of action ex contractu, but may be set off in equity; party having equitable set-off may enjoin common-law action and have entire controversy determined in equity.

Mrs. Edward Hilton instituted an equitable action against Sarah Rogers. The petition as amended alleged that Sarah Rogers had sued plaintiff, in the municipal court of the city of Macon, for certain wages due her as cook, and that the defendant who was insolvent had stolen from her specified articles of the value of \$53; that plaintiff had demanded the return of the goods, which was refused; that plaintiff desired to plead her demand as a set-off in the action for wages, but, being based on tort, such plea could not be urged in a court of law. The prayers as amended were: (a) That the suit pending in the municipal court be enjoined, and that the plaintiff therein be ordered to set up her demands in the equitable suit. (b) That plaintiff be allowed to recover "her property stolen by the defendant, and that her set-off be allowed." The judge overruled certain grounds of special demurrer, and dismissed the petition on general demurrer alone. The plaintiff excepted. *Held:* "Damages arising ex delicto cannot be set off against a cause of action

arising ex contractu, but a defendant sued at law upon a cause of action arising ex contractu may, in equity, set off damages arising ex delicto, when the plaintiff is insolvent or a non-resident. And if the plaintiff's suit is pending in a city court, the defendant, in order to avail himself of such right of equitable set-off, may apply to the superior court, as a court of equity, to enjoin the common-law proceeding in the city court and take jurisdiction of the entire controversy between the parties and make a decree doing complete justice between them." *Arnold v. Carter*, 125 Ga. 319-325, 54 S. E. 177, 179; *Hecht v. Snook*, 114 Ga. 921, 41 S. E. 74; *Ray v. Anderson*, 119 Ga. 926, 47 S. E. 206.

2. Action ¶28—Injured party may waive tort if property converted into money, but not otherwise.

Where one wrongfully takes the personal property of another and converts it into money, the latter has a right of action ex delicto for the wrong done him, though he is not restricted to that form of action, but may as a general rule waive the tort and sue in assumpsit as for money had and received to his use. If the wrongdoer after taking the property converts the same to his own use in some other manner than by a sale, and does not receive any money therefor, the owner has a right of action ex delicto against such wrongdoer, and is restricted to this form of action. Civ. Code, § 4407; *Cragg v. Arendale*, 113 Ga. 181 (3, 4), 38 S. E. 399.

3. Injunction ¶26(8)—Relief against action at law improperly denied on ground that plaintiff could waive tort and counterclaim at law.

Whether or not it would be proper to refuse to entertain a suit for injunction and other relief where the plaintiff seeks to set off his demand founded on tort against a demand arising in contract, because the plaintiff might have an election to waive the tort and sue on the contract, it would not be proper to refuse the injunction and other equitable relief in this case where it is not alleged that the articles stolen were sold or otherwise converted into money.

4. Dismissal of petition held error.

Applying the principles above stated, the trial court erred in dismissing the petition on general demurrer.

Error from Superior Court, Bibb County; *Malcolm D. Jones*, Judge.

Suit by Mrs. Edward Hilton against Sarah Rogers. Judgment for defendant, and plaintiff brings error. Reversed.

E. W. Maynard, of Macon, for plaintiff in error.

C. H. Hall, of Macon, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(152 Ga. 721)

RIMES v. RIMES. (No. 2384.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

Specific performance ¶68, 114(1)—Not generally decreed of contracts relating to personalty; allegations of petition held not to require specific performance of contract to sell stock.

As a general rule, equity will not decree specific performance of contracts relating to personal property. In order to sustain a bill for the specific performance of such a contract, it is necessary to allege some good reason in equity and good conscience to take the case out of the general rule. The allegations of the petition do not take this case out of the general rule, and the court did not err in dismissing the petition on general demurrer.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by R. D. Rimes against T. T. Rimes. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

Melville Price, of Ludowici, for plaintiff in error.

Seabrook & Kennedy, of Savannah, for defendant in error.

FISH, C. J. Plaintiff's petition sought to have specific performance of a written contract of sale by defendant to plaintiff of 25 shares of the corporate stock of the Citizens' Bank of Ludowici. Defendant demurred generally and specially. The general demurrer was sustained, and plaintiff excepted.

No special value is attached to particular shares of stock in a corporation over other like shares. Generally damages at law are considered adequate to enable the plaintiff to procure stock in the open market, equivalent to that which he is entitled to receive under his contract. 25 R. C. L. 298, and cases cited in notes 11 and 12. It is not alleged in the petition here that defendant is insolvent, or that the value of the stock is uncertain. The ground upon which the jurisdiction of equity is invoked in this case is said to arise from the peculiar value which the stock has under the special circumstances of the case, by reason of which plaintiff's right to recover damages would not constitute an adequate remedy at law. The special circumstances relied on are that plaintiff contracted to buy the stock for the purpose of securing to himself the control of the corporation, and that, acting upon his contract with defendant, plaintiff purchased and paid full value for other large blocks of stock in the corporation, with the knowledge of defendant. While the contract, made for the avowed purpose of securing to plaintiff the control of the corpo-

ration, which purpose was known to defendant at the time, is not illegal (see *Central Ry. Co. v. Central Trust Co.*, 135 Ga. 472 [2], 69 S. E. 708), it has been held that it is contrary to well-established equitable principles to grant relief for such purpose. (*Clowes v. Miller*, 74 Conn. 287, 50 Atl. 728; see, also, *Ryan v. McLane*, 91 Md. 175, 46 Atl. 340; 50 L. R. A. 514, 80 Am. St. Rep. 438). There are cases to the contrary. See *Sherman v. Herr*, 220 Pa. 420, 69 Atl. 899; *Schmidt v. Pritchard*, 135 Iowa, 240, 112 N. W. 801; *Sherwood v. Wallin*, 1 Cal. App. 532, 32 Pac. 566. It is generally held that specific performance of a contract for the sale of corporate stock will be decreed where the stock has some peculiar value to the plaintiff, or where the value of the stock is uncertain, or the stock cannot be obtained elsewhere. *Hubbard v. George*, 81 W. Va. 538, 94 S. E. 974, L. R. A. 1918C, 835, and cases cited in note; *Morgan v. Bartlett*, 75 W. Va. 293, 83 S. E. 1001, L. R. A. 1915D, 300, and cases cited in note; *Hogg v. McGuffin*, 67 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491, and cases cited in note.

The plaintiff in this case does not affirmatively allege that he cannot obtain other shares of the stock in the open market. His allegation is "that he has been out and tried to buy stock in said bank to replace that of the said Troy F. Rimes, but entirely failed to buy same; that petitioner cannot buy same." But he also avers that defendant's purpose in refusing to complete the sale and transfer of the stock is to compel plaintiff to pay an unreasonable price for the stock. The further allegation is made that defendant and another stockholder in the corporation are acting together for this purpose. In the absence of a direct and unequivocal allegation that the stock could not be purchased in the open market, or that the value of the stock was not easily ascertainable, or other good cause, equity will not enforce specific performance of the contract against the solvent defendant upon the sole ground that the contract was made to enable plaintiff to secure to himself control of the corporation.

It is true that the petition alleges that plaintiff, if allowed to have the stock, will greatly increase its value by increasing the earnings of the bank, and that his damages in this regard cannot be ascertained if he is not granted the relief prayed. It is clear that plaintiff does not here intend to allege that the stock has a special or peculiar value. The element of value here asserted is not inherent in the particular stock itself. The expected profits and benefits to be derived from the control of the corporation by plaintiff are quite too remote and contingent to authorize the relief prayed. The al-

legations of the petition do not take the case out of the general rule stated in *Carolee v. Handells*, 103 Ga. 299, 29 S. E. 935, stated in the headnote; and the court did not err in dismissing the petition on general demurrer.

Judgment affirmed.

All the Justices concur.

(152 Ga. 693)

EMPIRE COTTON OIL CO. v. TAYLOR.
(No. 2534.)

(Supreme Court of Georgia. Feb. 17, 1922.)

(Syllabus by the Court.)

Appeal and error \S 267(1)—Writ dismissed when bill of exceptions does not assign error on final decree; assignment of error on ruling sustaining demurrer to amendment insufficient.

"Although the bill of exceptions specifically assigns error upon rulings made during the progress of the case in the trial court, and recites the rendition of a final decree, and specifies that decree as a part of the record to be transmitted, yet if it contains no assignment of error on the final decree, the writ of error must be dismissed. The final decree must be excepted to, in order to obtain consideration of exceptions to rulings preceding it." *Winder Lumber Co. v. Washington Brick Co.*, 149 Ga. 215, 99 S. E. 863. Accordingly, where on the call of the case in this court the defendant in error moves to dismiss the bill of exceptions, on the ground that there is no assignment of error upon the final judgment rendered in the case, although it recites and shows that a final judgment was rendered, and where upon an inspection of the bill of exceptions it appears that the only exception is to the judgment of the court below sustaining a demurrer to an amendment in aid of the levy in the case, and exceptions pendente lite to such ruling were certified and ordered filed as a part of the record in the case, an assignment of error merely upon such ruling made during the progress of the trial is not an exception to the final judgment, and therefore, under the foregoing ruling, the motion to dismiss must be sustained.

Error from Superior Court, Tallahassee County; E. T. Shurley, Judge.

Action between the Empire Cotton Oil Company and J. B. Taylor. Judgment for the latter, and the former brings error. Writ of error dismissed.

J. A. Mitchell, of Crawfordville, for plaintiff in error.

Alvin G. Golucke, of Crawfordville, for defendant in error.

ATKINSON, J. Writ of error dismissed. All the Justices concur.

(152 Ga. 621)

STOKES et al. v. HUMPHRIES et al.
(No. 2516.)

(Supreme Court of Georgia. Feb. 15, 1922.)

(Syllabus by the Court.)

Evidence **§401**—**Reformation of Instruments** **§20, 36(1)**—One giving note and taking bond for title cannot contradict the bond without showing fraud or mistake; fraud which will be relieved against must be fraud preventing reading of written instrument; partnership negotiations held not to have reached point where confidential relations excused failure of diligence in signing agreements; petition held not to show diligence in ascertaining terms of the writing.

The court did not err in sustaining a general demurrer to the petition, it appearing that the plaintiff was not entitled to the relief sought, because he was bound by the terms of a written instrument, and was not entitled to be relieved of the effects of such written instrument under the facts alleged in the petition.

Error from Superior Court, Twiggs County; J. L. Kent, Judge.

Suit by W. C. Stokes and others against C. O. Humphries and others. Judgment for defendants on demurrer, and plaintiffs bring error. Affirmed.

The essential facts alleged in the petition brought by Stokes against Humphries and Waters are as follows: Stokes held an option on a tract of land belonging to the Napiers for \$30,000. Stokes found a party willing to pay \$38,000 for the land, and was about to consummate a sale to him whereby he would realize a profit of some \$8,000, when Humphries advised him that the land with its valuable timber was worth much more than that amount; that the timber alone was worth \$45,000 above the cost of cutting, sawing and marketing. Stokes knew Humphries to be a man of wide experience in the sawmill and lumber business. Humphries proposed to Stokes to finance the proposition, offering to put in the money necessary to purchase the land from the Napiers. The Napiers were willing to accept \$28,500, \$10,000 to be in cash and the balance in two annual payments of \$9,250 each. Humphries proposed to make the first cash payment, and to put in active charge of cutting and sawing the timber one Waters, who was an expert sawmill man; that the three, Stokes, Humphries, and Waters would own each a one-third interest in the land; Humphries to reimburse himself for all sums paid to the Napiers from the sale of lumber obtained from the land; when fully reimbursed for such payments, the land would then belong jointly to Stokes, Humphries, and Waters. Humphries advanced the cash payment of \$10,000

to the Napiers; whereupon the latter executed their warranty deed to Stokes. Stokes executed two promissory notes for \$9,250 each in favor of the Napiers, for the balance of the purchase price of the land, payable on October 4, 1920, and October 4, 1921, respectively. To secure the payment of these notes Stokes executed his deed to the land, conveying the same to the Napiers. Humphries then advising Stokes that the proper thing to do was for Stokes to execute a deed to him for the land, this was done, Stokes at the same time executing his promissory note to Humphries for \$9,250, and expecting to receive from Humphries a paper embodying the agreement and understanding of the parties. Whereupon Humphries procured a named lawyer, in whom petitioner had the utmost confidence, to draw the necessary paper, petitioner also having great confidence in Humphries, and believing that, on account of their partnership and confidential relations, Humphries would correctly inform the attorney who was to draw the paper as to the trade. The paper thus drawn and executed by Humphries was a bond for title, in which Humphries obligated himself to convey to Stokes a one-third undivided interest in the land upon the payment by Stokes of the two outstanding promissory notes given to the Napiers for \$9,250 each, and the note given by Stokes to Humphries for \$9,250. Stokes received from Humphries this bond for title, but did not read the same, supposing that it was a paper so drawn as to speak the agreement and understanding of the parties, to wit, that Humphries and Waters would begin promptly (this was in the fall of 1919) to place sawmills upon the land and proceed to convert the timber into lumber and sell the same, which at that time was very valuable, and, when a sufficient quantity was sold to reimburse Humphries, not only for the cost of cutting, sawing, and marketing the same, but to pay off all indebtedness against the land, Humphries would then convey to petitioner a one-third undivided interest in the land. Petitioner alleges that there was delay in placing sawmills on the land, although he urged Humphries and Waters to carry out their promise in this respect. At that time lumber was bringing high prices, and the delay was resulting in loss to petitioner. Becoming impatient with Humphries and Waters on account of the slow progress being made in cutting and sawing the timber, Stokes examined his bond for title, and found that the stipulation contained therein was to the effect that, upon the payment by Stokes of all outstanding indebtedness against the land, consisting of the three promissory notes aggregating \$27,750, a one-third undivided interest in the land would be conveyed to him by Humphries. Whereupon Stokes, set-

ting forth these facts, alleged that the bond for title did not speak the understanding between him and the defendants, and that the same was a fraud perpetrated upon him, and he prayed that the notes which he had executed be surrendered and canceled, that Humphries be required to perform his obligation as to sawing the timber on the land at his own expense; for an accounting for all lumber sold and the expenses incident to cutting, sawing, and selling same, and for other relief. The defendants filed general and special demurrers, which were sustained by the court, and the petition was dismissed. To this ruling the petitioner excepted.

Jordan & Moore and Walter De Fore, all of Macon, for plaintiffs in error.

John R. L. Smith and Grady C. Harris, both of Macon, and R. A. Harrison, of Jeffersonville, for defendants in error.

FISH, C. J. (after stating the facts as above). The note which was executed by Stokes, the plaintiff in error, to Humphries for \$10,000, and the bond for title which Humphries then executed, and delivered to Stokes, taken together, constituted a single contract in writing. While Stokes did not sign the bond for title, he did sign the note; and, before he could have the right to submit oral evidence to vary or contradict the terms of the contract as contained in the writing, it would be necessary for him to show that the contract was obtained by fraud or executed by mistake relievable in equity. The two papers constituting one written contract, the maker of the note, who was the obligee in the bond, could not vary or contradict the terms of the bond so as to enlarge his rights or diminish his liabilities without showing fraud upon the part of the maker of the bond and the payee in the note in obtaining the signature to the note and the acceptance of the bond. And, according to the repeated rulings of this court, the fraud which would relieve a party who can read, under the circumstances set forth in the petition, must be fraud which prevents him from reading.

"Equity will not reform a written contract because of mistake as to the contents of the writing on the part of the complaining party (who was able to read), and fraud of the other party which consists only in making false representations as to such contents, on which the complaining party relied as true because of confidence in the party making them, no fiduciary or confidential relation existing between the parties, and no sufficient excuse appearing why the complaining party did not read the contract." *Weaver v. Roberson*, 134 Ga. 149, 67 S. E. 662.

There is no merit in the contention that Humphries and Stokes were partners, and

that because of that fact such confidential relations existed between them as would relieve the complainant of the effects of his negligence in acquainting himself with the terms of the contract for the sale and conveyance of this land. The establishment of the contention of the plaintiff in error as to this question depends upon the effect of his efforts to eliminate the written contract so as to permit him to enter upon a consideration of prior negotiations which resulted in the written contract. If those prior negotiations had resulted in a written contract embodying what the plaintiff in error now contends was the real understanding between the parties, there might have been something in the contention that such confidential relations existed between them as would have excused him for relying upon statements made in the conduct of the business, and that would have justified him in expecting from Humphries the observance of that good faith which one partner owes to another. But when this transaction was made the two parties had not progressed to that extent in the formation of a partnership which would excuse either one of them for failing to exercise the ordinary diligence of business men in the signing of written instruments embodying the evidence of a consummation of negotiations leading up to an important business transaction. If the bond for title in this case contained a mistake, or if the plaintiff in error was in ignorance of its terms, or if it contained terms which enabled the obligor in the bond to perpetrate an actual fraud, the mistake or fraud would have been apparent to one of ordinary intelligence upon a reading of the paper; but the plaintiff in error did not read it, it seems, and even alleges that he did not give it serious consideration. And, so far as appears from this petition, the complainant let a considerable time elapse before carefully considering the paper and ascertaining its contents; just how long a period of time he let elapse the pleader does not show—certainly does not show that he exercised any diligence in ascertaining the contents of the writing. It may be that the case is a hard one under the facts alleged, which are to be taken as true upon demurrer; but that does not authorize the court of equity to grant relief to one who failed entirely to exercise the diligence and prudence imposed by law upon one who seeks equitable relief.

It follows from what we have said that the judgment sustaining the demurrer and dismissing the case must be affirmed.

Judgment affirmed.

All the Justices concur; ATKINSON, J., in the judgment.

(152 Ga. 659)

BOWERS v. HANKS. (No. 2515.)

(Supreme Court of Georgia. Feb. 16, 1922.)

(Syllabus by the Court.)

1. Counties \S 21½—Have only such powers as are given by some legislative act.

Neither the counties of this state nor their officers can do any act, make any contract, or incur any liability not authorized by some legislative act applicable thereto.

2. Counties \S 114—County board held without power to employ county demonstration agent.

The board of commissioners of roads and revenues of the county of Floyd is without authority to employ a county demonstration agent and to pay his salary out of the funds of said county; there being no statute of this state authorizing such employment and expenditure.

3. Counties \S 192—Legislature may authorize employment of county demonstration agent.

Under the Constitution of this state the Legislature has authority to authorize the counties thereof to employ county demonstration agents, and to pay their salaries from funds to be raised by county taxation.

4. Counties \S 63 — No authority to employ county demonstration agent under act relating to boards of health.

The record in this case failing to disclose that the act of 1914, giving to the county board of health full power to adopt all such rules and regulations, not inconsistent with the Constitutions of this state and of the United States, for the protection of the health of their respective counties, had been recommended by two successive grand juries of Floyd county, and, the record further failing to disclose that, if said act had been so recommended and rules and regulations prescribed, such rules and regulations authorize the employment of county demonstration agents, the contract in this case cannot be sustained under this act.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Mandamus by W. E. Bowers against J. D. Hanks, Chairman of the Board of Commissioners of Roads and Revenues of Floyd County. Judgment refusing to make the mandamus absolute, and the petitioner brings error. Affirmed.

W. E. Bowers was employed by the board of commissioners of roads and revenues of Floyd county as county demonstration agent of said county for the year 1921, at the salary of \$150 per month. As such agent he rendered the services required for the months of January and February, 1921. The clerk of said board issued a warrant for the two months' salary due him; but the chairman of the board, upon whom devolved the duty of signing county warrants, refused to sign the same. Thereupon Bowers applied for a

mandamus to compel him to sign the warrant issued by the clerk for his salary for the two months. Mandamus nisi issued; and in reply thereto J. D. Hanks, as chairman of said board, demurred to the petition, on the grounds: (a) That there was no law authorizing the employment of such agent and the payment of his salary by the county of Floyd; and (b) because such salary could not be constitutionally paid from the funds of said county raised by taxation. In his answer Hanks, as such chairman, set up the same defenses to the mandamus proceedings.

The case was submitted to the trial judge upon the petition, demurrer, and answer, and he refused to make the mandamus absolute. The plaintiff excepts to this judgment.

M. B. Eubanks, Lamar Camp, and L. A. Dean, all of Rome, and Cobb & Bell, of Athens, for plaintiff in error.

John W. Maddox, of Rome, for defendant in error.

HINES, J. (after stating the facts as above). [1] 1. Article 2, § 1, par. 1, of the Constitution of this state declares that "each county shall be a body corporate, with such powers and limitations as may be prescribed by law." Civil Code, § 6594. Under this provision of our Constitution counties possess no powers not conferred upon them either expressly or by fair implication from the statutes applicable to them. When they undertake through their constituted authorities to exercise the power of taxation in any given manner, a clear and manifest legal right to do so must appear. *Maxwell v. Cumming*, 58 Ga. 384; *Kennedy v. Seamans*, 60 Ga. 612; *Albany Bottling Co. v. Watson*, 103 Ga. 503, 30 S. E. 270; *Howard v. Early County*, 104 Ga. 669, 30 S. E. 880; *De Vaughn v. Booten*, 146 Ga. 836, 92 S. E. 629.

[2] Has the Legislature granted to the county of Floyd the authority to employ and pay a county demonstration agent? Our attention has not been called to any statute of this state conferring this power generally upon the counties thereof; but it is insisted that the act creating the board of commissioners of roads and revenues for the county of Floyd confers statutory power upon said board to employ and pay such an agent from the funds of the county raised by public taxation. No such express power is given this board by the act of the Legislature creating the same; but it is insisted that this board can exercise, in addition to the specific authority granted in the act of its creation, such other powers as were granted by the then Code of this state to justices of the inferior court. Section 5 of this act declares that—

"Said board of commissioners shall have the same powers in appointing road commissioners and enforcing the road laws, as justices of the inferior court had by the Code of this state

prior to the ratification of the late state Constitution, and shall exercise such other powers as are granted by the Code of the state to said Justices." Ga. Laws 1871-72, p. 226 et seq.

Under the then Code of this state the justices of the inferior court of the several counties had authority, upon the recommendation of the grand jury, to levy a tax upon the state tax, for educational purposes, of such per cent. as said jury may recommend. Code of 1867, § 1281. If the grand jury at the time they should recommend the general county tax failed to take any action in reference to this tax, then such justices might, in their discretion, levy a tax for such purpose, not to exceed 25 per cent. upon the state tax. Code of 1867, § 1282. The educational fund of each county was under the management of a board of education, consisting of the justices of the inferior court, the ordinary, and some other qualified citizen, to be selected by the judge of the superior court presiding in such county. Code of 1867, § 1285. If the board of education failed to devise any plan of education, the laws in force prior to December 13, 1859, were continued in force. Code of 1867, § 1294.

It is insisted that the act creating the board of commissioners of roads and revenues of Floyd county is preserved by article 12, section 1, paragraph 4, of the Constitution of 1877, which provides:

"Local and private acts passed for the benefit of counties, cities, towns, corporations, and private persons not inconsistent with the supreme law, nor with this Constitution, and which have not expired nor been repealed, shall have the force of statute law, subject to judicial decision as to their validity when passed, and to any limitations imposed by their own terms"

—and that this board can still exercise all the powers with reference to county matters, including educational matters, that the justices of the inferior court possessed. This provision of the Constitution gives to this local act the force of statute law, and preserves to this board all powers which the justices of the inferior court had under the Code of 1867. Under this Code the justices of the inferior court had authority, upon the recommendation of the grand jury, to levy a tax upon the state tax, for educational purposes, of such per cent. as said jury might recommend; and in case the jury failed to act, then the justices could levy a tax for such purpose, not to exceed 25 per cent. upon the state tax. Code of 1867, §§ 1281, 1282. But this power, possessed by the justices of the inferior court, and given to the board of commissioners of roads and revenues of Floyd county by the act creating it, does not confer upon this board the power to declare what kinds of education shall be provided. The plan and system of county education was to be fixed by the then county board of education, or, on their default in this matter, the

plan and system provided by law prior to December 13, 1859, prevailed.

The justices of the inferior court were without power to declare and define educational purposes; but could only levy a tax to carry out such purposes when defined and fixed by the proper authorities. At the date of Irwin's Code the educational system of Georgia consisted of the University of Georgia, the Georgia Military Academy, the Academy for the Blind, the Academy for the Deaf and Dumb, county academies, and common schools. Code of 1867, § 1197 et seq. There was a board of education for each county, made up of justices of the inferior court, the ordinary, and some other qualified citizen selected by the judge of the superior court presiding in the county. Code of 1867, § 1285. This board adopted annually the school system. Code of 1867, § 1286. If this board failed to devise any plan of education, the system provided by law prior to December 13, 1859, was continued in force. Code of 1867, § 1294.

So the system of county education was then fixed by the county board of education; and the justices of the inferior court as such did not have the power to adopt the county system of education. As members of the county board the justices of the inferior court in that capacity could have predominant influence. But they exercised this influence, not as justices of the inferior court, but as members of the county board of education.

So the justices of the inferior court were without power to fix the curriculum in the county schools, but when the same was adopted by the county board of education they could levy the tax for the support of the county schools under the provisions of law above referred to.

Under the present Code county taxes can be levied "to pay charges for educational purposes, to be levied only in strict compliance with the law." Civil Code, § 513, par. 8. This provision does not confer power on the county authorities to levy a school tax ad libitum. This provision of law manifestly refers to statutes which authorize the levy, and on which such levy must depend. *Richter v. Bacon*, 145 Ga. 408, 89 S. E. 367.

[4] The county boards of health now have supervision over all matters relating to health and sanitation in their respective counties, where the operation of the act of August 17, 1914 (Ga. Laws 1914, p. 124), has been recommended by two successive grand juries. In counties where this law has been so adopted the county authorities have full power to adopt, enact, establish, and maintain all such rules and regulations, not inconsistent with the laws and Constitutions of this state and of the United States, as they may deem necessary and proper for protecting the health of their respective counties. Civil Code, § 1670. As county demonstration agents have,

as we shall hereafter show, much to do with sanitation and health, the county boards of health or the county authorities, after adopting proper rules and regulations, might provide for the employment and pay of these agents (*Townsend v. Smith*, 144 Ga. 792, 87 S. E. 1039), but this act has not been adopted in Floyd county, so far as the record discloses. So, in the absence of statutory authority, we reach the conclusion that the board of roads and revenues of Floyd county is without authority to employ and pay a county demonstration agent from the public funds of said county raised by taxation. The contract which the board made with the plaintiff, employing him as such agent, is without authority of law, and is null and void.

[3] 2. But we are equally clear that the Legislature of the state can authorize the counties of this state to levy taxes for the purposes of employing county demonstration agents. Under legislative authority any county can levy a tax for educational purposes. Civil Code, § 6562 (Ga. Laws 1910, p. 45).

Under the Constitution of 1877, as originally written, the Legislature could only delegate to counties the power to levy a tax "for educational purposes in instructing children in the elementary branches of an English education only." The Legislature was without authority to authorize the counties to levy a tax for any other educational purpose. Under this provision of the Constitution, as amended in 1910 (Ga. Laws 1910, p. 45), the Legislature has power to authorize the counties to levy a tax for educational purposes generally. So, if a county demonstration agent is engaged in carrying out an educational purpose, the Legislature can authorize the counties to levy a tax for such purpose.

What are the functions of a county demonstration agent? The Agricultural Extension Work Act of Congress (38 Stat. 372; U. S. Comp. St. §§ 8877a-8877b) was passed "in order to aid in diffusing among the people of the United States useful and practical information on subjects relating to agriculture and home economics, and to encourage the application of the same"; and to this end it was enacted that—

"There may be inaugurated in connection with the college or colleges in each state now receiving, or which may hereafter receive, the benefits of the act of Congress approved July second, eighteen hundred and sixty-two, entitled 'An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts, * * * agricultural extension work which shall be carried on in co-operation with the United States Department of Agriculture.'"

The assent of the General Assembly of Georgia was given to the provisions and re-

quirements of this act of Congress, and the trustees of the University of Georgia were authorized to receive the grants of money appropriated under said act, to organize and conduct agricultural extension work. Ga. Laws 1914, p. 1243.

To carry out this university extension work county demonstration agents are appointed. They are required to make farm surveys, arrive at farm problems, and assist in solving them, to conduct demonstrations for adult farmers on the rotation of crops, improvement of the soil, better methods of cultivation, and the rational use of fertilizers, to develop the swine industry by the use of better pastures, better bred herds, and by fighting hog cholera, lice, other diseases and parasites, to enlarge the beef industry by the use of better bred sires and the development of pure bred herds, to assist in improving the farm dairy through the introduction of pure bred sires, the use of balanced rations, and the keeping of methodical records, to demonstrate the proper care of the home orchards, home gardens, small fruit and truck crops, to encourage local fairs and clubs for the purpose of securing united effort in developing community enterprises, such as co-operative creameries, meat-curing houses, methods of controlling boll weevil, and co-operation in the marketing of farm products, and to co-operate with school superintendents and teachers in the organization of boys' and girls' agricultural club work, and the introduction, use, and study of home economics in the public schools.

So the farm demonstration agent is appointed to carry out a very ambitious scheme of education in the above-enumerated matters. He is a peripatetic teacher of these subjects, going from home to home, from farm to farm, to impart information on these various subjects. He is employed to impart agricultural information to adult farmers. He does this by university or college extension work in connection with the agricultural college of this state and the United States Department of Agriculture. The educational purpose to be achieved by him is a very important one to the agriculture of this state. He carries on an important branch of education.

So we are of the opinion that under the present Constitution of this state the Legislature can authorize the county authorities to levy a tax for this educational purpose.

But, as the Legislature has not yet seen fit to authorize the counties to engage in this university extension work, the county of Floyd was without authority to employ the plaintiff to engage in this work in that county, and to pay him therefor from the public funds of that county raised by taxation. The judgment of the court below, refusing a mandamus absolute, is affirmed.

All the Justices concur.

(152 Ga. 723)

HARTLEY v. SMITH et al. (No. 2483.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

Executors and administrators of—200—Widow gives entire estate subject to debts as year's support not liable for unpaid balance on stock.

Where a man at the time of his death held a certificate for five shares of bank stock of the par value of \$100 a share, upon which a balance of \$200 of the subscription price remained unpaid, and a year's support was set aside to his widow and minor children of his "entire estate after all the just debts are paid," and in the schedule of the appraisers the five shares of stock set aside as a part of a year's support was valued at \$300, and subsequently, upon an inspection of a certified copy of the entire proceedings of the year's support exhibited to the cashier of the bank by the widow, the cashier issued to her a certificate for five shares of stock, in which there was the recital, "60 per cent. paid in and assessable," the receivers of the bank, which subsequently became insolvent, could not obtain against the widow a general judgment for \$200, as balance due as unpaid subscription.

Beck, P. J., dissenting.

Certiorari from Court of Appeals.

Action by T. Y. Smith and others, receivers, against Mary Hartley. Judgment for plaintiff was affirmed by the Court of Appeals (26 Ga. App. 212, 105 S. E. 725), and defendant brings certiorari. Reversed.

At the time of his death A. N. Hartley held a certificate in his name for five shares of stock in the Farmers' State Bank of Bartow, Ga., of the par value of \$100 a share, for which he had paid 60 per cent. of such value, the certificate reciting, "60 per cent. paid in and assessable." Upon the application of his widow a year's support from his estate was set aside to her and their three minor children. The appointed appraisers set apart as such year's support the "entire estate [of the decedent] after all the just debts are paid." The schedule of the appraisers attached to their report included "five shares in Farmer's State Bank of Bartow, Ga., \$300," and other itemized property of stated value. The report of the appraisers was duly made the judgment of the ordinary's court. Mrs. Hartley subsequently requested the cashier of the bank to issue to her a certificate of stock, which he declined to do unless presented with a certified copy of the year's support proceedings. Mrs. Hartley presented such certified copy to the cashier, and he issued to her a certificate for five shares of the stock, which contained the words, "60 per cent. paid in and assessable." Thereafter she received one dividend declared on the stock held by her. The bank became insolvent; and the receivers appoint-

ed for it brought an action against Mrs. Hartley, and a number of other stockholders, to recover \$40 a share as the balance of the unpaid subscription to stock held by them. The judge of the trial court directed a verdict against Mrs. Hartley for \$200, with 7 per cent. interest thereon from July 1, 1919, which was from the date of the institution of the action. The defendant's motion for a new trial having been overruled, the case was carried to the Court of Appeals for review. A majority of the division of that court before which the case came for decision rendered a judgment affirming the ruling of the trial court. The case is here on certiorari to the Court of Appeals.

Evans & Evans, of Sandersville, for plaintiff.

R. G. Price and Phillips & Abbot, all of Louisville, for defendants.

FISH, C. J. (after stating the facts as above). The entire estate of the decedent, Hartley, was set apart as a year's support to his widow and minor children, "after all the just debts are paid." The judgment of the court of ordinary setting aside a year's support in which the language quoted appears, did not and could not legally impose upon the widow and the other beneficiaries of the year's support any liability to pay the debts owing by the estate of the decedent. Of course the widow could, if so minded, have voluntarily discharged all the debts of her deceased husband's estate, and have taken it in its entirety, relieved from any liability. It is true that under the terms of the report of the appraisers and the judgment of the court of ordinary she and the children took the entire estate after the payment of all of its just debts; that is, all the just debts had to be discharged before the beneficiaries of the year's support could take the entire estate. And an administrator could have been appointed of the estate, whose duty it would have been to pay all of the just debts from the assets of the estate received by him, and whatever assets of the estate remained after the payment of the just debts and the expenses of administration would have gone to the widow and minor children as their year's support. This procedure, however, was not followed; but the receivers of the bank, which they claim held the debt against the estate of the intestate for the sum of \$200 owing by the decedent at the time of his death, as a balance of unpaid subscription on the five shares of stock, brought this action against his widow as a debt due by her by reason of the fact that her husband owed it, and that the bank upon her solicitation had issued to her a certificate for the five shares of stock for which her husband held a like certificate at his death. The bank demanded the exhibition to it of the certified copy of the year's support pro-

ceedings, before it would issue to her a certificate. The bank therefore had actual notice, from the copy of the proceedings exhibited to it, that only an interest to the amount of \$300 had been set aside to the widow and children in the five shares of stock owned by the decedent. The widow did not expressly or impliedly agree or promise to pay the bank anything for the issuance by it to her of a certificate. It follows that, whatever claim the bank may have against the estate of the decedent, it has no cause of action against the widow, upon which a general judgment could be obtained against her.

Our conclusion is that the judgment of the majority of the division of the Court of Appeals which affirmed the judgment of the trial court was error.

Judgment reversed.

All the Justices concur, except BECK, P. J., dissenting.

(152 Ga. 638)

WILKINS et al. v. MAYOR AND ALDERMEN OF SAVANNAH. (No. 2491.)

(Supreme Court of Georgia. Feb. 16, 1922.)

(Syllabus by the Court.)

1. Municipal corporations \S 323(1, 3) — Lot owners may sue to enjoin repaving and assessments therefor for illegality; lot owners authorized to join in injunction suit to prevent multiplicity of suits; suit held not premature nor barred by laches.

Where a city is proceeding to repave a street and is preparing to have assessments for such improvement levied against the lots of owners abutting on such street, several owners of such lots can join in an equitable action to enjoin such work and to have the assessments against their lots enjoined on the ground that the municipal authorities are without power to make them, and that the contract between the city and the contractor for such work was illegal and furnished no valid basis for such assessments. In order to prevent a multiplicity of suits, several owners of such abutting lots can join in a common attack upon the validity of such assessments; the city admitting that it was getting ready to levy them against the lots of the plaintiffs. *Sanders v. Mayor, etc., of Gainesville*, 141 Ga. 446, 81 S. E. 215.

2. Statutes \S 76(2)—Special law relative to assessments for repaving held unconstitutional because of existence of general law.

So much of "An act to alter and amend the several acts relating to and incorporating the mayor and aldermen of the city of Savannah, and for other purposes," as authorizes the mayor and aldermen of the city of Savannah to assess the entire cost of repaving its streets to the lots of owners abutting thereon, instead of assessing to such lots the proportion of cost assessed against them when said streets were originally paved, is unconstitutional and void, because there was an existing general

law applicable in such case when said act was passed.

3. Appeal and error \S 954(1)—Grant or refusal of injunction will be reviewed when question is one of law.

The rule that this court will not interfere with the discretion of the trial judge in granting or refusing an injunction does not apply when the question to be decided is one of law.

(Additional Syllabus by Editorial Staff.)

4. Municipal corporations \S 269(2)—Statute authorizing cities to "renew" pavement includes repaving.

Under Civ. Code 1910, \S 870, authorizing cities to renew or repair any pavement on the terms and conditions in force when the pavement was laid, the power to "renew" includes the power to repave, especially as the original act used the words "pave again."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Renew.]

5. Municipal corporations \S 414(1)—Statute requiring repaving on same terms and conditions as original paving held to include proportion of cost chargeable against abutting owners.

Civ. Code 1910, \S 870, authorizing cities to renew or repair pavements on the same terms and conditions as to assessment as were in force when the pavement was originally laid, includes in such terms and conditions the proportion of the cost chargeable to abutting lots.

On Motion for Rehearing.

6. Constitutional law \S 188—Municipal corporations \S 407(1)—Law providing for assessments under earlier law and validating proceedings thereunder held prohibited retroactive law.

Laws 1921, p. 1080, providing that when paving proceedings by the city of Savannah under Laws 1919, p. 1294, shall be invalid for any reason, assessments shall be levied under Laws 1884-85, p. 362, Laws 1887, p. 537, and Laws 1910, p. 1142, and the assessments shall be legal and binding, and validating proceedings under the act of 1919, is a retroactive law prohibited by Const. art. 1, \S 3, par. 2.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by C. Wilkins and others against the Mayor and Aldermen of Savannah. An injunction was denied, and plaintiffs bring error. Reversed.

C. Wilkins, Annie C. Warren, Victor G. Schreck, J. C. Slater and Kate G. Simkins filed their petition for injunction against the mayor and aldermen of the city of Savannah, and made this case: The plaintiffs are owners of lots which front on West Broad street between Indian street and Thirty-First street in the city of Savannah. Said street is now paved between the curbing with vitrified brick. Sections of said street within said limits were paved at vari-

ous times by the city, under the act of the General Assembly approved October 1, 1887, (Laws 1887, p. 537), whereby the owners of abutting lots on each side of said street were assessed and paid two-thirds of the cost of said paving, exclusive of cost of paving the frontage of intersecting streets and lanes, which was paid by the city, and excluding the width of the street railroad tracks and two feet on each side, the cost of which was paid by the street railroad company. The city is now undertaking, by various resolutions and proceedings, to remove said vitrified brick pavement on West Broad street, and to repave said street with vibrolithic concrete. For this purpose the city, on January 28, 1921, executed a contract for this work with Dixon Contracting Company, and is now proceeding under color of the act of the General Assembly of Georgia approved August 18, 1919, known as the "Oklahoma Plan Act," to levy assessments against, and provide liens upon, the lots of plaintiffs fronting on said street, to pay for the whole cost of such pavement, except for the frontage of intersecting streets and lanes. The city of Savannah has a population of over 20,000 inhabitants, and has no lawful right to renew any pavement in said city, except as is provided by section 870 of the Civil Code of 1910. Plaintiffs allege that the Act of August 18, 1919 (Acts 1919, p. 1294 et seq.) under color of which the city is proceeding to repave West Broad street, is unconstitutional, because in conflict with article 1, § 4, par. 1, of the Constitution of this state, which provides that—

"No special law shall be enacted in any case for which provision has been made by an existing general law."

Plaintiffs allege that the assessments for this repaving, and the liens sought to be fixed upon their lots abutting said street for the payment of the entire cost of said pavement, constitute clouds upon their titles to the lots aforesaid. They pray that the city be enjoined from taking up said vitrified brick pavement, and from repaving West Broad street from Indian to Thirty-First street; from further proceeding to levy any assessments on their lots; and from issuing any street improvement bonds, payable out of said West Broad street assessments.

The city alleges that the pavement on West Broad street had become worn out and unserviceable; that on December 17, 1919, it had adopted a resolution under the provisions of section 22 of the Act of August 18, 1919, condemning said pavement, and on December 15, 1920, it had passed a resolution to repave said street between Indian street and Thirty-First street.

The city is proceeding to pave said street under the provisions of sections 10, 12, and 23 of the Act of August 18, 1919. The city contends that section 780 of the Civil Code of

Georgia, which was amended August 19, 1919, never had any application to the city of Savannah until it was amended; that said Code section was enacted in 1890, and that at the time of its enactment the city of Savannah had full power and authority to renew existing pavements under the act of 1887, found in Georgia Laws 1887, p. 537. The city insists that the act of 1887 was not repealed by the act of 1890, embodied in said section of the Code, and that when the Act of August 18, 1919, was passed there was no general state statute which conflicted with said act of August 18, 1919.

The application for injunction was heard upon the petition and answer with the admission that the city of Savannah had a population of more than 20,000 inhabitants. The injunction was refused and the refusal of the injunction is complained of. The court below denied the injunction on the grounds: (1) Because the plaintiffs have an adequate and complete remedy at law; (2) because the unconstitutionality of the Act of August 18, 1919, was not made clearly to appear; and (3) in the exercise of his discretion the judge declined to grant a temporary injunction, the average excess amount which the complainants will be required to pay under the new plan over the old being \$187.05, for which reason he was not willing to stop this needed public improvement.

H. W. Johnson, of Savannah, for plaintiffs in error.

Shelby Myrick, E. A. Cohen, and Lawrence & Abrahams, all of Savannah, for defendant in error.

HINES, J. (after stating the facts as above). [2] On August 18, 1919, the charter of the city of Savannah was amended, and the city was given the authority to pave and repave its streets, and to assess the entire cost of such improvement to owners of property abutting on the streets so paved or repaved. Ga. Laws 1919, p. 1294 et seq. Plaintiffs, who own lots abutting on West Broad street in Savannah, the pavement on which had been condemned by the city and the street ordered to be repaved, attacked the constitutionality of so much of the said act of August 18, 1919, amending the charter of the city of Savannah as authorizes the city to assess the entire cost of repaving its streets to abutting property owners, on the ground that said act is in conflict with article 1, § 4, par. 1, of the Constitution of this state (Civil Code, § 6391), which provides that—

"No special law shall be enacted in any case for which provision has been made by an existing general law."

[4, 5] At the date of the passage of this act there was in force a general law which declares that—

"The mayor and council or governing authority of any city having a population of over

twenty thousand have authority to renew, by the use of any material that may be decided on, or repair any pavement in said city, upon the same terms and conditions, as to assessment of property and street car companies, as were in force when the pavement was originally laid." Civil Code, § 870.

Here is a general law which gives to municipalities in this state having a population of over 20,000 authority to renew or repair any pavements within their limits, upon the same terms and conditions, as to assessment of property and street car companies, as were in force when the pavement was originally laid. The power to renew is the power to repave. *Regenstein v. Atlanta*, 98 Ga. 167, 25 S. E. 428. In fact, the original act from which this section of the Code was taken used the words, "pave again," which clearly demonstrates that "renew" in the above section was used for "repaving." Under this general law municipalities could only assess the owners of property abutting on streets for repaving purposes the same percentage of cost assessable under the law when such streets were originally paved. In other words, assessments against owners of abutting property on streets which are repaved must be upon the same terms and conditions as to such assessments of property and street car companies as existed when the original pavement was put down. If, when the original pavement was laid, the owners of abutting lots could only be charged one-third, one-half, or two-thirds of the cost, then such owners, under this section, cannot be charged more when the pavement is renewed or the street repaved. The language, "upon the same terms and conditions as to assessment of property," includes the proportion of the cost which can be charged to owners of lots abutting upon the street which is repaved. Such proportion must be the same as that which could be charged to owners under the law in force when the pavement was originally laid.

When West Broad street was originally paved with vitrified brick, this was done under an act entitled:

"An act to authorize the mayor and aldermen of the city of Savannah to require the grading, paving, macadamizing or otherwise improving for travel or drainage any of the streets or lanes of the city of Savannah; to make and collect assessments for the same, and for other purposes." Ga. Laws 1887, p. 537.

Under this act the mayor and aldermen of the city of Savannah were authorized "to assess two-thirds of the cost of such paving, grading, macadamizing and otherwise improving on the real estate abutting on each side of the street or lane improved" and could require any street railroad company having tracks running through the streets of said city so improved to macadamize or otherwise pave, as the city might direct, the width

of its track and two feet on each side thereof. These were the terms and conditions upon which the lots of owners abutting on streets of the city of Savannah could be assessed for paving or other improvements of its streets.

By the Act of August 18, 1919, the city is authorized to charge for repaving its streets the entire cost thereof to abutting property owners. This special act was passed when the general law embraced in section 870 of the Code was in force, and seems to us to be clearly in conflict with the provision of the Constitution of this state which forbids the passage of any special act for which provision had been made by an existing general law. This constitutional infirmity of the Act of August 18, 1919, is not cured by the fact that this section of the Code was amended on August 19, 1919, providing that—

"Where any change or modification is made in the charter of any city having a population of not less than 65,000 and not more than 100,000, in regard to the method of paving, by an amendment to such charter, provision may be made in such amendment for the renewal and repairing of any existing pavement under the provisions of such amendment." Ga. Laws 1919, p. 81.

This remedy came too late to save the fatal malady of the act of August 18, 1919. *Jones v. McCaskill*, 112 Ga. 453, 37 S. E. 724.

Counsel for the city of Savannah insist that section 870 never did apply to that city, because the act of 1887 conferred upon the city the identical power conferred by this section. It is urged that there is no conflict between the act of 1887 and this section of the Code, and that, for this reason, the local law is not modified or repealed. Granting this, the situation is not changed. The act of October 1, 1887, does confer upon the city the power to repave its streets. This section confers the same power; but it goes one step further, and establishes a general system of assessments for repaving for all cities of 20,000 inhabitants or more. It makes all assessments, chargeable under local laws, when the streets of such cities were originally paved, applicable to the repavement thereof.

Thus a general law on this subject is enacted, and by its express terms is made applicable to Savannah. But however this may be, the city of Savannah was not proceeding under the act of 1887, but under the amendment to its charter of 1919.

So we are of the opinion that so much of the act of August 18, 1919, as clothed the mayor and aldermen of the city of Savannah with the right to assess the entire cost of repaving this street to property abutting thereon, falls clearly within the case for which provision is made in section 870 of the Code, and for this reason is null and void because in violation of the provision of the Constitution above recited,

[3] The rule that this court will not interfere with the discretion of the trial judge in granting or refusing an injunction does not apply when the question to be decided by the trial judge is one of law. *Chestatee Pyrites Co. v. Cavenders Creek Gold Mining Co.*, 118 Ga. 255, 45 S. E. 267.

[1] We do not think that the plaintiffs are guilty of such laches as would deprive them of the right of injunction. Counsel for the city contends that they are not entitled to an injunction, because they acted prematurely, as the assessments had not been made, but were only in process of being levied. They cannot be both premature in their action and at the same time guilty of laches. We think they are liable to neither charge.

We think that the court below should have granted an injunction restraining the mayor and council of the city of Savannah from proceeding to repave this street under the act of August 18, 1919. As this disposes of the case, we do not consider any of the other objections urged by the plaintiffs to these proceedings.

Judgment reversed.

All the Justices concur.

On Motion for Rehearing.

[8] Our attention has been called to the act of July 27, 1921 (Ga. Laws 1921, p. 1080), by which it is enacted that—

"Wherever and whenever said mayor and aldermen shall have undertaken to pave, or repave, or resurface, or otherwise improve any street * * * in the city of Savannah, under and by virtue of the provisions of the act of the General Assembly * * * approved August 18th, 1919, and found in Georgia Laws 1919, page 1294, and following * * * and the proceedings for such paving * * * and the assessments thereof, shall be held to be invalid for any reason, either before or after the paving * * * then and in such event the assessments for such paving * * * against the property and property owners shall be made and levied and collected under and by virtue and in pursuance of the provisions of the acts of the General Assembly * * * found in Georgia Laws 1884-1885, page 263 [362], and following, also in Georgia Laws 1887, page 537, and in Georgia Laws 1910, page 1142, and such assessments so made under the provisions of the last-named acts shall be legal and binding upon the property benefited and upon the property owners. All proceedings heretofore had by the mayor and aldermen of the city of Savannah under and by virtue of the act of the General Assembly, * * * approved August 18th, 1919, and found in Georgia Laws 1919, page 1294, and following for the paving or repaving or any street, * * * are hereby de-

clared to be valid, it being the intention of the General Assembly of Georgia in the said act of August 18th, 1919, to include and import in the use of the word 'pave,' as used in sections 10 and 12 of said act the right to 'repave' any such street. * * *

It is insisted by able counsel for the defendant in error that this statute does not offend the provisions of our state Constitution against retroactive acts; and that although the act of August 18, 1919, under which the mayor and aldermen of the city of Savannah undertook to repave the portion of West Broad street and to assess the adjoining property for the cost of such improvement, has been declared by this court in this case unconstitutional, the above act of July 27, 1921, cures the invalidity of the proceedings for the repaving of this street and the assessments on the abutting lots for the cost of this improvement.

It is undoubtedly true that a municipal contract expenditure, or appropriation, invalid when made, may be cured by subsequent legislation, unless the invalidity results from a violation of a constitutional inhibition. So where municipalities, without authority, subscribe for shares in railroad companies, the Legislature formerly could pass acts making valid and binding such subscriptions, and authorize the municipalities to levy taxes for the purpose of paying such subscriptions. *Winn v. Macon*, 21 Ga. 275; *Bass v. Columbus*, 30 Ga. 845.

But the above cases are distinguishable from the case at bar. Those cases simply validated contracts made by municipalities and authorized the municipalities to levy taxes to meet the obligations incurred thereunder. They did not authorize the municipalities to enforce obligations against third persons and their property. Curative acts validating invalid obligations of a municipality are widely different from a curative act authorizing a municipality to enforce contracts which impose liabilities upon its citizens and making valid illegal and unconstitutional assessments upon their property.

The Constitution of this state prohibits retroactive laws. Article 1, § 3, par 2 (Civil Code, § 6389). Under this provision every statute which "creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or consideration already past, must be deemed retrospective." *Ross v. Lettice*, 134 Ga. 866, 68 S. E. 734, 137 Am. St. Rep. 281.

So we are constrained to deny the motion for a rehearing in this case.

(152 Ga. 704)

WASHINGTON EXCH. BANK et al. v. BARNETT, Tax Collector, et al.
(No. 2680.)

(Supreme Court of Georgia. Feb. 17, 1922.)

*(Syllabus by the Court.)***1. Taxation** \Rightarrow 40(8)—Statute as to equalization not unconstitutional.

The provisions of section 6, 13, and 14 of the act of the General Assembly of Georgia for the equalization of taxation in this state, approved August 14, 1913 (Acts 1913, p. 123), are not unconstitutional upon the grounds assigned.

2. Taxation \Rightarrow 611(6)—Affidavit on motion for injunction held to support finding that notice of increase in valuation was given.

The judge was authorized to find from the evidence that the taxpayers whose tax returns were changed were served with notices as provided by law.

3. Taxation \Rightarrow 611(6)—Evidence held to support finding that changes in assessments were made by board of assessors and not by tax receiver.

There was sufficient evidence to authorize the court to find that the changes in the assessments had been made by the county board of tax assessors in accordance with instructions and directions from the state tax commissioner.

Error from Superior Court, Wilkes County; W. L. Hodges, Judge.

Suit by the Washington Exchange Bank and others against A. C. Barnett, Tax Collector, and others. Judgment denying an injunction, and plaintiffs bring error. Affirmed.

The Washington Exchange Bank and some 33 citizens and taxpayers of Wilkes county filed their equitable petition against the tax collector, the sheriff, and the tax receiver of the county, seeking to enjoin the defendants from enforcing certain tax *fi. fas.* It is alleged in the petition that within the time required by law petitioners legally and properly made returns of their property for taxation, in the year 1920; that for that year the board of tax assessors for the county were ordered by the state tax commissioner to increase the value of the assessment in Wilkes county 75 per cent. over the previous year's assessment, which the board of assessors and equalizers refused to do, but did increase the same 35 per cent. over the preceding year; that the board of assessors made report and wound up the business of the board in the year 1920 within the time required by law, their report showing an increase in the valuation of all the property in the county of 35 per cent., and gave notice by mailing same to petitioners; that petitioners were not given notice as provided by law of the increase in the assessment, and had no opportunity to be heard, so as to con-

test the raise in the valuation of their property, until after the assessment was made. In the petition an attack is made upon the constitutionality of sections 6, 13, and 14 of the act providing for a system of equalization of taxation in this state, approved August 14, 1913 (Acts 1913, p. 123).

At the interlocutory hearing the judge passed an order dissolving the restraining order theretofore granted, and refused the injunction.

I. T. Irvin, Jr., of Washington, Ga., for plaintiffs in error.

Clement E. Sutton, of Washington, Ga., and Alvin G. Golucke, of Crawfordville, for defendants in error.

GILBERT, J. (after stating the facts as above). [1] 1. The court below did not err in refusing an injunction in this case. The questions of the constitutionality of those parts of the act here attacked have already been passed upon and discussed at length, rendering unnecessary a further discussion, inasmuch as we adhere to these decisions. In the case of *Ogletree v. Woodward*, 150 Ga. 691, 105 S. E. 243, not only is the decision rendered adversely to the contentions of the plaintiffs in error here, upon the constitutionality of the law, but the questions are there dealt with at length by Justice George; and that decision and the decisions upon which it is based uphold the constitutionality of the equalization act as against the attacks made in the instant case. The *Ogletree Case* deals with all the questions made as to the constitutionality of sections 13 and 14, and also points out that the decision in the case of *Turner v. Wade*, 254 U. S. 64, 41 Sup. Ct. 27, 65 L. Ed. 134, affects only that part of section 6 of the equalization act which contains the particular provision embodied in these words: "else the decision of said board shall stand affirmed and shall be binding in the premises." And it was also ruled in this connection, in the *Ogletree Case*, *supra*, that—

"The main purpose of the statute not being affected by the unconstitutionality of the particular provision, the whole act is not thereby defeated."

Upon a review of that case, made at the request of the plaintiffs in error, the court declines to reverse and set aside that decision.

[2] 2. The allegation in the petition, that notices of the changes made in the taxpayers' returns and of the increased assessments were not given as required by law, does not seem to be borne out by the evidence submitted at the hearing. At least, there is evidence in the record from which the judge could have found that the notices were duly served. An affidavit was submitted at the hearing, made by D. S. Standard, showing

that he was a member of the board of tax equalizers for Wilkes county during the year 1920, and this affidavit contains the recital that—

"The board caused written notice to be served by the deputy sheriff of said county on all parties in said county whose cases are named, before the raise of their properties returned became finally fixed within the time required by law. That the only notices sent by mail were those to taxpayers living without said county and state, as required by the act."

[3] 3. It is alleged in the petition that the increase of 20 per cent. in the valuations of the properties for which the taxes were assessed was not made by the board of county tax assessors, although the state tax commissioner had already directed that such increase be made, but that the increase was made by the tax receiver himself. The judge was authorized to find to the contrary of this allegation. In the record we find the following affidavit made by P. N. Combs, tax receiver of the county:

"That on or about the — day of July, 1920, he was ordered by the state tax commissioner of Georgia to increase assessments of property of Wilkes county of each taxpayer thereof 20 per cent. over the assessments fixed by the board of county assessors for the year 1920. That the tax commissioner ordered the county tax assessors to make this increase, but that they refused to do so, and thereafter he was ordered to have said 20 per cent. of values added to each taxpayer's assessment in said county. That he objected to doing this, and sent an attorney to Atlanta to endeavor to get the state tax commissioner to rescind this order, but that the said state tax commissioner refused to do so."

But further on in the record we find another affidavit made by the same witness, as follows:

"That said P. N. Combs is tax receiver of Wilkes county, Ga., and acted as such during the year 1920. That he also served as clerk to the local board of tax equalizers of said county. That on or about the — day of —, 1920, after the book of the tax receiver was made up and mailed to the comptroller general, that about the date of July 30, 1920, he was instructed by the local board of tax equalizers of Wilkes county, Ga., acting under advice from Hon. H. J. Fullbright, state tax commissioner, and also by the said state tax commissioner directly, to add 20 per cent. increase to all the taxable property returned for taxation in Wilkes county for the year 1920, in order to equalize the taxes of said county with other sections of the state. That such instructions were immediately carried out, and all returns of taxpayers were raised 20 per cent. of the amount of the original return."

Construing the two together, as it is not absolutely necessary to hold that they are contradictory, it means that the affiant, clerk of the board, acting under the instructions

of the board, made the changes complained of. And this was sufficient compliance with the law requiring the changes to be made by the board.

Judgment affirmed.

All the Justices concur, except BECK, P. J., disqualified.

(152 Ga. 696)

WILLIAMS v. MAYOR AND COUNCIL OF WAYNESBORO. (No. 2825.)

(Supreme Court of Georgia. Feb. 17, 1922.)

(Syllabus by the Court.)

1. Licenses \S 29—City may increase occupation tax after tax first levied has been paid.

Where a city has full power to tax an occupation, it may increase the rate on the particular class of persons engaged therein at any time before the expiration of the period for the enforcement of the tax, after the tax first levied has been paid.

2. Licenses \S 7(9)—No power to impose prohibitive tax on legitimate business.

The mayor and council of a city have not, under legislative grant of authority to levy occupation taxes, the power to impose upon a useful and legitimate business a prohibitive tax.

3. Licenses \S 7(9)—Tax on ice dealers held unreasonable, prohibitive, and confiscatory.

The occupation tax of \$300 on ice dealers in the city of Waynesboro, and \$100 additional on each wagon employed in such business, is unreasonable, prohibitive, and confiscatory, under the facts in this case.

(Additional Syllabus by Editorial Staff.)

4. Licenses \S 7(9)—Occupation tax presumed reasonable.

The presumption is always in favor of the reasonableness of an occupation tax imposed by a city, and the burden is on one attacking the tax to establish the fact that it is unreasonable and prohibitive.

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Suit for injunction by J. P. A. Williams against the Mayor and Council of Waynesboro. An injunction was refused, and plaintiff brings error. Reversed.

Williams filed his petition to enjoin the enforcement of an ordinance of the city of Waynesboro, which imposed an occupation tax of \$300 on dealers in ice and an additional tax of \$100 for each wagon used in its delivery, on the ground that it was unreasonable and oppressive. This ordinance was passed on April 4, 1921. Prior to that time the occupation tax on ice dealers was \$25. The plaintiff had been engaged in the business of selling ice in Waynesboro for a number of years prior to the enactment of this ordinance. The revenue year in that city runs from October 1st of one year to Octo-

ber 1st of the next year. Williams used three wagons in connection with his ice business, and under this ordinance would have to pay a tax of \$600 per annum. For lack of money he was unable to pay this tax and would have to go out of business.

The members of the city council of Waynesboro at the date of the passage of this ordinance were A. J. Herrington, W. E. Taylor, F. Hamp Blount, Frank A. Blount, Gray Quinney, and Moses C. Cohen. Frank S. Palmer was mayor. A majority of these were members of the Waynesboro Ice Association.

A witness for the plaintiff testified that he heard Frank A. Blount, on April 8, 1921, say that the city council imposed this heavy license tax on ice dealers because Williams was selling ice at such a low price that the Waynesboro Ice Association could not compete, and that the tax was imposed to prohibit Williams from further dealing in ice. Another witness for the plaintiff testified that on the morning of April 9, 1921, a few days after Williams had been compelled to stop selling ice by reason of this tax, the Waynesboro Ice Association raised the price of ice from 70 to 80 cents per hundred, while Williams was retailing ice at 50 cents per hundred on the day previous. Edgar Barger, on behalf of the plaintiff, testified that for the past year and several years prior thereto he had been engaged in retailing ice in Waynesboro, but owing to this tax it was impossible for him to engage in the ice business. He could not carry on such business profitably when operated on the most economical basis. His yearly sales would not exceed 500 tons. In April, 1920, an ordinance was passed, imposing an occupation tax on such dealers of \$25. During the years 1918 and 1919 the plaintiff sold, respectively, 2,100 tons and 2,600 tons. In 1920 his sales amounted to 1,700 tons, due to the fact that the Waynesboro Ice Association had begun the sale of ice in September of that year. This association sold approximately 300 tons during the remainder of that year. Edgar Barger sold about 500 tons. All dealers did not sell more than 2,700 tons. He sold ice at from \$12 to \$15 per ton, making a very small profit. The average consumption of ice in Waynesboro is 2,500 tons per annum. The Waynesboro Ice Association is selling one-half or more of the ice consumed in that city. The plaintiff's sales for the present revenue year will not exceed 1,200 tons, and will yield the gross sum of \$12,000. The margin of profit is so small that he cannot afford to pay this occupation tax. The cost of 1,200 tons of ice and the sale and delivery to customers will amount to \$10,000, leaving a profit of \$2,000, with nothing deducted for depreciation.

The clerk of the city council testified that

the plaintiff paid the license tax on his ice business of \$25 for the year ending October 1, 1920. No change in this tax was made for the year beginning October 1, 1920, until April 4, 1921, when the tax of \$300, and \$100 on each additional wagon was imposed. On April 9, 1921, the plaintiff tendered to him as clerk \$25 in payment of said license tax, which he refused. Under the ordinance of the city of Waynesboro an occupation tax is imposed on merchants of \$5 on the first thousand dollars worth of business done or fraction, and \$1 on each additional thousand. Blacksmiths pay \$35, merchandise brokers \$25, stockbrokers \$10, boarding houses \$10, bottling works \$75, contractors \$25 to \$100, dealers in cotton seed or seed cotton \$25, public drays \$25, express companies \$100, hotel keepers \$50, insurance companies \$10, dealers in green meats \$25, candy factories \$10, carriage and wagon factories \$35, opera houses or music halls \$50, delivery and sales stables \$25, telephone and telegraph companies \$25, storage warehouses \$50, lumber yards \$25, dealers in brick \$25, cotton-oil mills \$200, packing houses \$50, milk sellers \$10, and public gineries \$50.

J. E. Munday, manager, and John B. McNatt, bookkeeper, of the Southern Cotton Oil Company, testified that the annual business of such companies in Waynesboro amounts to \$75,000 per annum. C. L. Rowland, manager of the Burke County Oil & Fertilizer Company, testified that his company did an annual business of \$50,000 in Waynesboro. The occupation tax on ice dealers in the city of Augusta was \$150 per annum and on wagons \$5 for each horse. The population of Augusta was between 50,000 and 60,000, and that of Waynesboro between 3,000 and 4,000.

In its answer the defendant alleges that the plaintiff for a number of years was the sole ice dealer in Waynesboro, doing a business of \$40,000, and making net profits of \$10,000 per year, without payment of any license tax. He charged extortionate prices, and refused to give correct weights. The citizens of Waynesboro complained to the mayor and council for relief. On the first Monday in April, 1920, an ordinance was passed requiring all dealers to keep on hand accurate scales, and imposed a nominal license tax of \$25 on its dealers.

Donald Blount, agent of the Central of Georgia Railway Company at Waynesboro, testified, for the defendant, that there was delivered to the plaintiff from January 3, 1920, to December 13, 1920, 111 cars of ice, that the freight on each car up to September 3, 1920, was about \$15 per car of 30,000 pounds, and after September 3d \$18.75 per car. The cars contained 30,000 pounds, except in a few instances.

Robert Barger, for the defendant, testified that E. Barger & Bro. sold ice in

Waynesboro from April 1 to September 1, 1920, that during said period his firm sold an average of two cars of twelve tons each per week, or 480 tons. This ice cost from \$6 to \$8 per ton. Seven dollars would be an average price. The freight was \$1.50 per ton.

Floyd Scruggs, on behalf of the defendant, testified that he was employed by the plaintiff as delivery man of ice during the years 1919 and 1920. He sold during the season of 1920 an average of about a ton and a half per day. He sold ice to drug stores and beef markets at 60 cents, to business houses and stores at 75 cents, and to residences at \$1, per hundred. While these prices were supposed to be based on the weights of a hundred pounds, the ice weighed a great deal less; he being instructed to cut the ice so that it would sell at the weights at which the same was purchased. He was constantly met with complaints from the citizens of Waynesboro about the weights. He was paid \$3 per day for his services during the ice season of 1920, and others were paid the same amount. The only other expenses were the cost of maintaining the delivery wagons and the cost of storage.

R. L. Oliver, city clerk, testified that in addition to the occupation tax the Southern Cotton Oil Company paid during 1920 an ad valorem tax of \$379.80; the Burke County Oil Mill, in addition to the occupation tax, paid an ad valorem tax of \$135; the Waynesboro Gin Company, an ad valorem tax of \$105; and the Kitchens & Page Ginney, an ad valorem tax of \$63. A business' tax of \$300 upon each agent engaged in delivering fertilizer from warehouses has since been imposed. The ordinance of which plaintiff complains was unanimously passed, and in his opinion was not unreasonable or discriminatory.

J. H. Whitehead, president of the Waynesboro Ice Association, testified that he and 36 other citizens of the city of Waynesboro, in the spring of 1920, formed said association; that they borrowed \$25,000, and erected an ice plant in Waynesboro. Said organization was not formed for private gain, but solely for the benefit of the community. It is the purpose of said organization, as soon as its plant is paid for, to donate the same to the city of Waynesboro, without any gain or dividend to its members. This association and Williams are the only ice dealers within the limits of Waynesboro. The Waynesboro Ice Association has already paid this occupation tax. In his opinion this occupation tax is reasonable.

John G. Herrington deposed for the defendant that he is manager of the Waynesboro Ice Association, and that said association sold during 1920 400 tons of ice. The association is now selling approximately

half of the total amount of ice sold in Waynesboro.

James H. Whitehead, president of the Waynesboro Ice Association, testified for the defendant that there had been no increase by this association in the price of ice after the passage of the ordinance of April 4, 1921.

In rebuttal, the plaintiff testified that he pays a property tax in the city of Waynesboro on his lot where his warehouse is located and on his residence. His profits on ice sales did not go above \$2 per ton. The Waynesboro Ice Association did not go into the ice business until September of 1920. That company is now in the market, and he does not see how he could expect to sell more than 1,200 tons of ice during the year 1921.

When the purchaser weighed his own ice, the price was about \$1 per hundred. He was selling this year at 50 cents per hundred pounds on the average. The other company was selling at 70 cents. He is now paying drivers \$10 per week. He tried to sell ice so that the weights at which he bought in Augusta would hold out. The buyer would stand the loss. The ice he sold at \$20 per ton to retailers, to wholesale consumers at \$12 per ton, to drug stores at \$15 per ton, cost him \$6 per ton, later \$7 per ton, beside freight. He cannot account for his making only \$2 per ton profit when there is this difference between cost and selling price.

Frank A. Blount testified for the defendant that he denied that he made the statement about crushing out Williams' business, but admitted he did talk about it, and said if they wanted to take it that way they could do so. He admitted he said he would be willing to put the tax up to \$1,000 on account of the way the plaintiff had been charging people for ice when he had no opposition.

F. S. Palmer, for the defendant, testified that he is the mayor of Waynesboro; he never made the statement that this tax was put on to crush out Williams, but admitted he wrote to persons outside of Waynesboro to know if he would be permitted to levy a tax of \$2,000 or \$2,500. He felt that they were obliged to take some kind of a defensive step. He denies that there was any increase in the price of ice made by the new company on April 9, after they stopped Williams from selling his ice.

The judge below refused to grant the temporary restraining order, and this is the error assigned.

E. M. Price, of Waynesboro, and Wm. H. Fleming, of Augusta, for plaintiff in error.

E. V. Heath, of Waynesboro, and H. J. Fullbright, of Atlanta, for defendant in error.

HINES J. (after stating the facts as above). [1] 1. It is insisted by the plaintiff

that the mayor and city council of Waynesboro is without power to increase a business tax, where, at the beginning of the license year, there is an ordinance in existence fixing the amount of such tax; and that such increase of a business tax by a new ordinance, passed after the beginning of the revenue or license year of the municipality, would in effect be a revocation of the license granted to carry on the particular business for which it was granted. Counsel for plaintiff relies on the case of *Peginis v. Atlanta*, 132 Ga. 302, 63 S. E. 857, 35 L. R. A. (N. S.) 716. In that case this court drew a distinction between the collection of a business tax on occupations which are per se useful and lawful, although the method of imposing such tax is called a license, and the granting of a license, strictly so called, granted under the police power for the regulation and control of certain pursuits. The court said:

"In the former class the tax or charge is imposed for the purpose of collecting revenue; and although the mode of doing so is frequently called licensing, the real purpose is to enforce the collection of the municipal revenue. As to such occupations the municipal authorities are not vested with a discretion to grant or refuse licenses or to revoke such licenses at the will of the grantor."

This case is authority for the proposition that a municipal corporation cannot revoke a license to conduct a lawful and useful business, where the method of licensing is for the purpose of collecting an occupation tax on such business; but it does not decide that a municipality, having full power of levying occupation taxes, cannot change an ordinance in existence at the time its license year begins by passing a new ordinance increasing such occupation tax, where the increased tax is not unreasonable, arbitrary, prohibitive, or confiscatory, especially when such tax had not been paid under the prior ordinance before the passage of the new one. This court has held that—

"The municipal authorities could change an ordinance imposing a special tax upon a particular class of dealers by increasing the rate, after the tax first levied had been paid, but before the expiration of the time for returning and paying the same; and such a change, made between the date of the payment and the time when its collection could have been enforced, was not unlawful." *Mayor, etc., of Savannah v. Crawford*, 75 Ga. 35.

The principle ruled in that case may be justified upon the ground that a municipality, having full power to levy business taxes, can at any time increase the tax on a particular class of dealers, provided such increase is not arbitrary, prohibitive, confiscatory, or discriminatory, whenever the exigencies of the municipal finances require the increase.

The case of the plaintiff is not so strong

as that of the *Crawford Case*, just cited, because he did not pay the license tax for the license year beginning October 1, 1920, before the passage of the ordinance of April 4, 1921. Upon the authority of the *Crawford Case* we do not think that the levy of a larger occupation tax by the ordinance of April 4, 1921, than that fixed by the ordinance in force at beginning of the license year, is unlawful.

[2, 3] 2. It is now indisputably established by the decisions of this court that an occupation tax must be reasonable in amount and must not be discriminatory, confiscatory or prohibitive. *Morton v. Macon*, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485; *Mayor, etc., of Savannah v. Cooper*, 131 Ga. 670, 63 S. E. 138; *Southern Express Co. v. Ty Ty*, 141 Ga. 421, 81 S. E. 114; *Western Union Telegraph Co. v. Fitzgerald*, 149 Ga. 330, 100 S. E. 104.

[4] The presumption is always in favor of the reasonableness of the tax, and the burden is upon the plaintiff to establish the fact that it is unreasonable or prohibitive. Is it shown under the facts of this case that the occupation tax, imposed upon the plaintiff, by this ordinance, is unreasonable, prohibitive, or confiscatory? The undisputed evidence shows that the tax has driven out of the ice business one of the three ice dealers in the city of Waynesboro, and prohibits the plaintiff, one of these three ice dealers, from continuing this business in the city. This leaves the Waynesboro Ice Association as the sole ice dealer in Waynesboro, and gives to this association a monopoly of the ice business in that city. The effect of this tax has been prohibitive as to all dealers in ice except this association.

The plaintiff asserts that his net earnings amounted to only \$2,000 per annum, and this ordinance imposes a tax of 30 per cent. on that amount. The city contends that the plaintiff had been making a net income of \$10,000 per annum. Even according to the contention of the city, he was making this amount of net income before the Waynesboro Ice Association began to make and sell ice in Waynesboro. Since the plaintiff has been compelled to meet this new competition, he has been able to do only about half as much business as he had been doing prior to the levying of this tax. It is shown that there are consumed in Waynesboro annually 25,000 to 27,000 tons of ice. The inference may be fairly drawn from the evidence that the plaintiff will hereafter sell not more than one-half of this amount of ice consumed in that city. In that event he will pay 12 per cent. upon his net income as an occupation tax. But assuming that the plaintiff could earn \$10,000 per annum, this occupation tax amounts to 6 per cent. of that amount. This court has held that an occupation tax of \$500 upon "money lenders, copartners, as-

sociations, corporations, or individuals, lending money on household or kitchen furniture and wearing apparel," is unreasonable (*Morton v. Macon*, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485); and that a tax of \$400 upon an agent selling fresh meats, his salary being but \$1,800, was excessive and unreasonable (*Mayor, etc., of Savannah v. Cooper*, 131 Ga. 670, 63 S. E. 138).

In this case the tax has been proved prohibitive in its results by driving out all dealers but one, and in creating a monopoly in the ice business in the city of Waynesboro. This alone would not make such tax unlawful, but can be considered in determining, under the whole situation, whether such tax is unreasonable.

So we reach the conclusion that this occupation tax is unreasonable, and that the court below should have granted an injunction restraining its enforcement.

Judgment reversed.

All the Justices concur.

(152 Ga. 677)

CARAKER v. BROWN. (No. 2510.)

(Supreme Court of Georgia. Feb. 17, 1922.)

(*Syllabus by the Court.*)

1. Executors and administrators \S 130(2)—Administrator held not entitled to recover land not shown to be needed for payment of debts or for distribution.

There being no evidence that the administrator had ever been in possession of the premises sued for, or that any order for the sale thereof had ever been granted to him by the court of ordinary, or that there was any necessity for the administrator to recover them in order to pay the debts of his intestate, or any circumstances tending to show the necessity for their recovery in order for the administrator to distribute the same, a verdict for the defendant was demanded; and the court erred in not granting a new trial on the ground that the verdict was contrary to the evidence. *Adams v. Phillips*, 132 Ga. 455, 64 S. E. 467; *Winn v. Simmons*, 141 Ga. 680, 81 S. E. 1106.

2. Wills \S 800—Administrator of wife given nothing to which she was not otherwise entitled held not estopped to claim land by wife's acceptance of legacy; essentials of estoppel against legatee whose property is disposed of by will stated.

The fact that the intestate of the plaintiff owed no debts, and that all the legatees under the will of the husband of said intestate, including the latter, accepted and took possession of the legacies given them under said will, would not estop her administrator from asserting title to be in her to land in which she was given a life estate, under said will. To constitute an estoppel the testator must have affected to give property not his own, which was true in this case; but he must also have given

a benefit to the person to whom that property belongs, which is not true in this case, as the wife did not get any benefit under the will to which she was not entitled independently of the will, and such legatee must elect to take under the instrument. Civ. Code 1910, § 4610; *Johnson v. Hayes*, 139 Ga. 218, 221, 77 S. E. 73.

3. Trial \S 240, 253(3)—Instruction on title by prescription held properly refused as argumentative; instruction erroneous as not enumerating essential elements of prescriptive title.

The court did not err in refusing a request to charge which was couched in argumentative language. *McGee v. Young*, 132 Ga. 606, 64 S. E. 689. The written request set out in the second ground of the defendant's amendment to his motion for new trial has this infirmity. Besides, this request was faulty in not enumerating all the elements necessary to give a prescriptive title.

4. Adverse possession \S 43(6)—Possession of executor, legatee, and legatee's grantee may be tacked.

The possession of property by the vendee of a legatee, by the legatee, and by the executor of the will under which the legatee was given such property may be tacked to make out the full period of the prescriptive term.

5. Adverse possession \S 116(1) — Husband and wife \S 16—Instruction as to title by possession for 20 years properly refused when not pertinent to evidence; prescription does not run as between husband and wife jointly occupying premises as a home.

The court did not err in refusing a written request to charge, based upon the theory that the defendant had acquired a prescriptive title by 20 years' possession, because there was no view of the evidence under which said charge was pertinent. Where a husband and wife jointly occupy premises as a home, prescription will not run in favor of one against the other. *Carpenter v. Booker*, 131 Ga. 546, 62 S. E. 983, 127 Am. St. Rep. 241.

6. Husband and wife \S 16—No presumption of husband's possession of property jointly occupied but owned by wife.

The court did not err in refusing to charge the jury, when requested so to do by the defendant, that, when husband and wife occupy property jointly, the presumption of law is that such possession is that of the husband, and that the burden was on the plaintiff to rebut this presumption; the undisputed evidence showing title in the wife to such property during their joint occupancy of the premises in dispute.

7. Deeds \S 119—Whether land involved was embraced held properly submitted to jury.

The court did not err in submitting to the jury the question whether the premises in dispute were embraced in the deeds under which the plaintiff claimed, as the court could not as matter of law determine this question from the description embraced in these muniments of title.

8. Estoppel §71—One permitting another to sell land and executing formal disclaimer held estopped to claim title.

Where the owner of land permits another to sell it to a third person, and at the same time executes a formal disclaimer of title thereto, which disclaimer is attached to the deed under which said land is so sold, and on the strength of which disclaimer the vendee buys and accepts title, the maker of said disclaimer, and his heirs would be estopped from afterward asserting title to the property so conveyed.

9. Deeds §25—Disclaimer of title under seal attached to another's conveyance held a sufficient muniment of title.

The court did not err in charging the jury that the muniments of title under which the plaintiff claimed were sufficient to convey the title to the premises in dispute from the common grantor to the intestate of plaintiff.

10. Appeal and error §302(3)—Grounds of motion complaining of admission of documents insufficient when they are not copied or contents stated.

The twelfth, fourteenth, and fifteenth grounds complain of the admission of certain deeds and a mortgage. These grounds do not contain copies of these instruments, nor state their contents substantially. For this reason these grounds cannot be considered. *Calaway v. Beachamp*, 140 Ga. 207, 78 S. E. 846.

11. Evidence §175, 273(3)—Homestead §51—Original homestead papers the best evidence, and record inadmissible until loss of original shown; homestead void when not approved at time fixed; homestead papers inadmissible to prove person's title when evidence of adverse possession unnecessary.

The court did not err in excluding the record of the homestead of Hamilton Brown, Sr.: (a) Because the original homestead papers, and not the record thereof, were the highest and best evidence, the loss of the originals not being shown. *Brown v. Driggers*, 62 Ga. 354; *Larey v. Baker*, 85 Ga. 687, 11 S. E. 800. (b) Because the homestead was void, not having been approved at the time fixed for the hearing of the application. *West v. McWhorter*, 141 Ga. 590, 598, 81 S. E. 859. (c) Because the homestead proceedings were irrelevant, declarations of one in possession of the property in favor of his own title being only admissible to prove his adverse possession (Civ. Code 1910, § 5767), and title being shown in Hamilton Brown, Sr., at the date of the homestead, thus rendering evidence of adverse possession unnecessary and irrelevant to establish his title.

12. Deeds §38(1)—Property may be conveyed by descriptive name, which will prevail over uncertain and imperfect description.

When property has a descriptive name, it may be conveyed by that name; and such description will prevail over one which is intended to be further description, but which is uncertain and imperfect. *Bunger v. Grimm*, 142 Ga. 448, 83 S. E. 200, Ann. Cas. 1916C, 178.

(Additional Syllabus by Editorial Staff.)

13. Adverse possession §63(4)—Grantor's possession may be adverse to grantee in case of explicit disclaimer.

Though possession never surrendered by a grantor is held under the grantee, and not adverse to his title, an explicit disclaimer by the grantor of such relation and a notorious assertion of right in himself will render it adverse.

14. Adverse possession §10—Executor holds in his own right within rule as to character of holding.

Within Civ. Code 1910, § 4164, providing that possession, to be the foundation of prescription, must be in the right of the possessor, and not of another, the possession of the executor is in his own right as such until he assents to a devise under section 3895.

15. Adverse possession §63(4)—Grantor's devise of land held explicit disclaimer of grantee's title rendering possession adverse.

A grantor's will devising the granted lands to a third person was an explicit disclaimer of the grantee's title, rendering his executor's possession adverse to the grantee.

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by Joe Brown, administrator, against C. T. Caraker. Judgment for plaintiff, and defendant brings error. Reversed.

This was an action of ejectment in the fictitious form commenced on December 20, 1913. The demise was laid in the name of Joe Brown as administrator of Katherine Brown. The suit was brought to recover "that tract of land situated and lying in the city of Milledgeville, Baldwin county, Ga., known in the plan of the city as part of lot No. 3, square No. 24, bounded on the east by lands of Bell Brown; north by Washington street; south by lands formerly owned by Hamp Brown estate; west by Elbert street." The defendant filed his plea of not guilty, and set up title by prescription by possession for 20 years, and by possession for 7 years under color of title. The defendant amended his answer by setting up valuable improvements made upon the premises, under a bona fide claim of title, of the value of \$1,024.53, and prayed that the value of such improvements be adjudged a lien upon the land if the plaintiff should recover.

Both parties claimed under W. G. Lanterman. On March 28, 1871, Lanterman conveyed to Hamilton Brown certain lands, including the premises in dispute. On January 7, 1878, W. G. Lanterman conveyed by deed to Samuel Walker lands embracing the premises in dispute, which was duly recorded; and attached to said deed was the following instrument:

"Georgia, Baldwin County: I, Hamilton Brown, Sr., certify that the following described city lots in Milledgeville and the island here-

inafter described are not included in my homestead, and I lay no claim thereto, as I was due the purchase money to W. G. Lanterman for said city lots, and the mortgage given by me to said Lanterman on the Island was dated prior to the homestead act of 1868, said property known and described as follows: 'The north half of lot No. three (3) in square 24, and the south half of lot No. three (3) in square twenty-four (24), and the south half of lot No. four (4) in square twenty-four (24), and the whole of lot No. one (1) in square twenty-four (24), containing one acre, and the three half lots containing half acre each, together with all the appurtenances thereto appertaining; also the John Haas and Dan'l Caraker Island, lying in the Oconee river, near Milledgeville, Ga., in said county, containing seven acres, more or less, one half undivided interest thereof for and during the natural life of Lizzie Willis, the other undivided half interest in fee simple.'

"In witness whereof I have hereto set my hand and affixed my seal this Jan'y. 7, 1878.

"Hamilton Brown. [L. S.]

"Attest:

"B. B. Adams.

"W. W. Williamson."

The plaintiff claimed by mesne conveyances from Samuel Walker into Katherine Brown. He introduced his letters of administration on Katherine Brown's estate, granted by the court of ordinary of Baldwin county on November 18, 1913.

Hamilton Brown and his family lived on these premises for many years prior to his death in February, 1902. His wife, Katherine Brown, died in possession of these premises, some seven months after the death of her husband. The plaintiff did not introduce any order of the court of ordinary authorizing him to sell this land, and he did not show that it was necessary for him to recover the same for the payment of debts or the distribution among the heirs of Katherine Brown. Hamilton Brown died testate, and his will dated June 7, 1901, was probated and admitted to record on February 5, 1902. The eighth item of his will was as follows:

"I give and bequeath to my son, Frank, the house and lot on which I now reside, after the death of his mother, everything to remain on said premises just as it now is, so long as his mother shall live, also all of the parcel of land outside of that belonging to Joseph, with all the improvements thereon, in same block as that of my residence lot, also the vacant quarter of an acre lot fronting the Covey lot, and adjoining lot given to William."

This item devised the property in dispute.

Frank Brown was named as executor of this will, and letters testamentary were issued to him on February 5, 1902. On November 17, 1909, Frank F. Brown conveyed to C. T. Caraker the premises in dispute. Caraker took immediate possession of the premises in dispute, under his deed from Frank Brown, and has had continuous and uninterrupted possession thereof since his

purchase. Sometimes the house on these premises would be vacant, due to the fact that one tenant would move out and some time would elapse before another tenant would take possession; but Caraker controlled and claimed this property, his possession being open, public, and notorious.

Frank Brown, as executor of his father's will, took possession of the premises in dispute, and held the same as executor or individually, through tenants, continuously from the death of his testator down to the time he sold the same to Caraker.

The jury found for the plaintiff the premises in dispute; that the rental value of the land from December 20, 1909, was \$850; that the present market value of the land, exclusive of improvements, was \$800; that the defendant placed these improvements thereon in good faith; and that the present market value of such improvements was \$1,500. Judgment was entered in favor of the plaintiff, in accordance with this verdict. The defendant moved for a new trial on the formal grounds, and on the following additional grounds:

(1) Because the court refused to charge the jury, when properly requested in writing by the defendant, "that if you believe from the evidence that Katherine Brown died owing no debts, and * * * that all the legatees under the will of Hamilton Brown accepted the legacies provided therein for them, and went into possession of the various legacies therein provided without protest or objection, I charge you that the plaintiff, as administrator of the estate of Katherine Brown, would be estopped to assert that the title to the property sued for was in Katherine Brown."

(2) Because the court erred in refusing to charge the jury, when properly requested in writing, the following: "The defendant in this case contends that; even if it is true that Katherine Brown died in possession of the property sued for, claiming it as her own in good faith, and even if it is also true that she had occupied the property openly, notoriously, uninterruptedly, continuously, and adversely under a bona fide claim of right for seven years under color of title, giving her a good prescriptive title, nevertheless the plaintiff is not entitled to recover, because, as defendant contends, after the death of Katherine Brown in possession, he acquired a good prescriptive title under seven years' possession under color of title. He contends that immediately after the death of Hamilton Brown, Frank Brown, executor of his * * * will, * * * took possession of the property in controversy as legatee under the will of Hamilton Brown, and that this possession continued uninterruptedly for more than seven years thereafter, and that while in possession as such legatee * * * Brown sold the property in dispute * * * to Caraker, who continued in possession thereof about four years before the filing of this suit. The defendant contends that the possession of Frank Brown as legatee under the will of Hamilton Brown was open, notorious, continuous, uninterrupted, adverse, and under a bona fide claim of right, and

that the possession of Caraker under deed from Frank Brown was also open, notorious, continuous, uninterrupted, adverse, and under a claim of right.

"I charge you that the will of Hamilton Brown was color of title; and if you believe that Frank Brown took possession of the premises in dispute as legatee, and said possession continued uninterruptedly and adversely for the period named, and that, under the deed from Frank Brown, C. T. Caraker held possession of a similar character from that date to the date of the filing of this suit, then the defendant would have a good title by prescription, and it would be your duty to find a verdict in his favor, although you might be satisfied that Katherine Brown at the date of her death had a good title to the property."

(3) Because the court erred in refusing a timely written request to give in charge to the jury the following: "If you believe from the evidence that Frank Brown, as executor of the estate of Hamilton Brown, went into possession of the property in controversy in 1902, immediately after the death of Hamilton Brown, Sr., and remained in possession thereof from that date to 1909, at which date he sold the property to C. T. Caraker, and if you believe that that possession as executor was open, notorious, peaceable, continuous, uninterrupted, adverse, and under a bona fide claim of right, as executor, and if you further believe that in 1909 he sold the property to C. T. Caraker, and that C. T. Caraker remained in possession of said property from that date to the filing of this suit, and if you further believe that the possession of Caraker was of the same character hereinbefore referred to, then I charge you that the defendant would have a good prescriptive title, and it would be your duty to find a verdict in his favor, although you should believe that Katherine Brown at the time of her death had a good prescriptive title thereto."

(4) Because the court erred in refusing a timely written request to give in charge to the jury the following: "I charge you that, if you believe from the evidence that the possession of Hamilton Brown and Frank Brown and C. T. Caraker was taken together for a period of 20 years or more, and that the possession of all three of said persons named was of the character hereinbefore set out, then the defendant would have a good title, and it would be your duty to return a verdict in his favor, notwithstanding the fact that Katherine Brown died in the physical possession of the property. * * *"

(5) Because the court erred in refusing a timely written request to give in charge to the jury the following: "I charge you that, where a husband and wife occupy property jointly, the presumption of law is that the possession is that of the husband, and that the burden of proof is on the plaintiff in this case to show that the possession was really the [wife's], and that she occupied the property under a bona fide claim of right in herself. * * *"

(6) Because the court erred in charging the jury as follows: "I charge you this principle of law: It is claimed that Mr. Caraker did not buy this land until 1909. I charge you, if Frank Brown went into possession of the property in dispute, not as a legatee, but as the executor, and he remained in possession of

it as executor, and not as legatee, and if he sold it to Mr. Caraker in the year 1909, in order for Mr. Caraker to have a good prescriptive title to the property, he and Frank Brown, under whom he claims, must have been in possession of the land as the owner, as I have already explained to you, for seven years previous to December 30, 1913; and if Frank Brown was in possession of it from 1902 up to a short time before he sold it to Mr. Caraker as executor, and not as legatee, then the possession he held it under as executor would not be counted as part of the seven years. He would have to be in possession of it, he and Mr. Caraker, for seven years, and Frank Brown's possession would have to be as legatee, and not as executor. * * *"

(7) Because the court erred in charging the jury as follows: "There have been certain deeds introduced in evidence; and I will call them out to the jury, that you may clearly understand them. All these deeds will be out before you, and when you go to your jury room it would be proper for the jury to take all these instructions I read to you; then it is for you to say whether or not the property in dispute is embraced in those deeds. If you reach the conclusion the property in dispute is not embraced in the description in those deeds, under those circumstances the court charges you that the plaintiff would not be entitled to recover. But, if you reach the conclusion the property in dispute is embraced in the description of those deeds that will be out before you, the court charges you the plaintiff would be entitled to recover, provided Mr. Caraker has not a prescriptive title to the land as explained to you by the court. * * * The defendant assigns this charge as error, because the property sued for is described as being bounded on the north by Washington street and on the west by Albert street, and the property embraced in said deeds does not touch either of said streets."

(8) In this ground it is complained that the court erred in his construction of the disclaimer of Hamilton Brown, attached to the deed of Lanterman to Walker, made in 1878. The court charged the jury that, if Brown signed this paper disclaiming title to the property therein described, and on the strength of that paper that property was sold by Lanterman to another, on the strength of his disclaimer, then Brown and his heirs would be bound by that paper, provided the premises in dispute are embraced in said disclaimer.

(9) In the charge complained of in this ground the court called the attention of the jury to the muniments of title under which the plaintiff claimed title to the premises in dispute, and instructed the jury that if, after reading the descriptions of the property embraced in those conveyances, they reached the conclusion that the property sued for was the same property embraced in those instruments, they were sufficient to convey the title from Lanterman to Katherine Brown. The court then instructed the jury that, when property having a descriptive name is conveyed by that name, such description will prevail over one which is intended to be a further description, and left the jury to determine whether the property sued for was embraced in those conveyances. The exception to this charge is that these conveyances show upon their face that

the property embraced therein is different from that sued for. The further contention is that said charge is not abstractly true, but, if correct, is irrelevant, because the deeds referred to refer to the property as the Hamp Brown place, whereas the uncontradicted evidence shows that Hamp Brown owned the entire block, containing about four acres.

(10) In the charge complained of in this ground the court instructed the jury that, if they reached the conclusion that the property sued for is not embraced in the conveyances under which the plaintiff claims, they should find for the defendant, but, if they found that the land sued for is embraced in those conveyances, then the plaintiff would be entitled to recover, if the defendant does not show a prescriptive title.

(11) In this ground the court instructed the jury that, if Frank Brown went into possession of this property in 1902 as a legatee, and not as executor, and if his possession, coupled with the possession of Caraker in this case, was for a period of seven years or longer, previous to the filing of this suit, Caraker would have a good prescriptive title to the property, although it may have belonged to Katherine Brown at the time of her death. The defendant says this charge is erroneous because under the uncontradicted evidence Frank Brown went into possession of this property in the year 1902 as legatee, and not as executor.

(12) This ground complains of the admission in evidence of a deed from W. A. Walker to Joseph E. Pottle, dated July 16, 1890, a deed from Joseph E. Pottle to W. A. Walker, dated July 17, 1890, and a deed from W. A. Walker to Katherine Brown, dated October 3, 1890. The objection to these deeds was that they described the property therein conveyed as "all that lot or parcel of land situate, lying, and being in the city of Milledgeville, said state and county, known in the plan of said city as part of lot No. three (3) in square No. twenty-four (24), formerly known as the Hamp Brown place, bounded as follows: By Hamp Brown and others on the north, east, and west, and on the south by Saml. Walker; said lot said to contain one-half ($\frac{1}{2}$) acre, more or less"; that the descriptions in these deeds show that the property therein conveyed is different from that sued for; and that the court should have so instructed the jury.

(13) In this ground it is complained that the court erred in admitting in evidence the disclaimer signed by Hamilton Brown, Sr., made in 1878, hereinbefore fully set out.

(14) In this ground it is complained that the court erred in admitting in evidence, over the objection of counsel for the defendant that the same were irrelevant, "the deed from W. G. Lanterman to Jerry Cooper; deed from C. W. Ennis, sheriff, to Samuel Walker; deed from Samuel Walker to C. H. Wright & Son; deed from C. H. Wright & Son to Matthew Brown; and mortgage from Matthew Brown to W. A. Walker, with power of sale."

(15) In this ground the defendant complains that the court erred in admitting in evidence, over his objection, "a mortgage from Matthew Brown to W. A. Walker, containing a power of sale." The objection to its admission was that it did not convey or create a lien on the property sued for.

(16) Because the court erred in refusing to

admit in evidence, when tendered by the defendant, "a homestead record of Baldwin county, on page 176 thereof, showing a homestead set aside to Hamilton Brown. Said homestead application was sworn to before the ordinary February 28, 1874, and was approved by the ordinary of said county on March 12, 1875, and the property surveyed and set apart to Hamilton Brown as a homestead for the benefit of his wife and minor children, including the whole of block No. 24 in the city of Milledgeville, and said block includes the property sued for." The defendant contends that this homestead was relevant because it showed that, during the life of Katherine Brown, Hamilton Brown claimed the property as his own, and that Katherine Brown recognized the property as that of Hamilton Brown, occupied it as beneficiary under the homestead, and that she made no claim or title to any part thereof.

The court overruled the defendant's motion for new trial; and this is the error complained of.

Allen & Pottle, of Milledgeville, for plaintiff in error.

Sibley & Sibley, of Milledgeville, for defendant in error.

HINES, J. (after stating the facts as above). [1-3, 5-7, 10-12] 1. None of the headnotes require elaboration, except the fourth, eighth, and ninth grounds.

[8] 2. The court construed the disclaimer of title by Hamilton Brown, Sr., to apply to lands embracing the premises in dispute. The court instructed the jury that under this disclaimer Brown and those claiming under him would be estopped to assert title against one who acquired title to these premises on the strength of his disclaimer. In this disclaimer Brown, who had undertaken to take out a homestead in lands embracing the premises in dispute, alleged that he was due W. G. Lanterman the purchase money of these lands, and had given a mortgage on a certain island prior to the homestead act of 1868 (Laws 1868, p. 27) to secure the payment thereof. In view of these facts he declared he laid no claim to this property. This disclaimer was under seal and attested by two witnesses, and was attached to the deed by which Lanterman conveyed this property, for a valuable consideration, to Samuel Walker. Evidently Brown knew that he could not hold the lands embraced in his homestead against the claim of Lanterman for the purchase money thereof; and for this reason made this solemn disclaimer of title thereto.

One who silently stands by and permits another to purchase his property without disclosing his title is estopped from subsequently setting up such title against the purchaser. Civil Code, § 4419. His heirs would likewise be estopped. If a person and his heirs can be estopped from asserting title to land under the above circumstances, he and his heirs would certainly be estopped from asserting title thereto when he solemnly enters into a

written disclaimer of title upon the strength of which a purchaser buys. This disclaimer of title is tantamount to Brown's joining in the deed from Lanterman to Walker. So the court did not err in charging the jury that Brown and his heirs were estopped from asserting title to these lands, after such solemn disclaimer, against one who purchased for value from Lanterman.

[9] 3. The court charged the jury that the muniments of title under which the plaintiff claimed were sufficient to convey the title to the premises in dispute from the common grantor to the plaintiff's intestate; and this charge is complained of. Both the plaintiff and the defendant claimed under W. G. Lanterman. The plaintiff claimed under mesne conveyances from W. G. Lanterman into Katherine Brown. The first deed under which the plaintiff claimed, being one from W. G. Lanterman to Samuel Walker, was made subsequently to a deed from Lanterman to Hamilton Brown, Sr. Whether this charge was correct or not depends upon the force and effect of the disclaimer made by Hamilton Brown, Sr., hereinbefore referred to. In essence and effect, this disclaimer, made under seal, and attached to the deed from Lanterman to Walker, has the same force and effect as if Brown had joined in the deed from Lanterman to Walker. In this disclaimer Brown admitted that he had purchased the premises in dispute from Lanterman, and had not paid him the purchase money thereof. Although Brown had undertaken to have these premises set aside, with other lands, as a homestead, the homestead would not be good against Lanterman's claim for the purchase money thereof. Realizing this, Brown disclaimed title thereto for the evident purpose of enabling Lanterman to convey the land directly to Walker; and this amounts to Brown's so joining in this conveyance as to pass to the vendee of Lanterman the title to the premises in dispute. It may be said that this disclaimer amounted to an estoppel only, and did not convey title. *Thornton v. Ferguson*, 133 Ga. 825, 87 S. E. 97, 134 Am. St. Rep. 226; *Coursey v. Coursey*, 141 Ga. 65, 68, 80 S. E. 462. No prescribed form is essential to the validity of a deed to lands. If sufficient in itself to make known the transaction between the parties, no want of form will invalidate it. Civ. Code, § 4182. Very informal instruments have been held sufficient to pass title. *Horton v. Murden*, 117 Ga. 72, 43 S. E. 786, and cases cited.

When Brown executed this disclaimer, and it was attached to the deed from Lanterman to Walker, it was, in effect, the same as if Brown had joined in this conveyance, and was effectual to convey Brown's title to the premises in dispute to Walker under whom Katherine Brown claimed. So we submit that the court did not err in this charge.

[4] 4. The court was requested to charge the jury that the possession of the premises in dispute by the executor of Brown could be tacked to the subsequent possession of Frank Brown, to whom the premises in dispute were devised under the will of Brown, and to the possession of the vendee of Frank Brown, in order to make out the necessary period of prescription. This the court declined to do, but, on the contrary, charged the jury that they could not consider the possession of the executor in determining whether the vendee of Frank Brown had acquired a title by prescription to the premises in dispute. This is the vital point in this case. It is earnestly insisted by the counsel for the defendant in error that the court's ruling in this matter is correct. The argument is that the vendor, after making an absolute deed to lands, cannot prescribe against his vendee. Counsel for the plaintiff then asserts that the possession of the executor is that of his testator, and then draws the conclusion that, as the vendor could not prescribe against the vendee, the executor of the former cannot prescribe against such vendee. This would be sound logic, and unanswerable, but for the view which will now be stated.

[13] This court has held that possession, remaining with the grantor and never surrendered, is held under the grantee, and is not adverse to his title. *Jay v. Wheelchel*, 78 Ga. 786, 3 S. E. 906. But an explicit disclaimer by the vendor of such relation and a notorious assertion of right in himself will be sufficient to change the character of his possession and render it adverse to the grantee. 2 C. J. 143, § 246. There is nothing in the relation of vendor and vendee by deed executed which will prevent the vendor who may remain in possession from claiming adversely to the vendee.

"To say," says the Supreme Court of Vermont, "that the grantor, remaining in possession after his deed, is incapable of committing a disseisin upon his grantee, involves an absurdity too gross almost for argument. He is a mere tenant by sufferance, whom the grantee may elect to treat as a tenant, or as a disseisor. He may bring ejectment, or treat him as an occupier under himself. But if the grantor set up a claim of title in himself, and this be made known to the grantee, the grantor, from that time, becomes a disseisor in fact—the grantee can no longer treat him as a tenant." *Stevens v. Whitcomb*, 16 Vt. 121.

The grantor by warranty deed may acquire title against his grantee by adverse possession, and the rule estopping the grantor from setting up after-acquired title does not apply. *Chatham v. Lunsford*, 149 N. C. 363, 63 S. E. 81, 25 L. R. A. (N. S.) 129; *Abbett v. Page*, 92 Ala. 571, 9 South. 332; *Doolittle v. Robertson*, 109 Ala. 412, 19 South. 851; *Garabaldi v. Shattuck*, 70 Cal. 511, 11 Pac. 778; *Knight v. Knight*, 178 Ill. 553, 58 N. E. 306;

McClenahan v. Stevenson, 118 Iowa, 106, 91 N. W. 925; Bishop v. Van Winkle (Ky.) 117 S. W. 345; Zebriksa's Succession, 119 La. 1076, 44 South. 893; Traip v. Traip, 57 Me. 268; Hines v. Robinson, 57 Me. 324, 99 Am. Dec. 772; Stearns v. Hendersass, 9 Cush. (Mass.) 497, 57 Am. Dec. 65; Kelly v. Palmer, 91 Minn. 133, 97 N. W. 578; Sherman v. Kane, 86 N. Y. 57; Milnes v. Van Gilder, 197 Pa. 347, 47 Atl. 197, 80 Am. St. Rep. 828.

[14] If the grantor can hold adversely to his grantee and acquire title by prescription against his grantee, why cannot the executor of the grantor likewise hold adversely to the grantee of his testator and acquire title by prescription, not for himself, but for those whom he represents? The executor represents the devisees and legatees under the will. Fulghum v. Carruthers, 87 Ga. 484, 13 S. E. 597. It is said by counsel for the plaintiff that the possession of the executor is not in his own right, but in that of his testator, and that for this reason prescription cannot be based on his possession. This contention rests upon the principle that—

"Possession to be the foundation of a prescription must be in the right of the possessor, and not of another." Civil Code, § 4164.

This means that possession must be hostile, and that the possessor cannot prescribe against the persons for whom he holds possession. This contention is not sound. The possession of the executor is in his own right as such. He holds the title to the property devised until he assents to the bequests and turns over the land devised to the devisee. So there seems to be no good reason why his possession cannot form a link in the chain of possession from which a prescriptive title will ripen.

If property is conveyed to an active trustee, who holds possession of real estate for the use of the beneficiaries in the trust, his possession would be such as would enable the beneficiaries to tack their possession to his, in order to make out a prescriptive title. The possession of a receiver may be tacked to that of the debtor, and to that of the purchaser of the premises at a sale made under a decree in the case, to make out the full period of the prescriptive term. Verdery v. Savannah, etc., Ry. Co., 82 Ga. 675, 9 S. E. 1133. Here the receiver does not hold possession in his own right, but holds it as an officer of the court, for the benefit of those to whom the property, or its proceeds, may be awarded by the final judgment in the case.

If his possession is such as will support a prescription in favor of the owner of the property placed in his hands, why should not the possession of an executor be such as would support a prescription in favor of the devisees under the will of his testator?

Such privity exists between the testator and the devisee as will authorize the tacking of the two possessions to make out the period necessary to acquire title by prescription.

Where the administrator has the legal right by statute to take possession and control of real estate, his possession is in privity with that of the intestate, and upon his possession prescription can be based. Cannon v. Prude, 181 Ala. 629, 62 South. 24; Ricker v. Butler, 45 Minn. 545, 48 N. W. 407; Fugate v. Pierce, 49 Mo. 441; Rowland v. Williams, 23 Or. 515, 32 Pac. 402.

If prescription can be based upon the possession of an administrator, to which the subsequent possession of a grantee from him can be tacked in order to make out the prescriptive period, there is no reason why the possession of an executor will not support prescription. The case of the executor is stronger than that of the administrator. Upon the death of an intestate his lands descend at once to his heirs, subject to be administered; but in the case of a will the property devised or bequeathed does not pass immediately to the devisees or legatee, but the title thereto vests in the executor until he assents to the legacy. No devise or legacy passes the title until the assent of the executor is given to such devise or legacy. Civil Code, § 3895.

[15] In this case Hamilton Brown, Sr., by his will, disposed of the premises in dispute by devising them to his son, Frank Brown. Here was an explicit disclaimer of the title of his vendee and those claiming under such vendee. His will was probated and recorded. His executor immediately took possession of these premises under this will, and openly and notoriously held possession thereof as such executor and devisee for a period of seven years, and then sold to Caraker, who held possession for something over four years under his deed from the devisee of these premises.

We hold that the possession of the executor can be tacked to that of the vendee of the devisee to make out the necessary period of prescription.

Judgment reversed.

All the Justices concur.

(28 Ga. App. 353)

EDWARD ROSE CO. v. GATTI-GOODYEAR CO. (No. 13079.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1922.)*(Syllabus by the Court.)*

Sales ¶377—Petition on assigned contract for purchase by defendant of accumulations of mills insufficient without showing accumulations would be within the contract if it had not been assigned.

The petition did not set out a cause of action, and the court erred in overruling the general demurrer.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Gatti-Goodyear Company against Edward Rose Company. Judgment for plaintiff, and defendant brings error. Reversed.

Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, for defendant in error.

BROYLES, C. J. The Gatti-Goodyear Company, a corporation, brought suit against Edward Rose Company, a corporation, on the following contract:

"Greenville, S. C., Dec. 31, 1919.

"We confirm having sold you the following: Quantity: About 30,000 pounds monthly Dirty Dust House Fly, quantity estimated but not guaranteed, but to include all that we will accumulate during 1920. Price: 1½ cents per pound. F. o. b. shipping point of the Mills or Greenville, S. C. Terms: Net cash thirty days. Shipment: Monthly as accumulated. Remarks: The quality of this stock is to be just as produced by the mills.

"[Signed] The Chester Goodyear Co.,

"Per G. M. Goodyear, Treas.

"Accepted:

"Edward Rose Co.

"C. H. McMillian."

The petition alleges that on November 29, 1920, this contract was assigned by Chester M. Goodyear Company to Joseph Gatti, and that on December 7, 1920, Joseph Gatti assigned it to Gatti-Goodyear Company, the plaintiff in this case. The petition shows that on December 6, 1920, the plaintiff shipped to the defendant 22,129 pounds of the commodity contracted for, and that this ship-

ment was refused by the defendant, and that the contract price thereof was \$359.50, for which sum plaintiff sues. The petition further alleges that in December, 1920, plaintiff had on hand 14,950 pounds of the same commodity which it sought to ship and deliver to the defendant, but which the defendant refused to allow the plaintiff to ship, and that this refusal was a breach of the contract and damaged the plaintiff in an amount equal to the difference between the contract price of the goods and the market price, to wit, \$205.56, for which additional amount suit is brought. The petition alleged that the accumulations sued for were from the same mills as previously accumulated from, and none other, by Chester M. Goodyear Company, and that the accumulations were from the mills being accumulated from at the time the contract was made and subsequently; and that Chester M. Goodyear Company was accumulating from various mills at the time the contract between it and the defendant was made. The petition, however, does not allege that the goods sued for were not greater in quantity than they would have been if they had been accumulated by the Chester M. Goodyear Company, although the accumulation sued for was from the same mills as previously accumulated from by the Chester M. Goodyear Company. It does not appear from the petition that Chester M. Goodyear took over "all" the accumulations from those mills, or that the plaintiff did not take over all of such accumulations. In other words, the petition does not show that the accumulations sued for would have been included in the accumulations of the Chester M. Goodyear Company for the year 1920, had the contract not been assigned to the plaintiff. Hence, even if the contract were assignable (which question is not here passed upon), the petition does not show that the goods sued for were accumulated in accordance with that contract. Under these circumstances, the defendant, not having consented (so far as the petition shows) to the assignment of the contract, and not having in any way ratified the assignment, was not legally bound to accept the shipment made, or the shipment tendered, by the plaintiff.

It follows that the petition did not set out a cause of action, and that the court erred in overruling the general demurrer.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 238)

NORWOOD v. STATE. (No. 13111.)(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1922.)*(Syllabus by the Court.)***1. Homicide \S 317—Instruction that pistol is gun not cause for new trial.**

"An indictment for murder charged that the accused shot and killed the named decedent 'with a certain gun' which the accused then and there held. On the trial it appeared that the accused committed the homicide by shooting the decedent with a pistol. *Held*, that it was not cause for a new trial that the court told the jury that a pistol is a gun. *State v. Barrington*, 198 Mo. 23, 95 S. W. 235." *Hill v. State*, 147 Ga. 650(1), 95 S. E. 213. See *Burney v. State*, 22 Ga. App. 622(1), 97 S. E. 85, and cases cited in the opinion. The rulings in the above cases dispose of grounds 4 and 5 of the motion for a new trial. Counsel for the plaintiff in error request that we certify this case to the Supreme Court, in order that the above decisions may be "reviewed and overruled." We think this would be a useless consumption of time.

2. Homicide \S 317—Failure to define felony in charge on self-defense not error.

"In charging section 70 of the Penal Code, failure to explain to the jury the meaning of the word 'felony,' used therein, is not cause for a new trial, in the absence of an appropriate and timely request so to do." *Smith v. State*, 23 Ga. App. 541(4), 99 S. E. 142 citing *Pressley v. State*, 132 Ga. 64(3), 65, 63 S. E. 784; *Pickens v. State*, 132 Ga. 46, 63 S. E. 783; *Jordon v. State*, 18 Ga. App. 393, 400, 85 S. E. 455. Under the rulings in the above cases there is no merit in special ground 6 of the motion for a new trial.

3. Homicide \S 309(4)—Charge on manslaughter and mutual combat authorized when anything deducible tending to show manslaughter.

In *Cain v. State*, 7 Ga. App. 24, 65 S. E. 1069, this court said: "It is well settled by repeated rulings of the Supreme Court and this court that on a trial for murder, if there is anything deducible from the evidence or the defendant's statement that would tend to show manslaughter, voluntary or involuntary, it is the duty of the court to instruct the jury fully on the law of manslaughter. *Crawford v. State*, 12 Ga. 142(6); *Jackson v. State*, 76 Ga. 473; *Wynne v. State*, 56 Ga. 113; *Bell v. State*, 130 Ga. 865, 61 S. E. 996; *Strickland v. State*, 133 Ga. 76, 65 S. E. 148; *Pyle v. State*, 4 Ga. App. 811; 62 S. E. 540. In the *Crawford Case*, supra, the court strongly expresses itself on the subject, as follows: 'When a defendant is put upon trial for murder, and there is any doubt as to the grade of homicide of which he is guilty, it is the duty of the court clearly and distinctly to instruct the jury as to the law, defining the several grades of homicide as recognized by the Penal Code, and then leave it to the jury to find from the evidence of what particular grade he is guilty.' In *Jackson v. State*, supra, the court uses still stronger language, and holds that 'where

there is evidence sufficient to raise a doubt, however slight, upon the point whether the case is murder or manslaughter, voluntary or involuntary, the court should instruct the jury upon these grades of manslaughter as well as murder.'" Under these rulings as applied to the facts of this case, the trial judge did not err in charging on voluntary manslaughter or upon a mutual intent to fight.

4. Failure to give charge not error.

Under all the facts of this case it was not error harmful to the accused for the judge to fail to give in charge to the jury section 73 of the Penal Code of 1910.

5. Criminal law \S 942(1, 2)—Declarations of witness at variance with testimony not ground for new trial; evidence to impeach only witness on vital point not ground for new trial.

The following principles are thoroughly established in this state:

(a) "Declarations of a witness after trial, at variance with his sworn testimony, even when made under oath and explicitly asserting that his testimony on the trial was false, do not constitute a cause for a new trial. *Laseter v. Simpson*, 78 Ga. 61 (3 S. E. 243); *Munro v. Moody*, 78 Ga. 127 (2 S. E. 688); *Jordon v. State*, 124 Ga. 417(2) (52 S. E. 768); *Hardy v. State*, 117 Ga. 40 (43 S. E. 434); *Clark v. State*, 117 Ga. 254(8) (43 S. E. 853), and cases there cited. *Hayes v. State*, 16 Ga. App. 334, 335(2) (85 S. E. 253); Civil Code, § 5961." *Smarr v. Kerlin*, 21 Ga. App. 813(2), 95 S. E. 306.

(b) "Though the witness sought to be impeached by newly discovered evidence was the only witness against the prisoner upon a vital point in the case, if the sole effect of the evidence would be to impeach the witness a new trial will not be granted." *Arwood v. State*, 59 Ga. 391(1); *Levinig v. State*, 13 Ga. 513(1); *Wright v. State*, 34 Ga. 110(2); *Jackson v. State*, 98 Ga. 190, 18 S. E. 401; *Haynes v. State*, 18 Ga. App. 741(3), 742, 743, 90 S. E. 483, and cases cited." *Key v. State*, 21 Ga. App. 795(1), 95 S. E. 269.

Under the above rulings there is no merit in the tenth ground of the amendment to the motion for a new trial.

6. Reason for rule denying new trial.

In connection with the immediately preceding paragraph, we call attention to the following words of Judge Starnes, who delivered the opinion of the court in *Levinig v. State*, 13 Ga. 513: "If it be true that an innocent man has been convicted upon false testimony, and witnesses have since been discovered who can prove that testimony false, the victim is not without a remedy, potent to break his bonds, and free his character from stain. Such a case presented to the Executive will, without doubt, successfully appeal to the power with which the Constitution clothes that officer, and speedily invoke that pardoning clemency for the sufferer, which, whilst it carries with it a remedy for his wrongs, will insure justice to his character and memory. It is better that to this efficient tribunal we should commend such a case of individual hardship, than by granting a new trial, violate one of those general rules,

so essential to the pure and certain administration of justice."

7. Sufficiency of evidence.

There is evidence sufficient to support the finding of the jury, and the judgment is affirmed.

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Clayborn Norwood was convicted of homicide, and he brings error. Affirmed.

Sibley & Sibley, of Milledgeville, for plaintiff in error.

Doyle Campbell, Sol. Gen., and A. Y. Clement, both of Monticello, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 236)

CLARK v. STATE. (No. 13093.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 18, 1922.)

(Syllabus by the Court.)

1. Criminal law §958(1)—Affidavit as to acquittal for related offense not considered on motion for new trial.

Plaintiff in error was convicted of manufacturing liquor, and made an extraordinary motion for a new trial.

Upon the hearing of this motion the movant offered an affidavit, a portion of which is as follows: "At a subsequent term of court, after defendant's conviction for manufacturing liquor, he was placed on trial for having liquor in his possession, and the same bottle of liquid used in the case for manufacturing was used against him in the case for possessing, and defendant was acquitted on the latter charge. I kept possession of the bottle and know the facts." The bill of exceptions alleges that "the court erred in disallowing the above portion of said affidavit, and says that same should have been allowed and considered." The court properly refused to consider this portion of the affidavit.

2. Criminal law §957(2)—Affidavit of jurors subsequently acquitting defendant on related charge not considered.

Movant also offered an affidavit as follows: "We were members of the jury which tried Charley Clark for having liquor in his possession, which trial was subsequent to the trial for manufacturing liquor, and the defendant was acquitted because the liquid introduced by the state did not appear to be liquor and was not shown to be intoxicating, and did not look like liquor, and the jury was convinced that the defendant's wife, who had taken up with and was living with another man, was trying

to railroad the defendant to the chain gang to get him out of her way, and was responsible for the prosecution." It is alleged that the court erred in disallowing this affidavit, and should have received and considered it. In refusing to consider this affidavit the court did not err.

3. Criminal law §942(2) — Declarations of witness at variance with testimony not ground for new trial.

In the motion for a new trial it is alleged that Wallace Clark was the chief witness for the state, and that "since said trial at which movant was convicted, said Wallace Clark has made a written affidavit to the effect that his testimony on the trial which resulted in movant's conviction was false, and was given by the witness at the instance and by the direction of his mother, who was movant's wife, separated from him, and who was the real prosecutor of said case. Said Wallace Clark further testified in said affidavit that movant was not guilty, as charged, and that he had never seen movant manufacture or make intoxicating liquors of any kind, or around the still where same was manufactured, if there was such still and such manufacture." It is well settled in this state that the declarations of a witness after trial which are at variance with his sworn testimony, even when made under oath and explicitly asserting that his testimony on the trial was false, do not constitute a cause for new trial. *Story v. State*, 28 Ga. App. —, 110 S. E. 328, and citations; *Norwood v. State*, 28 Ga. App. —, 111 S. E. 59.

4. Criminal law §913(4)—Objection to sentence not ground for new trial.

"Objection that a sentence imposed in a criminal case is for any reason illegal or irregular cannot be made the ground of a motion for a new trial." *Chapman v. State*, 118 Ga. 58(1), 44 S. E. 814. See *Sable v. State*, 22 Ga. App. 768, 97 S. E. 271, and citations. Under the rulings in these cases we cannot consider that ground of the motion for a new trial which attacks the sentence as being "unlawful and without authority of law."

5. Extraordinary motion properly overruled.

The court did not err in overruling the extraordinary motion for a new trial.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Charley Clark was convicted of manufacturing liquor, and he brings error. Affirmed.

E. C. Collins, of Reidsville, for plaintiff in error.

J. Saxton Daniel, Sol. Gen., of Claxton, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 285)

MACK v. AMERICAN AGR. CHEMICAL CO.
(No. 12579.)(Court of Appeals of Georgia, Division No. 2.
March 4, 1922.)*(Syllabus by the Court.)***1. Negligence** \S 121(5)—Possible cause may be inferred on evidence eliminating all other causes.

Where there are several possible causes of an event and the evidence authorizes an elimination of all but one of such possible causes as having no causal connection therewith, it may be inferred, in the absence of any evidence, either direct or circumstantial, connecting the remaining possible cause as having a causal relation to the event, that the last remaining possible cause was the cause of the event.

2. Master and servant \S 265(3, 5)—Inference of negligence in insecurely tying chain justified.

It follows therefore that, where a suit for personal injuries is predicated upon the alleged negligence of the defendant in insecurely tying a chain which the defendant had wound around a post for the purpose of safely securing a pulley or some such similar attachment to the chain, the mere fact that the chain became unwound from the post will, in the absence of evidence that the chain became unwound from any cause other than its being insecurely tied, authorize the inference that the defendant insecurely tied the chain. Where there was evidence to the effect that the chain was, before it was used as above indicated, good and in no wise defective, and that the noise made by the chain when breaking loose from the attachment was not such a noise as would have been made by a breaking chain, or by the breaking loose of a hook affixed to the attachment hooking it to the chain, but was such a noise as could only have been made by the chain becoming unwound from the post, the inference is authorized that the chain did not become disengaged on account of its breaking, or that the hook broke loose from the attachment, but that the chain became unwound.

3. Inference authorized by evidence.

The evidence authorized the inference that the only possible cause of the chain becoming unwound from the post and thereby releasing the attachment and causing the latter to hit and injure the plaintiff was that the chain was insecurely tied, and that the insecure condition of the chain was most probably due to the negligence of the defendant.

4. Master and servant \S 189(2), 190(9)—Superintendent held a vice-principal; vice principal's negligence in directing tying of chain held chargeable to employer.

"A person employed as a superintendent or foreman, having authority to supervise the master's business and to employ and discharge employees and direct them in their work, is the vice principal or alter ego of the master, and his negligence in the discharge of such duties may be imputed to the master." *Buckeye Cotton Oil Co. v. Everett*, 24 Ga. App. 738

(1), 102 S. E. 167. Where the master, through his alter ego or vice principal, undertakes to provide for the servant a suitable appliance to be used by him in the performance of a particular work, superintending and directing himself the manner of construction, and in consequence of his negligence the appliance is so imperfectly constructed that in its proper use the servant is injured, the master would be liable. *Blackman v. Thomson-Houston Elec. Co.*, 102 Ga. 64, 70, 29 S. E. 120. The evidence in this case authorized the inference that the foreman directing the tying of the chain around the post was the alter ego or vice principal of the master, and that the chain under his direction was so negligently and imperfectly tied that in its proper use by the plaintiff he was injured by reason of such defect.

5. Nonsuit erroneously awarded.

It was error for the court to award a nonsuit.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Robert Mack against the American Agricultural Chemical Company. Judgment of nonsuit, and plaintiff brings error. Reversed.

Shelby Myrick, of Savannah, for plaintiff in error.

Seabrook & Kennedy, of Savannah, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(28 Ga. App. 356)

WRIGHT, Comptroller General, v. CENTRAL OF GEORGIA RY. CO. (No. 13105.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1922.)*(Syllabus by the Court.)***Counties** \S 190(2)—Tax levy for county purposes unauthorized to extent of excess over one-half of state tax levy.

This case arose by reason of an affidavit of illegality filed to the levy of a tax execution issued by the Comptroller General for the use of Henry County against the Central of Georgia Railway Company. The commissioner of roads and revenues of Henry county levied a tax of 15 mills or \$15 on each thousand dollars of property for the year 1920. Of this levy of taxes, there was levied for general county purposes four mills, or \$4 on the thousand, as follows: To pay sheriffs, jailers, or other county officers fees one-half mill, or 50 cents; to pay all fees that may be due the coroner for holding inquests, one-quarter mill, or 25 cents; to pay the expenses of the county bailiffs at court, nonresident witnesses in criminal cases, servant hire, stationery, and the like, one-half mill, or 50 cents; to pay jurors per diem compensation, 1 mill, or \$1; and to pay all other

lawful charges against the county, $1\frac{1}{4}$ mills, or \$1.75. The railway company, after paying all of the state tax, which was 5 mills, and the entire levy of 15 mills except $1\frac{1}{4}$ mills, or \$1.50 on the thousand, challenged by affidavit of illegality the legality of the execution, upon the ground that the said tax levy for general county purposes exceeded by $1\frac{1}{4}$ mills, or \$1.50 on the thousand, 50 per cent. of the state tax of 5 mills, or \$5 on the thousand. By agreement the issue raised by the affidavit of illegality was submitted to the judge of the superior court, without the intervention of a jury, upon an agreed statement of facts in which the tax levy as pleaded in the affidavit of illegality was admitted. The judge determined the issue in favor of the railway company, and sustained the affidavit of illegality. To this judgment exception was taken upon the ground that it was contrary to law. *Held*, upon the agreed statement of facts, it was not error to sustain the affidavit of illegality. To the extent of $1\frac{1}{4}$ mills, or \$1.50 on the thousand, the tax levied exceeded the legal amount authorized by law to be levied for the general county purposes so levied and as pointed out in the affidavit of illegality. See Civil Code 1910, §§ 508-513; *Sullivan v. Yow*, 125 Ga. 326, 54 S. E. 173; and compare *Sheffield v. Chancy*, 138 Ga. 684, 75 S. E. 1112.

Error from Superior Court, Henry County; W. E. H. Searcy, Jr., Judge.

Proceedings on an affidavit of illegality filed by the Central of Georgia Railway Company to an execution issued by W. A. Wright, Comptroller General, for the use of Henry County. Judgment for the Railway, and the Comptroller General brings error. Affirmed.

Brown & Brown, of McDonough, for plaintiff in error.

E. M. Smith and R. O. Jackson, both of McDonough, and Cleveland, Goodrich & Cleveland, of Griffin, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 357)

WRIGHT, Comptroller General, v. SOUTHERN RY. CO. (two cases).
(Nos. 13106, 13107.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1922.)

(Syllabus by the Court.)

Tax levy for county.

This case is controlled by the decision and judgment this day rendered in case No. 13105, *Wright v. Central of Georgia Railway Co.* (Ga. App.) 111 S. E. 61.

Error from Superior Court, Henry County; W. E. H. Searcy, Jr., Judge.

Proceedings on separate affidavits of illegality filed by the Southern Railway Company to executions for \$821.81 and \$145.49 in favor of W. A. Wright, Comptroller General, etc. Judgment for the Railway Company, and the Comptroller General brings separate writs of error. Affirmed.

Brown & Brown, of McDonough, for plaintiff in error.

E. M. Smith and Paul Turner, both of McDonough, and Harris, Harris & Witman, of Macon, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 279)

BROADWELL v. KIKER. (No. 12486.)

(Court of Appeals of Georgia, Division No. 2.
March 4, 1922.)

(Syllabus by the Court.)

1. Executors and administrators §138(1, 6)

—Offer to perform contract made before issuance of letters held ratification or acceptance of offer; letters held to confirm retroactively executor's power to make contract.

Where, after the death of a testator, and before the probate of the will, and before the issuance of any letters testamentary to the executor named in the will, who is vested with power to sell certain real estate belonging to the estate of the testator, the executor enters into a contract of sale with a purchaser, who has full knowledge of the above-recited facts, by which contract it is agreed that the executor is to sell and the purchaser is to buy such real estate, but where it is further agreed that the executor is not to execute and deliver a bond for title to the purchaser until a certain date in the future, which date is designated and agreed upon between the parties because it will occur after the executor shall have obtained letters testamentary, and where the purchaser goes into possession under such contract and immediately makes a payment on the purchase price, and upon the arrival of the designated date upon which it has been agreed that the executor is to execute a bond for title to the purchaser the executor has received his letters testamentary, and offers to perform his obligations under the contract and to execute to the purchaser a bond for title to the real estate, such offer by the executor to perform, even if the original agreement could be considered as void for lack of power in the executor at the time to execute it, in the absence of any offer to rescind by the purchaser, and especially in view of the purchaser's remaining in possession, amounts to a ratification by the executor of the original agreement, or to an acceptance by the executor of an outstanding offer to purchase by the purchaser. The right of the executor to make a sale and to execute the necessary papers was confirmed by the retroactive effect of the letters testamentary. *Northington v. Farm-*

ers' Gin Co., 119 Ga. 851, 47 S. E. 200, 100 Am. St. Rep. 210; Hatch v. Proctor, 102 Mass. 351.

2. Vendor and purchaser ¶22—Description by street and number, etc., held sufficient.

A description of the land contained in the contract is sufficiently definite where the land is described as "all that tract or parcel of land lying and being in the city of Atlanta, Georgia, being house and lot known as No. 22 Alaska Ave., lot being 50x140 feet on the west side of Alaska Ave., located 250 feet north of Highland Ave." Horine v. Hicks, 25 Ga. App. 802, 104 S. E. 922.

3. Executors and administrators ¶138(1)—Purchaser's refusal to perform obligations of contract held a breach.

Where the executor offered to perform as above set out, a refusal by the purchaser to comply with his obligations under the contract amounted to a breach.

4. Petition held not subject to demurrer.

This being a suit by the executor against the purchaser, seeking to recover damages for such an alleged breach of the contract, the plaintiff's petition is good against the general and special demurrers interposed, and the trial judge erred in dismissing the petition on demurrer.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by F. G. Broadwell, executrix, against W. L. Kiker. Judgment for defendant, and plaintiff brings error. Reversed.

Etheridge, Sams & Etheridge, of Atlanta, for plaintiff in error.

E. F. Childress and J. Caleb Clarke, both of Atlanta, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(28 Ga. App. 334)

ELLIOTT v. STATE. (No. 13110.)

(Court of Appeals of Georgia, Division No. 1, March 7, 1922.)

(Syllabus by the Court.)

False pretenses ¶4, 49(1)—Lack of authority to draw drafts as represented held essential to offense; evidence held not to show lack of authority.

Where an indictment for cheating and swindling alleges that the defendant drew drafts for a stated sum on a nonresident mercantile concern and induced a bank of this state to cash them, by falsely representing that he had express authority from such drawee to draw such drafts, and that they would be paid on presentation, etc., the lack of such authority from the drawee to make such drafts is an essential element of the alleged offense. Mere

proof that the drawee did not pay the drafts when payment was demanded by a bank in the city of the drawee's residence will not suffice to establish the defendant's alleged lack of authority from the drawee to draw them. Where, in such a case, the cashier of the bank cashing the drafts testifies to all the alleged representations, adding that "those statements made by the defendant were false and fraudulent," but it clearly appears from his testimony as a whole that he had no connection with or knowledge of the business of the drawee or of its relation to or communications with the defendant, such testimony will not suffice to establish the defendant's alleged lack of authority from the drawee to draw the drafts. Nor will the two circumstances together sufficiently establish the allegation. There being in this case no other proof offered to establish this essential allegation of the indictment, the verdict of guilty was without evidence to support it, and it was error to deny the defendant's motion for a new trial.

Error from Superior Court, Berrien County; R. G. Dickerson, Judge.

I. J. Elliott was convicted of cheating and swindling, and he brings error. Reversed.

R. A. Hendricks, of Nashville, for plaintiff in error.

J. D. Lovett, Sol. Gen., and W. D. Bule, both of Nashville, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 308)

McCALL v. STUBBS. (No. 12971.)

(Court of Appeals of Georgia, Division No. 1, March 7, 1922.)

(Syllabus by the Court.)

Certiorari ¶70(8)—First grant of new trial on certiorari not disturbed.

The judgment of the judge of the superior court sustaining the certiorari in this case has the effect of granting a new trial, and this being the first grant of a new trial, and the evidence not having demanded the verdict, under repeated rulings of the Supreme Court and of this court, the judgment of the judge of the superior court will not be set aside. See Shirley v. Swafford, 119 Ga. 43, 44, 45 S. E. 722, and cases cited." Nickajack Milling & Grain Co. v. International Vegetable Oil Co., 26 Ga. App. 473, 106 S. E. 300.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action between S. B. McCall, administrator, and J. M. Stubbs. Judgment for McCall, but certiorari was sustained by the judge of the Superior Court, and McCall brings error. Affirmed.

A. S. Way and S. B. McCall, both of Reidsville, for plaintiff in error.

Anderson & Hodges, and Daniel & Durence, all of Claxton, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 316)

BULLARD et al. v. HIGHTOWER.
(No. 13077.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

Appeal and error \S 1005(2)—Approved verdict not disturbed.

The several special assignments of error in this case are but amplifications of the general grounds, and are resolved into the single assignment of error that the evidence did not authorize the verdict. There is some evidence to authorize the verdict, which verdict has the approval of the trial judge. For no reason assigned did the court err in overruling the motion for a new trial.

Error from Superior Court, Fulton County;
J. T. Pendleton, Judge.

Action between B. M. Bullard and others and A. S. Hightower. Judgment for the latter, and the former bring error. Affirmed.

J. L. Anderson, of Atlanta, for plaintiffs in error.

Geo. F. Gober, and D. K. Johnston, both of Atlanta, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 209)

DURDEN v. STATE. (No. 12122.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 14, 1922.)

(Syllabus by the Court.)

1. Sufficiency of indictment.

Where an indictment is drawn in two counts, the first count charging the forgery of "a certain paper, acquittance, and receipt," which paper is therein set out in full, and the second count charging the accused with knowingly uttering a forgery, for that he did falsely and fraudulently utter and publish as true "the above-described false, fraudulent, forged, and altered paper, acquittance, and receipt," and the accused is convicted under the second count only, the failure to set out the alleged forged instrument in the second count is not ground for arrest of judgment.

2. Indictment and information \S 117—Allegation as to "offense and offender being heretofore unknown" construed.

In a special presentment by a grand jury, the language "the offense and offender being heretofore unknown," properly construed, means that the offense and offender were unknown until the date of the indictment. It follows that a special presentment for a felony (forgery and uttering a forgery) which shows upon its face that the offense charged was committed more than four years before the indictment was returned, and which alleges "the offense and offender being heretofore unknown," but which fails to set out the date upon which the alleged offense became known, is not so defective that after verdict and judgment a motion to arrest the judgment should be sustained, on the ground that it affirmatively appears from the face of the indictment that the offense charged is barred by the statute of limitations.

3. Criminal law \S 885—Verdict recommending punishment as for misdemeanor and invoking extreme mercy not void.

The accused was convicted of a felony (uttering a forgery), and was given a misdemeanor sentence. The verdict was as follows: We, the jury, find the defendant guilty on the second count in the indictment, and recommend that he be punished as for a misdemeanor by a term of imprisonment of no less than four years and not over five years. We further invoke the extreme mercy of the court." Under these facts, it was not error for the court to overrule that ground of the defendant's motion in arrest of judgment which alleged that the verdict was a nullity and amounted to an acquittal of the defendant, and that it was so vague, indefinite, and unintelligible that no valid legal judgment could be based thereon.

4. Rulings of Supreme Court.

This court certified to the Supreme Court the several questions of law involved in this case, and the rulings of the Supreme Court thereon are substantially given above. See the full opinion of the Supreme Court rendered December 16, 1921 (152 Ga. —, 110 S. E. 283).

5. Criminal law \S 1050, 1092(4)—Overruling of demurrer held not reviewable when not preserved by exceptions pendente lite.

The assignment of error in the bill of exceptions upon the overruling of the demurrer to the indictment cannot be considered, as the exception to that judgment was not preserved by exceptions pendente lite, and the demurrer was overruled on May 26, 1920, and the bill of exceptions was not tendered to the judge until January, 1921.

6. Motion in arrest properly overruled.

Under the rulings set forth in the first, second, and third preceding notes, the court did not err in overruling the defendant's motion in arrest of judgment.

Error from Superior Court, Glynn County;
J. I. Summerall, Judge.

R. W. Durden was convicted of uttering a forgery, and he brings error. Affirmed in

conformity to Supreme Court's answer to certified questions (152 Ga. —, 110 S. E. 283).

Francis H. Harris, J. T. Colson, Krauss & Strong, and Henry O. Farr, all of Brunswick, for plaintiff in error.

Alvin V. Sellers, Sol. Gen., of Baxley, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 327)

CALHOUN v. STATE. (No. 13096.)

(Court of Appeals of Georgia, Division No. 1. March 7, 1922.)

(Syllabus by the Court.)

Criminal law \S 935(1)—New trial properly denied when evidence sufficient.

This case is here upon the sole assignment of error that the verdict was unauthorized by the evidence. There is evidence to authorize the verdict, which has the approval of the trial judge, and it was not error to overrule the motion for a new trial.

Error from City Court of Soperton; W. J. Wallace, Judge.

Action between Floyd Calhoun and the State. Judgment for the State, and Calhoun brings error. Affirmed.

A. C. Saffold, of Vidalia, for plaintiff in error.

N. L. Gillis, Jr., Sol., of Soperton, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 249)

AMERICAN RY. EXPRESS CO. v. REVILLE. (No. 12319.)

(Court of Appeals of Georgia, Division No. 2. Feb. 22, 1922.)

(Syllabus by the Court.)

1. Corporations \S 509(6)—Entry of service on affidavit and bond may be amended to show service on corporation by serving its agent.

While it is true that the person named in the entry of service upon an affidavit and bond for garnishment as the person upon whom the summons of garnishment was served is presumably the person to whom the summons of garnishment was directed, yet where such entry shows that the summons was served upon an individual by name who is described in the entry of service as "agent in charge of the

office of said county for" a certain named corporation, and who happens to be the proper person with whom to leave the summons of garnishment directed to the named corporation when perfecting service upon the corporation, the entry of service is amendable to show that service of the summons of garnishment was perfected upon the named corporation by serving such summons personally upon the named individual, describing him in such amended return as "agent in charge of the office for said county for" the named corporation, thereby showing presumably that the summons of garnishment was directed to the named corporation and not to the individual. See in this connection, Southern Express Co. v. National Bank of Tifton, 4 Ga. App. 309, 61 S. E. 857; Burnett v. Central of Ga. Ry. Co., 117 Ga. 521, 43 S. E. 854, 97 Am. St. Rep. 175; Jones v. Bibb Brick Co., 120 Ga. 321, 48 S. E. 25; Phillips v. Bond, 132 Ga. 413, 421, 422, 64 S. E. 456.

2. Garnishment \S 97—Amendment to return of service properly permitted on motion to set aside judgment in absence of traverse.

Where a judgment by default has been rendered against a named corporation as garnishee, for failure of such corporation to make answer to the summons of garnishment, it was not error, in the absence of any traverse to the amended return, or of any evidence sustaining a traverse to the amended return, by the corporation, who has moved to set aside the judgment upon the ground that the movant had never been served with the summons of garnishment, to permit the officer who made the original entry of service to amend such return so as to make it show that the summons of garnishment was served upon the corporation by serving personally the individual named in the original return as "agent in charge of the office for said county for" the named corporation.

3. Garnishment \S 97, 141—Amendment of return of service related back to time of original entry as respected time for answering.

In such a case the amended return related back to the time of the original entry, and the corporation as garnishee, not having made answer to the summons of garnishment within the required time, was in default, and could not, after the allowance of the officer's amendment to his original return, be allowed to make answer to the summons.

4. Garnishment \S 187—Motion to set aside judgment for want of service properly denied when return amended to show proper service.

The trial court did not err in permitting the amendment to the returns of service, or in refusing to allow the corporation to make answer to the summons of garnishment, and did not err in overruling the motion made by such corporation to set aside the judgment which had been rendered against it.

Error from City Court of Athens; J. D. Bradwell, Judge.

Garnishment proceeding by D. J. Rville against the American Railway Express Com-

pany. Judgment for plaintiff, and the garnishee brings error. Affirmed.

Geo. C. Thomas and John J. Strickland, both of Athens, and Robt. C. Alston, of Atlanta, for plaintiff in error.

Austin Bell and Howell Cobb, both of Athens, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., concurs.

HILL, J., absent on account of illness.

(28 Ga. App. 360)

SWEAT v. FOSTER. (No. 13120.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1922.)

(Syllabus by the Court.)

Physicians and surgeons \S 18(4)—Pleading \S 364(5)—Allegations as to unskillfulness and carelessness held conclusions and properly stricken; petition held not to show improper diagnosis and neglect of patient was cause of death.

The court did not err in striking paragraph 11 of the petition, or in dismissing the amended petition, on general demurrer.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by C. Sweat against K. E. Foster. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

This was a renewal suit brought within six months of the dismissal of the original suit. The petition as amended (its formal parts and a copy of the petition of the first suit being omitted) is as follows:

"1. That the defendant is a resident of said state and county, a regular practicing physician, practicing the profession of medicine for compensation in said state and county.

"2. That this is a renewal of suit No. 39170, filed in the clerk's office of the superior court of said county on the 13th day of December, 1917, between the same parties and the same cause of action; said suit No. 39170 having been dismissed by plaintiff's attorney on July 16, 1921.

"3. Petitioner alleges that he has been damaged in the sum of \$25,000 as will hereinafter appear from the facts set out.

"4. Petitioner shows that on Sunday evening, the 14th day of October, 1917, petitioner's wife (Mrs. Mollie Sweat) was taken ill.

"5. Petitioner shows that he immediately called at the home of the defendant for the purpose of securing said defendant's services to wait upon petitioner's wife, but petitioner did not see defendant until the following morning, October 15, 1917.

"6. Petitioner shows that defendant responded to petitioner's call and agreed and promised to visit and wait upon petitioner's wife, and did

so visit and wait upon said wife on Monday October 15, 1917, at about 7 o'clock a. m. Defendant examined her and stated she was in child labor, and thereupon treated and waited upon petitioner's wife for that trouble and in that respect.

"7. After remaining and treating petitioner's wife for about one hour, for child labor, defendant left said wife, stating he would return to continue the treatment of petitioner's wife, for child labor, at 1 o'clock p. m., Monday, the 15th, 1917. Defendant did not call upon said wife at 1 o'clock as he had promised, as alleged and set out in this paragraph, but not until many hours afterwards, viz., about 5 p. m.

"8. Petitioner shows that he went to defendant's house about 4 o'clock p. m. Monday, the 15th day of October, 1917, and urgently requested defendant to return and look after and wait on petitioner's wife. Defendant did so return in about one hour, and remained about 30 minutes, continuing the treatment of said wife, as for child labor, and stated to those present that the child would be born in an hour. Defendant then left and returned no more to petitioner's wife and home. Petitioner charges that defendant's so leaving at this time was an act of gross carelessness and neglect of said petitioner's wife.

"9. Petitioner shows that his wife died on Tuesday, October 16, 1917.

"10. Petitioner shows that petitioner's wife was not in child labor at all at the time defendant waited upon and treated her for same, but her illness was caused by an entirely different thing, viz., gastritis.

"11. Petitioner alleges and charges that the death of his wife was due to the unskillful diagnosis and treatment by defendant as a medical practitioner, and to the gross carelessness and neglect in his treatment and handling of said wife's illness.

"Petitioner prays that he may recover of the defendant in the sum of \$25,000, by reason of the facts set out in this petition."

The defendant interposed a general demurrer to the petition, and the following special demurrer:

"Paragraph 11 of the plaintiff's petition should be stricken, because the allegations thereof are vague and indefinite and are conclusions of the pleader."

C. L. Kemper, of Atlanta, for plaintiff in error.

Bryan & Middlebrooks and Chauncey Middlebrooks, all of Atlanta, for defendant in error.

BROYLES, O. J. (after stating the facts as above). It is well settled that in a suit for damages alleged to have been caused by the malpractice of a physician, the burden is on the plaintiff to show a want of due care, skill, or diligence, and also that the injury resulted from the want of such care, skill, or diligence. Georgia Northern Railway Co. v. Ingram, 114 Ga. 639, 40 S. E. 708, and authorities cited. Conceding, but not deciding, that the petition in the instant

case established a want of due care, skill, or diligence, on the part of the defendant, it did not show that this negligence of the defendant was the cause of the death of the plaintiff's wife; paragraph 11 of the petition having been properly stricken on the special demurrer interposed. The court did not, therefore, err in dismissing the suit on general demurrer. In view of this ruling, it is unnecessary to decide whether the first suit was void or merely voidable.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 213)

ROME RY. & LIGHT CO. v. GADDIS.
(No. 12974.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 14, 1922.)

(Syllabus by the Court.)

1. Carriers \S 314(2)—Petition alleging failure of motorman to alight and see that there is no danger before crossing railroad tracks held not demurrable.

The court did not err in overruling the demurrer interposed by the Rome Railway & Light Company to the plaintiff's petition.

(Additional Syllabus by Editorial Staff.)

2. Carriers \S 280(1)—Carrier owes passenger duty of extraordinary care.

A carrier owes a passenger extraordinary care for his protection and safety.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Mrs. V. H. Gaddis against the Rome Railway & Light Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lamar Camp and Linton A. Dean, both of Rome, for plaintiff in error.

Porter & Mebane, of Rome, for defendant in error.

BROYLES, C. J. This was a joint suit brought against the Rome Railway & Light Company and the Southern Railway Company, to recover damages for the homicide of the plaintiff's husband. The plaintiff alleged that her husband was riding as a passenger in one of the cars of the Rome Railway & Light Company, and that a collision occurred between the car in which he was riding and a passenger train of the Southern Railway Company at a point where the tracks of the Rome Railway & Light Company's car line crossed the tracks of the Southern Railway Company, and that as a result of this collision her husband received injuries to his person which caused his death several months later. Upon the call of the case

the Rome Railway & Light Company interposed the following demurrer (the formal parts being here omitted):

"The allegations in said petition do not set forth a cause of action against this defendant, and there is no cause shown therein. The allegations in plaintiff's petition show that the independent intervening cause was the alleged negligence of the Southern Railway Company, its agents and employees, and that but for such intervening cause no injury would have occurred to plaintiff's husband. The only allegation of negligence in said petition charged against this defendant is that the street car motorman 'ran said street car on which petitioner's said husband was a passenger, as aforesaid, out and on and across the tracks of said Southern Railway Company and in front of said oncoming, powerful, and fast running train, without getting off his car and seeing and knowing that his said car would not collide with said train.' Defendant says that this does not allege negligence upon the part of this defendant to constitute a cause of action."

[1, 2] We think the demurrer was properly overruled. The plaintiff's husband was being transported as a passenger by the Rome Railway & Light Company, and therefore that company owed him extraordinary care for his protection and safety. Under the facts, and the allegations of negligence, as set forth in the petition, it was for the jury to say whether extraordinary care for the safety of the plaintiff's husband required the motorman of the car (in which the husband was a passenger), before he ran his car onto the tracks of the Southern Railway Company and in front of the oncoming passenger train, to get off of his car and to see and know that his car would not collide with such train.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 299)

WHITE PROVISION CO. v. HARDMAN.
(No. 12853.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

Appeal and error \S 1005(2)—Approved verdict supported by evidence not disturbed.

The White Provision Company obtained judgment against C. W. Christian, and W. L. Hardman was served with a summons of garnishment. Hardman answered that he was in no way indebted to the defendant in *fi. fa.*, and had in his hands nothing belonging to him. This answer was traversed. Upon the trial of the issues raised by the traverse and on conflicting evidence the jury returned a verdict in favor of the garnishee and against the traverse. The motion for a new trial contained the general grounds only; there was some evidence to support the finding of the jury, and

their verdict having been approved by the trial judge, under the repeated and uniform rulings of this court and of the Supreme Court, a reviewing court is powerless to interfere. See *Bradham v. State*, 21 Ga. App. 510, 94 S. E. 618, and cases cited.

Error from Superior Court, Madison County; W. L. Hodges, Judge.

Garnishment by the White Provision Company against W. L. Hardman. Judgment for the garnishee, and plaintiff brings error. Affirmed.

Clarence E. Adams, of Danielsville, for plaintiff in error.

Berry T. Moseley, of Danielsville, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 247)

HOFFMAN v. SUMMERFORD.

SUMMERFORD v. HOFFMAN.

(Nos. 12306, 12307.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 22, 1922.)

(Syllabus by the Court.)

1. Judgment \S 713(2)—Adjudication on the merits on demurrer or otherwise conclusive when issues determinable under pleadings as they might have been amended.

Where the issues presented by the pleadings in a pending suit could have been inquired into and adjudicated in a former suit between the same parties, based upon the same cause of action, either under the pleadings there existing or as the pleadings could and should have existed by germane and appropriate amendments made thereto, an adjudication of the former suit on its merits, either by demurrer to the petition or otherwise, is *res judicata* of all issues presented in the suit pending. Civil Code 1910, \S 4338; *Perry v. McLendon*, 62 Ga. 598; 24 Am. & Eng. Ency. Law (2d Ed.) 714. See, also, *Draper v. Medlock*, 122 Ga. 234, 50 S. E. 113, 69 L. R. A. 483, 2 Ann. Cas. 650.

2. Judgment \S 572(2)—On demurrer is judgment on the merits, though more full statement of facts might have shown liability.

"A judgment on demurrer, which passes on the legal sufficiency of the facts stated by the plaintiff to hold the defendant to liability to him, is a judgment on the merits, although the plaintiff * * * has stated only a part of the facts when he might have stated more, and although, if the plaintiff had stated the facts fully, fairly, and truly, as they really existed, he might have set up a transaction showing liability against the defendant." *Wolfe v. Georgia Ry. & Elec. Co.*, 6 Ga. App. 410, 412, 65 S. E. 62, 63.

3. Judgment \S 713(2)—Sustaining demurrer held adjudication against right to recover for another breach of contract, whether pleaded or not.

Where, in a suit by an agent against the owner for a breach of a brokerage contract for the sale of real estate, the petition alleges a written contract between the parties, and, as a breach thereof entitling the plaintiff to recover, that the plaintiff procured, in pursuance of the contract, certain named parties, who were ready, willing, and able to buy upon the terms stipulated by the owner, and that the owner refused to accept such purchasers, and failed to pay to the plaintiff the commission contracted for, an adjudication by the court, sustaining a general demurrer filed by the defendant to such petition upon the ground that the allegations therein failed to set out a cause of action against the defendant, is an adjudication upon the merits of the case, and adjudicates the plaintiff's right to recover for any breach of the contract, whether such breach is specifically pleaded in the petition, or could and should have been pleaded by germane and appropriate amendments thereto.

4. Adjudication of special demurrers immaterial.

The court having adjudicated the merits of the former suit in passing upon the general demurrer, it is immaterial whether or not the adjudication of the special demurrers passed upon the merits of the questions raised in the petition.

5. Judgment \S 1—Reasons and arguments expressed by court not adjudication.

"It is the judgment rendered [by the court] and its legal effect, and not the reasons and arguments in support thereof expressed by the judge in his order or judgment, which constitutes the adjudication." *Matthews v. Green* (Ga. App.) 110 S. E. 507.

6. Judgment \S 572(1)—Plea of *res judicata* properly sustained in action for broker's commissions.

In a subsequent suit by the same plaintiff against the same defendant for a breach of the same contract, although the contract is more elaborately set out than it was in the former petition, and although it is now alleged that the breach by the defendant consisted in the actual selling by the defendant of the property to another and different purchaser from that alleged in the petition as the one who was procured by the plaintiff under the terms of the contract, and that the defendant refused to pay to the plaintiff the commission to which the plaintiff was entitled, a plea of *res judicata*, setting up the adjudication on the demurrer in the former case, was properly sustained. *Dodson v. Sou. Ry. Co.*, 137 Ga. 583, 73 S. E. 834; *Smith v. Smith*, 125 Ga. 83, 54 S. E. 78; *Kimbro v. Tenn. Air-Line Ry.*, 56 Ga. 185.

Error from City Court of Americus; W. M. Harper, Judge.

Action by J. O. Hoffman against J. M. Summerford. Judgment for defendant, and plaintiff brings error, and defendant brings

a cross-bill of exceptions. Cross-bill dismissed, and judgment affirmed.

W. T. Lane & Son, of Americus, for plaintiff in error.

Jas. A. Hixon and Stephen Pace, both of Americus, for defendant in error.

STEPHENS, J. Judgment affirmed on the main bill of exceptions; cross-bill of exceptions dismissed.

JENKINS, P. J., concurs.

HILL, J., absent on account of illness.

(28 Ga. App. 346)

MONROE v. STATE. (No. 13171.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

Criminal law \S 935(1)—Not error to deny new trial when evidence sufficient.

This case is here for review upon the sole assignment of error that the verdict was not authorized by the evidence. There is evidence to support the verdict, which has the approval of the trial judge, and, it was not error to overrule the motion for a new trial.

Error from City Court of Brunswick; E. C. Butts, Judge.

Action between Joe Monroe and the State. Judgment for the State, and Monroe brings error. Affirmed.

R. W. Durden and Frank H. Harris, both of Brunswick, for plaintiff in error.

F. M. Scarlett, Jr., Sol., of Brunswick, for the State.

LUKE, J. Judgment affirmed.

BROYLES, O. J., and BLOODWORTH, J., concur.

(28 Ga. App. 374)

DIXON v. STATE. (No. 13312.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1922.)

(Syllabus by the Court.)

1. Master and servant \S 87—Failure to perform work or return money without good cause essential element of offense.

"An essential element of the offense of violating section 715 of the Penal Code (known as the 'labor-contract act'), and one which the state must prove, is that the accused failed to perform the services contracted for, or failed to return the money advanced, 'without good and sufficient cause.' Glenn v. State, 123 Ga. 585, 51 S. E. 605; Johnson v. State, 125 Ga.

243, 54 S. E. 184; Brown v. State, 8 Ga. App. 212, 68 S. E. 865; Thorn v. State, 13 Ga. App. 10, 78 S. E. 853; Hudson v. State, 14 Ga. App. 490, 81 S. E. 862; Lewis v. State, 15 Ga. App. 405, 83 S. E. 439; and Tennyson v. State [16 Ga. App.] 214, 84 S. E. 988. The record does not show that this material fact was proved; consequently the conviction of the accused was unauthorized, and the judgment of the court below, overruling the motion for a new trial, must be reversed." Jones v. State, 16 Ga. App. 216, 84 S. E. 988.

2. Denial of new trial held error.

Under the ruling in the preceding note, and the facts of the instant case, the defendant's conviction was unauthorized, and the trial court erred in overruling the motion for a new trial.

Error from City Court of Wrightsville; S. W. Sturgis, Judge.

Cicero Dixon was convicted of an offense, and he brings error. Reversed.

B. B. Blount, of Wrightsville, for plaintiff in error.

W. C. Brinson, of Wrightsville, for the State.

BROYLES, O. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 253)

FLOYD COUNTY BANK v. TOLBERT et al. (No. 12486.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 22, 1922.)

(Syllabus by the Court.)

Master and servant \S 82(2) — Lien claimant held a laborer.

The sole question for determination being whether or not the defendant in error Tolbert was a laborer, and therefore entitled to a lien upon the proceeds of the sale of the property of his employer upon which the plaintiff in error had foreclosed a mortgage, and the evidence upon the hearing of the rule against the officer having in hand the funds arising from the proceeds of the sale being such as would authorize the inference that Tolbert was employed by his employer in the performance of work which consisted mostly in manual labor and not in mental skill, the finding of the trial judge upon the facts, holding that Tolbert was a laborer and therefore entitled to a lien upon such proceeds to the extent of the amount of the indebtedness due him by his employer for the services performed, is not without evidence to support it. Oliver v. Macon Hardware Co., 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Proceeding between the Floyd County Bank and Jack Tolbert and others. Judge

ment for the latter, and the former brings error. Affirmed.

Willingham, Wright & Covington, of Rome, for plaintiff in error.

Porter & Mebane and E. P. Treadaway, all of Rome, for defendants in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., concurs.

HILL, J., absent on account of illness.

(28 Ga. App. 274)

AMERICAN RY. EXPRESS CO. v. DUBOIS BROS. (No. 12247.)

(Court of Appeals of Georgia, Division No. 2. March 4, 1922.)

(Syllabus by the Court.)

1. Carriers \S 76—Consignor may sue for damages when goods refused by consignee.

"Where a consignee of freight refuses to receive goods on account of damage done to them in the hands of the common carrier, and the goods are subsequently thrown back on the hands of the consignor, the latter has a right to bring an action for such damages against the carrier." Savannah, Florida & W. R. Co. v. Commercial Guano Co., 103 Ga. 590, 30 S. E. 555.

2. Carriers \S 134—Evidence \S 142(3)—No recovery in absence of evidence of value of damaged goods; evidence of selling price of perishable goods day following tender not evidence of value at time of tender.

"Where, in a suit by a shipper against a common carrier for loss or damage to goods in transit, it appears from the evidence that some of the goods were not totally damaged or destroyed, but were of some value, and the evidence fails to furnish sufficient data from which a jury might infer the value of the damaged goods, the verdict is without evidence to support it." Southern Express Co. v. Bass, 24 Ga. App. 742, 102 S. E. 168.

(a) This being a suit by a shipper against a common carrier to recover damages alleged to have been sustained to goods consisting of celery and cucumbers while delayed in transit, and there being evidence that the goods were of some value after having been damaged, and there being no evidence as to this value at the time when the goods were by the carrier offered to the consignee, the verdict is without evidence to support it. Evidence as to the selling price of such goods on the day following is insufficient to establish such value, since the goods were of a nature, as appeared from the evidence, highly perishable and subject to rapid deterioration and decline in value. The trial judge therefore erred in overruling the defendant's motion for a new trial.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Dubois Brothers against the American Railway Express Company. Judgment for plaintiff, and defendant brings error. Reversed.

Lawton & Cunningham, of Savannah, for plaintiff in error.

Seabrook & Kennedy, of Savannah, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(28 Ga. App. 216)

ELDER v. STATE. (Nos. 13108, 13109.)

(Court of Appeals of Georgia, Division No. 1. Feb. 14, 1922.)

(Syllabus by the Court.)

Criminal law \S 935(1) — New trial properly denied when finding authorized by evidence.

The motion for a new trial contained the usual general grounds only; the finding of the judge, sitting without the intervention of a jury, was amply authorized by the evidence, and the refusal to grant a new trial was not error.

Error from City Court of Macon; Will Gunn, Judge.

Charlie Elder was convicted of carrying a pistol and pointing a pistol, and he brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

Roy W. Moore, Sol., of Macon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 306)

SMITH v. STATE. (No. 12920.)

(Court of Appeals of Georgia, Division No. 1. March 7, 1922.)

(Syllabus by the Court.)

Criminal law \S 1092(4)—Writ of error dismissed when bill of exceptions not tendered in time.

The recitals in the bill of exceptions in this case show that the motion for a new trial was overruled August 20, 1921; the certificate to the bill of exceptions is dated September 10, 1921, and the bill of exceptions shows affirmatively that it was tendered on that date to the judge who tried the case; and, this being a criminal case and the bill of exceptions having been tendered more than 20 days from the date of the judgment complained of, the writ of error must be dismissed.

Error from City Court of Madison; E. R. Lambert, Judge.

Willie Smith was convicted of an offense, and he brings error. Writ of error dismissed.

Stubbs, Duke & Duke, of Madison, for plaintiff in error.

A. G. Foster, Sol., of Madison, for the State.

LUKE, J. Dismissed.

BROYLES, O. J., and BLOODWORTH, J., concur.

(28 Ga. App. 348)

MIDDLETON v. STATE. (No. 13183.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

Criminal law §935(1)—Not error to deny new trial, when evidence sufficient.

The defendant was convicted of the offense of simple larceny. His sole assignment of error is upon the ground that the evidence was not sufficient to authorize the conviction. There was evidence to authorize the defendant's conviction, the verdict has the approval of the trial judge, and it was not error to overrule the motion for a new trial.

Error from Superior Court, Long County; W. W. Sheppard, Judge.

Robert Middleton was convicted of simple larceny, and he brings error. Affirmed.

Darsey & Mills, of Hinesville, for plaintiff in error.

J. Saxton Daniel, Sol. Gen., of Claxton, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 347)

CATES v. STATE. (No. 13177.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

Intoxicating liquors §236(19)—Evidence insufficient to sustain conviction for manufacture.

The defendant was convicted of the unlawful manufacture of liquor. His conviction was dependent upon the circumstance that he was present with several other men at a still which was in operation. At that time he stated to the officer who discovered the still that he had no connection with it, that he was present merely because he saw the smoke rising, and thought the woods were on fire and went to see about it. The other persons present at the still testified positively that he had no owner-

ship in the still and no connection with it, and that he walked to where it was in operation some time after they had begun to operate the still. The testimony is not sufficient to authorize this defendant's conviction of participating in the unlawful manufacture of liquor as alleged in the indictment. It was error to overrule the motion for a new trial.

Error from Superior Court, Walker County; Moses Wright, Judge.

Dorsey Cates was convicted of the unlawful manufacture of liquor, and he brings error. Reversed.

Henry & Jackson, of La Fayette, for plaintiff in error.

E. S. Taylor, Sol. Gen., of Summerville, and J. F. Kelly, of Rome, for the State.

LUKE, J. Judgment reversed.

BROYLES, O. J., and BLOODWORTH, J., concur.

(28 Ga. App. 337)

HOLLAND v. HILL. (No. 13122.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

1. Contracts §92—Entire loss of mental capacity necessary to avoid.

"To avoid a contract on account of mental incapacity, there must be an entire loss of understanding."

2. Bills and notes §537(6)—Verdict properly directed in action by bona fide holder.

The court properly directed a verdict for the plaintiff.

(Additional Syllabus by Editorial Staff.)

3. Evidence §535—Opinion as to mental condition properly excluded for want of showing that witness was expert.

Testimony that for several years defendant had not been in condition mentally to make a contract was properly excluded in absence of showing that witness was an expert, or knew what degree of mentality defendant possessed or what degree was necessary.

Error from Superior Court, Banks County; Blanton Fortson, Judge.

Action by J. C. Hill against Ella Holland. Judgment for plaintiff, and defendant brings error. Affirmed.

W. W. Start, of Commerce, for plaintiff in error.

Oscar Brown, of Lula, and S. R. Jolly, of Homer, for defendant in error.

BLOODWORTH, J. John C. Hill, transferee, sued Ella Holland on a mortgage note for \$500, given to the original payees and

transferors for services rendered by them as attorneys at law. The plaintiff alleged that he was a bona fide holder for value. Defendant filed a plea denying liability, and denying that the plaintiff was "a bona fide purchaser of said note without notice." Upon the trial the plaintiff proved his case as alleged, and the defendant testified that the attorneys to whom the note was originally given told her that their fee would be about \$8 or \$10, and that she had no recollection of giving the note, and that her mind was defective at times. After the introduction of all the evidence the judge directed a verdict for the plaintiff for the full amount sued for. The defendant made a motion for a new trial, which was overruled, and to the judgment overruling the motion the defendant excepted.

[1,3] 1. In the first special ground of the motion for a new trial it is alleged that the court erred 'in refusing to allow a witness, Pat Hardy, to testify that—

"For four or five years this woman (defendant) has not been in a condition mentally that she could make a contract."

The court did not err in refusing to allow this witness to testify that the defendant had been in such condition mentally that she could not make a contract. This would be a conclusion of the witness, and there is nothing in the record to show that he was an expert, or knew what degree of mentality the defendant possessed, or knew what degree of mentality was necessary for the making of a contract. Furthermore, the testimony fails to show that defendant's understanding and reason were entirely gone at the time she signed the note. In *Bond v. First National Bank*, 19 Ga. App. 817 (1, 1a), 92 S. E. 285, it is held:

"To avoid a contract on account of mental incapacity, there must be an entire loss of understanding. *Frizzell v. Reed*, 77 Ga. 724; *Maddox v. Simmons*, 31 Ga. 512, 527; *Nance v. Stockburger*, 111 Ga. 821, 36 S. E. 100; *De Nieff v. Howell*, 138 Ga. 248, 75 S. E. 202. One who has not strength of mind and reason equal to a clear and full understanding of his act in making a contract is one who is afflicted with an entire loss of understanding. *Barlow v. Strange*, 120 Ga. 1015, 1018, 48 S. E. 344."

[2] 2. There is no merit in the ground of the motion for a new trial that—

The court erred "in directing a verdict for the plaintiff in said case, because there were, as claimed by the movant, enough facts and circumstances in the case to require the jury to pass on and say whether or not the plaintiff was a bona fide innocent holder of said note before due and for value, and that it was error for the court not to leave that question to the jury, as well as whether or not the note sued on was an illegal contract, as well as

whether or not defendant ever agreed to sign any such contract or note."

The record shows that the plaintiff received the note before it was due, and without notice of any defect or defense, and there was no proof of non est factum, gambling, or immoral and illegal consideration, or fraud in its procurement. Civil Code 1910, § 4286.

Under the evidence as shown by the record, the verdict for the plaintiff was demanded, and the court did not err in directing a verdict in his favor, and in overruling the motion for a new trial.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 358)

MORGAN v. STATE. (No. 13115.)

(Court of Appeals of Georgia, Division No. 1. March 8, 1922.)

(Syllabus by the Court.)

1. Criminal law §200(4)—Conviction for manufacturing liquor will not bar prosecution for possessing liquor.

Under some circumstances a person could be guilty of manufacturing intoxicating liquors without having the liquors in his possession or control. It follows that, upon the trial of one charged with possessing intoxicating liquors, a plea of autrefois convict, setting up that a few days before the call of the case, and during "the present term of this court," the accused had been convicted of the offense of manufacturing intoxicating liquors, and that the court had jurisdiction of the crime and of the person, and that the charge against him of manufacturing intoxicating liquors, upon which he had been convicted, and the present charge of possessing such liquors, are based upon the same facts and grew out of one and the same transaction, and that the lesser offense of possessing intoxicating liquors was merged into the greater offense of manufacturing such liquors, is insufficient in law, and is not a good plea of autrefois convict.

2. Criminal law §547(2)—Defendant's statement in related case properly admitted.

It was not error for the court to admit in evidence upon the trial of this case the defendant's statement made to the jury in his trial in a previous case where he was charged with manufacturing whisky, the statement being read by the official stenographer of the court from his notes and without being sworn. This evidence was relevant, and was not inadmissible for any reason assigned. The proper construction of the ground of the motion for a new trial which complains of the admission of this evidence shows that it (the statement of the defendant) was objected to because it was not sworn testimony, but that no objection was made on the ground that the stenographer

himself was not sworn before he read the statement to the jury.

3. Charge not erroneous.

The excerpt from the charge of the court, complained of in the motion for a new trial, was not error for any reason assigned.

4. Criminal law §935(1)—Denial of new trial not error when evidence sufficient.

The evidence amply authorized the conviction of the accused, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Bulloch County; H. B. Strange, Judge.

Alexander Morgan was convicted of possessing intoxicating liquors, and he brings error. Affirmed.

W. F. Slater, of Eldora, and Francis B. Hunter, of Statesboro, for plaintiff in error.

A. S. Anderson, of Millen, for the State.

BROYLES, C. J. The defendant was indicted for possessing intoxicating liquors. Upon the call of the case, and before pleading or arraignment, he filed a plea of former jeopardy, in which he alleged, in effect, that on August 17, 1921, and during "the present term of this court," he was tried and convicted of manufacturing the same liquors which he is now charged with illegally possessing, and that both of the alleged offenses grew out of one and the same transaction, and that the lesser offense of possessing intoxicating liquors was merged into the greater offense of manufacturing them. Upon motion of the state this plea was stricken as being insufficient in law.

[1] 1. The question first ruled upon is whether a person can be lawfully convicted of manufacturing intoxicating liquors, and subsequently be prosecuted for controlling or possessing the same liquors? This question, so far as we have been able to ascertain, has never been directly passed upon in any judicatory. However, the Supreme Court, in *Bell v. State*, 103 Ga. 397, 30 S. E. 294, 68 Am. St. Rep. 102, cited and relied upon by counsel for the plaintiff in error, made certain broad and general rulings which we think are in principle controlling upon the question. It was there held, in effect, that where one had been convicted of an offense he could lawfully be prosecuted for another offense, if neither of them was a necessary element in and an essential part of the other, or, in other words, if either offense could be committed without perpetrating the other. And, in our opinion, this is the true criterion by which this question should be adjudicated. This is also the view taken of the question by counsel for the plaintiff in error, and they plant their case squarely upon the contention that it is impossible for a person to physically manufacture intoxicating liquors

without having the liquors in his possession. A little reflection will refute this contention. Under the laws of this state, any person who is present at a distillery, aiding and assisting another in making whisky, is himself guilty of manufacturing whisky, although he may have no interest whatever in the distillery or the whisky, and may have no possession or control of the whisky. As an illustration, suppose A., the owner of a distillery, and of all the corn, meal, mash, etc., from which the whisky is made, gives B. \$2 a day to cut wood at the distillery and to keep up the fire in the still while the whisky making is going on, and suppose further that A. is present at the distillery at all times while B. is there, and that A. at all times has the exclusive custody, possession, and control of the whisky and the ingredients from which it is made, B. never touching the ingredients or the whisky, and having no interest whatever in them, and doing no work except to cut wood and keep up the fire. It is clear that, while B. would be guilty of manufacturing whisky, he would not be guilty of having the whisky in his possession or control.

It follows that the plea of *autrefois* convict in the instant case, which in effect merely alleged that a person could not be guilty of manufacturing whisky without also being guilty of possessing the whisky, was properly stricken as being insufficient in law.

[2-4] 2. The other rulings stated in the headnotes do not require elaboration.

Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 296)

BURKHALTER v. WATERS. (No. 12835.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

Executors and administrators §20(5)—Application for administration not showing applicant's right to administer dismissed.

"An application for letters of administration which fails to allege that the applicant is an heir at law of the decedent, or a creditor of the estate, or any other reason which, under the law, would entitle the applicant to the administration, should be dismissed upon motion made on that ground by caveators appearing at the hearing who are heirs at law of the decedent." *Towner v. Griffin*, 115 Ga. 965, 42 S. E. 262.

Error from Superior Court, Tattnall County; H. B. Strange, Judge.

Application by Mrs. John Burkhalter for letters of administration on the estate of Mrs. Libbie Waters, to which W. W. Waters filed a caveat. Judgment denying the peti-

tion, and the petitioner brings error. Affirmed.

Mrs. Burkhalter applied for letters of administration on the estate of Mrs. Libbie Waters, alleging that she was the mother of the decedent. W. W. Waters filed a caveat, alleging that administration was not necessary, for the reason that the decedent left no debts, and left as her two heirs at law the caveator, who was her husband, and a minor child, and that the caveator had taken out letters of guardianship of the person and property of the child, and, as such guardian, had taken possession of the property of the child, and that administration on the estate would cause unnecessary expense, and further alleging that, if the court decided to appoint an administrator of the estate, the caveator, and not Mrs. Burkhalter, was entitled to be appointed. Upon a hearing before the ordinary the petition for administration was denied. An appeal was taken to the superior court, and on the trial there the presiding judge, after all the evidence was in, made the following announcement:

"It appearing to the court that the applicant for letters of administration is the mother of the deceased, and it appearing further that the deceased left a husband who now survives her, and one child, and it appearing that there are no debts owing by the estate of the deceased, and it further appearing that the applicant is neither an heir nor a creditor of said estate, the court is of the opinion that the applicant has no legal rights whatever to letters of administration upon this estate; and it further appearing that the entire estate has been turned over to the husband of the deceased as an heir and as guardian for his minor child, and that there is no necessity for his administration upon this estate, the court denies the application for administration, and directs that a verdict be returned in favor of the caveator."

The jury returned a verdict "in favor of the caveat, and that there be no administration granted." A judgment was entered upon this finding, and Mrs. Burkhalter brought the case here for review.

A. S. Way, of Reidsville, for plaintiff in error.

BLOODWORTH, J. (after stating the facts as above). This case is controlled by the ruling in *Towner v. Griffin*, 115 Ga. 965, 42 S. E. 262. In that case Mr. Justice Cobb said:

"The Code provides that every application made to the ordinary for the granting of any order shall be by petition in writing, stating the ground of such application and the order sought. Civil Code [1895] § 4254. It is also provided that all objections or caveats to an order sought shall be in writing, setting forth

the grounds of such caveat. Civil Code [1895] § 4256. It has been held that a caveat to an application for letters of administration should show that the caveator is interested in the estate, either as a creditor of the estate or an heir at law of the decedent. *Williams v. Williams*, 113 Ga. 1008, and case cited. The reason for this rule is that a mere interloper should not be allowed to interfere where a proper application has been made for letters of administration upon the estate. A person who is not concerned in any way in the question should, of course, not be heard before the court. While there is no ruling to the effect that an application for letters of administration must show that the applicant is an heir at law or a creditor or for some other reason entitled to the administration, it would seem that the principle at the foundation of the ruling above referred to would apply in such a case. Except in those cases where the law authorizes the county administrator or the clerk of the superior court to be appointed administrator upon an estate, the law does not recognize the right of any one to be appointed administrator, unless he is an heir at law of the decedent, or a creditor of the estate, or otherwise interested therein as legatee or devisee, or has been selected by a majority of the heirs at law as administrator, or has been associated as coadministrator with one who is entitled to the administration for some one or more of the reasons just referred to. Civil Code [1895] § 3367. No other person than those just referred to is entitled to be appointed administrator; and it would seem that no other person should be allowed to file an application for letters of administration, and thus involve the estate and those interested therein in the expense necessary to determine whether an administration is necessary or to defeat the application of a mere intermeddler. If the heirs and creditors and all other persons interested in the estate are satisfied to allow the same to go unrepresented, it is no concern of one who has no interest whatever in the estate. In the present case the application does not allege that the applicant has any interest whatever in his own right in the estate, or that he represents either as next friend or otherwise, any one who is interested in the estate. He does not show upon the face of his application that he has any right to bring before the court the question as to whether administration should be had upon the estate. The section of the Code which requires that every application made to the ordinary must state 'the ground of such application,' when applied to a petition for letters of administration, means that the applicant must show in his application that he has such an interest in the estate, either in his own right or as the representative of some other person, as would authorize him to bring the estate before the court in order that it might determine whether there should be representation thereon."

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 300)

CITY OF DAWSON et al. v. MCGILL.
(No. 12860.)(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)*(Syllabus by the Court.)*

1. Overruling of demurrers not error.

The court did not err in overruling the demurrers to the petition.

2. Municipal corporations \S 788(2), 791(2), 817(1)—No recovery against contractor without proof that planks were placed by him over excavation and were insecure; city not liable unless it had notice of presence of insecure planks; facts insufficient to show city officials might have known of insecure planks.

Under the evidence the plaintiff was not entitled to a verdict against either of the defendants.

3. Other grounds not considered.

As a new trial must result from the ruling in the immediately preceding paragraph, it is unnecessary to consider other grounds of the motion for a new trial.

Error from City Court of Dawson; M. C. Edwards, Judge.

Action by Edna McGill against the City of Dawson and others. Judgment for plaintiff, and defendants bring error. Reversed.

W. H. Gurr and R. R. Marlin, both of Dawson, and Pottle & Hofmayer, of Albany, for plaintiffs in error.

Parks & Parks, of Dawson, for defendant in error.

BLOODWORTH, J. [1-3] We need to elaborate only the second headnote. The petition, among other things, alleges that—

"The city of Dawson, in April, 1920, through the city council of Dawson, awarded to the said Pittman Construction Company a contract to grade and pave certain streets in Dawson. By the authority granted and direction given to it by the said city of Dawson, through the city council aforesaid, the Pittman Construction Company was empowered and authorized to make excavations, to remove and reset curbs, to eliminate any obstructions to the work of grading, paving, and setting curbs that might be necessary, to close streets or ways to traffic, and to do any and all other works of construction or demolition for the expeditions and successful carrying on of the operations aforesaid. During the entire period of such operations, including the 14th day of September, 1920, a civil engineer employed by the city of Dawson overlooked the work of the said Pittman Construction Company, with full power and authority vested in him to reject any unsafe or unsatisfactory construction or work incident to the carrying out of its contract by the said Pittman Construction Company. * * *

"On the 14th day of September, 1920, while engaged in the paving operations aforesaid, the said Pittman Construction Company removed a cross-bridge at the intersection of Lee

and Stonewall streets, said bridge being over a ditch at the edge of and contiguous to the curbing at the east end of the sidewalk on the north side of Lee street in front of the building known as Kennedy's warehouse building. A broad stream of water was turned into the curb ditch by the said construction company on the north side of Lee street, and ran thence down the west side of Stonewall street along and beyond and on either side of where the said crossing bridge had been removed. Several planks were placed across said ditch by the said construction company, or with its knowledge and consent and approval, where said bridge had been. These planks were about 4 feet in length and of the aggregate breadth of about 12 inches, one end of each being placed upon the curbing at the end of the sidewalk and the other upon the ground in the street, the same sloping at an angle of about 25 degrees. The same were not securely fixed in place, the ends resting upon the sidewalk curbing unevenly. This defect was not observable to petitioner or other pedestrians, but they apparently presented a safe and satisfactory means and ways of crossing. * * *

"About dark on the evening of the said 14th day of September, 1920, while returning to her home on Lee street from her work and proceeding along the sidewalk on the north side of said Lee street, petitioner proceeded to use the planks placed as aforesaid for the purpose of crossing at the regular crossing place from Lee street across said ditch and Stonewall street, and upon her stepping upon one of these planks it suddenly turned to one side and precipitated her into the ditch. At the time when petitioner attempted to make use of the said crossing and at no time prior thereto was the said sidewalk or crossing closed to pedestrians, nor were there any lights, ropes, and other signals to indicate that the sidewalk or the means of crossing provided as aforesaid should not be used or was safe and trustworthy. On the contrary, the said sidewalk had been continuously open to pedestrians during the whole of said day, and the planks placed as aforesaid had been in general use by the public during the whole of said afternoon, and said crossing of planks presented an open invitation to petitioner and pedestrians generally for its use. Petitioner further shows that there was no other place of crossing in the immediate locality except at the place where she attempted to cross, as a broad stream of water stood next to the curbing on both Lee and Stonewall streets, and there was no other passageway over the same. * * *

"As a result of the defective condition of said crossing as aforesaid, petitioner, without fault on her part, was thrown violently to the ground, and sustained a severe strain and laceration of her right ankle."

(a) Before the Pittman Construction Company could be held liable for the injury to the plaintiff, it would be necessary to prove the allegation in the petition that "several planks were placed across said ditch by the said construction company, or with its knowledge and consent and approval, where said bridge had been," and that "the same were not securely fixed in place." The evi-

dence fails to support these allegations, and a verdict against the construction company was unauthorized.

(b) The city of Dawson could not be held liable for the damage to the plaintiff resulting from the planks being placed across the ditch, unless the evidence showed that the city had actual knowledge that they were there and were not securely placed, or unless the facts were such as to charge the city with such knowledge. The record shows that the city authorities had no actual knowledge of the presence of the planks; and, as the evidence showed that they had been placed across the ditch only a few hours previous to the injury of the plaintiff, under the ruling in Mayor and Council of Jackson v. Boone, 93 Ga. 662 (3), 20 S. E. 46, this was not sufficient to show that, in the exercise of ordinary care, the city officials might have ascertained the presence of the planks, and that they were not securely fixed in place, the plaintiff was not entitled to a verdict against the municipality. Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 313)

EVANS v. SMITH. (No. 13070.)

(Court of Appeals of Georgia, Division No. 1. March 7, 1922.)

(Syllabus by the Court.)

1. Attachment \S 276—Declaration proceeds as at common law notwithstanding dismissal of attachment.

A declaration filed upon an attachment will proceed as at common law, although the attachment itself and the levy made thereunder be dismissed. See Busby v. Elliott, 22 Ga. App. 392, 95 S. E. 1014.

2. Trial \S 139(1)—Verdict properly directed when demanded by evidence.

The evidence demanded a verdict for the plaintiff, and it was not error for the court to direct the jury to find such a verdict. The several assignments of error are without merit.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by M. B. Smith against R. L. Evans. Judgment for plaintiff, and defendant brings error. Affirmed.

James Maddox, of Rome, for plaintiff in error.

Willingham, Wright & Covington, of Rome, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 294)

MELDRIM v. PEOPLE'S BANK OF SAVANNAH. (No. 12737.)

(Court of Appeals of Georgia, Division No. 1. March 7, 1922.)

(Syllabus by the Court.)

1. Overruling of demurrer not error.

The court did not err in overruling the demurrer to the petition.

(Additional Syllabus by Editorial Staff.)

2. Bills and notes \S 462(1)—Petition by bona fide holder against indorser held sufficient.

In view of Civ. Code 1910, §§ 3541, 3553, and 3559, relative to sureties, the petition in an action against an indorser alleging that petitioner was the owner and holder of the notes sued on in due course, bona fide and for value, held to state a cause of action, and not demurrable for failure to allege defendant's relationship to the notes and to the other parties to the notes.

Error from City Court of Savannah; Davis Freemap, Judge.

Action by the People's Bank of Savannah against L. K. Meldrim. Judgment for plaintiff, and defendant brings error. Affirmed.

H. P. Cobb, of Savannah, for plaintiff in error.

Karl M. Fleetwood and Wm. M. Farr, both of Savannah, for defendant in error.

BLOODWORTH, J. [1,2] The People's Bank of Savannah sued L. K. Meldrim on two promissory notes, both payable to Savannah Collection Agency, both signed by John Hardy Purvis, and both indorsed by him and by L. K. Meldrim, the defendant. It was alleged that petitioner was the owner and holder of the notes "in due course, bona fide, and for value," and that "said notes were duly and legally protested for nonpayment, and the defendant notified thereof." The defendant filed a demurrer as follows:

"First. Defendant demurs generally to said petition, because no cause of action is set out against him therein. Second. Defendant demurs specially to the second paragraph of said petition, because the alleged obligation of this defendant and his actual relationship in regard to the notes is not stated. Third. Defendant demurs to the third paragraph, because it is not stated at or in what manner the petitioner became the owner and the holder of said notes, nor at what time petitioner acquired such ownership. Fourth. Defendant demurs specially to the entire petition, because the relationship of the petitioner to the other parties whose names appear on the note is not disclosed, nor is there any allegation as to whether or not either or any of said parties have paid or satisfied said note, or have been released of their obligation thereon."

There is no merit in, any of the grounds of the demurrer to the petition, and it was properly overruled. See, in this connection, sections 3541, 3553, and 3559 of the Civil Code of 1910; *McMillan v. Heard National Bank*, 19 Ga. App. 151 (2), 91 S. E. 235; *Crawford v. Citizens' & Southern Bank*, 20 Ga. App. 579(1), 93 S. E. 173; *Johnson v. Georgia Fertilizer & Oil Co.*, 21 Ga. App. 530 (3), 94 S. E. 850.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 308)

HEWLETT v. STATE. (No. 12967.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

Criminal law \Rightarrow 935(1)—New trial properly denied when evidence sustains allegations.

The defendant was convicted of the offense of larceny after trust. The jury credited the evidence of the state, which substantiated the allegations of the indictment. The verdict has the approval of the trial judge. The several special grounds of the motion for a new trial are without such merit as to require a new trial. It was not error to overrule the motion for a new trial.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

W. R. Hewlett was convicted of larceny after trust, and he brings error. Affirmed.

Saml. A. Cann and Leo A. Morrissey, both of Savannah, for plaintiff in error.

Walter C. Hartridge, Sol. Gen., of Savannah, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 327)

BANKENDORF v. SEVELOVITZ.
(No. 13098.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

Sales \Rightarrow 41—Buyer held entitled to return of money where stones sold as diamonds were not diamonds.

The verdict in this case was not authorized by the evidence, and, for this reason, it was error to overrule the motion for a new trial.

Error from City Court of La Grange; Duke Davis, Judge.

Action by S. C. Bankendorf against G. C. Sevelovitz. Judgment for defendant, and plaintiff brings error. Reversed.

A. H. Thompson, of La Grange, for plaintiff in error.

M. U. Mooty, of La Grange, for defendant in error.

LUKE, J. Bankendorf sued Sevelovitz, alleging that he had bought from the defendant three alleged diamonds, paying the defendant \$375 for them; that the defendant expressly warranted the diamonds to be genuine and well worth more than the amount he was paying for them; that the stones looked like diamonds, but in fact were not genuine diamonds, but were spurious or paste diamonds, and were totally worthless; and that by reason of the breach of warranty and fraudulent statements of the defendant, the plaintiff was damaged in the sum paid for the diamonds. The plaintiff's evidence amply supported his petition. The testimony was uncontradicted that the stones purchased were not diamonds and were worthless, that they were mere imitations, but were such imitations as to mislead the casual observer, even though he might be familiar with diamonds; that they were, however, such fake or spurious stones that upon taking them out of the setting the casual observer would know that they were not diamonds. The plaintiff's evidence was to the effect that the defendant expressly warranted the stones to be genuine diamonds. The defendant, by his evidence, denied that he had warranted the stones to be genuine diamonds. He testified that he merely sold the three stones to the plaintiff and had given the plaintiff ample time to have them examined and see what he was buying; that before showing the stones to the plaintiff and while out riding with the plaintiff and his wife, diamonds were mentioned, and he told the plaintiff that he had a lavalliere which he had taken in upon a loan, and that the next day after this ride the plaintiff came around and asked to see the lavalliere, and it was handed to him with the statement that he could take it and, when he was satisfied with it, he could pay for it. On cross-examination however, he testified:

"I told him I had a diamond lavalliere with three stones in it. I told him they were set in white gold." "I sold them to him for diamonds." "I took them in as genuine diamonds." "I told him I took in the lavalliere with three diamonds." "I didn't know it was a fake when I sold it to him."

The jury trying the case found a verdict in favor of the defendant. Upon the undisputed evidence, was the jury authorized to return a verdict in favor of the defendant? It is without dispute that the defendant sold

them as diamonds, and it is without dispute that they are not diamonds. Can the defendant escape the return of the money paid for these stones, upon the ground that he took them in as diamonds and did not know they were not genuine diamonds, but gave the plaintiff a chance to examine them himself or have any one else examine them before purchasing them? We think not. By common information we know that there are many grades of diamonds, but a diamond is a diamond. If the issue had been here, upon the plaintiff's side, that these stones were expressly warranted to be a certain grade of diamonds, and upon the defendant's side that he did not warrant them to be of any particular grade, then the verdict could stand. In this case, no such issue is raised. The defendant himself says that he sold the plaintiff three diamonds and for such the plaintiff paid him. The evidence is undisputed that they were not diamonds. In our opinion, the evidence demanded a verdict for the plaintiff, and it was error for the court to overrule the motion for a new trial.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 322)

DURRENCE v. STATE. (No. 13087.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

1. Sufficiency of evidence.

Upon conflicting evidence the jury were authorized to convict the accused of having violated the prohibition law as charged.

2. Criminal law §938(1)—New trial not granted for newly discovered cumulative, impeaching evidence not likely to change result.

The ground of the motion for a new trial, based upon alleged newly discovered evidence, falls squarely within the rules that where such evidence is merely cumulative and impeaching, and would not likely produce a different result upon another trial, it does not require a new trial.

Error from City Court of Blackshear; R. G. Mitchell, Jr., Judge.

John Durrence was convicted of violating the prohibition law, and he brings error. Affirmed.

Eldon L. Bowen, of Blackshear, for plaintiff in error.

S. Thos. Memory, Sol., of Blackshear, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 365,

CENTER v. G. A. MERCER CO.
(No. 12968.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1922.)

(Syllabus by the Court.)

Brokers §82(1)—In action for services in negotiating for purchase of property which defendant subsequently purchased direct, petition held demurrable.

In substance the petition of the Mercer Company alleges that Center employed the company to negotiate with the owner for the purchase of a certain lot in the city of Savannah; that on a certain day after such employment the company made an offer of a certain amount to the owner for the property, and the owner declined the offer; that Center was notified that the offer had been refused, and after such notice he advised the company to make an offer at a named increased amount; that the increased offer was refused and the refusal was reported; that Center then advised and instructed the Mercer Company to wait a few days before making any further offer to the owner of the property; that subsequently Center, without the knowledge of the Mercer Company, negotiated with the owner of the property, and at a still further increased amount bought the property; that after Center had bought the property the Mercer Company demanded of him the payment of a certain amount of money which it alleged to be the reasonable value of its services for negotiating for the purchase of said property, which Center refused to pay, and that he is indebted to it in the same sum on open account for this service. The defendant challenged the petition upon the ground that it did not set forth a cause of action; that the petition was vague, indefinite, and insufficient in law, it not having set forth what the terms of the employment of the plaintiff by the defendant consisted of, nor what the consideration of the employment was, nor whether the plaintiff was to be paid by the defendant for his services, nor how the amount sued for was arrived at. The demurrer was overruled, and the defendant excepted to this judgment. *Held*, it was error to overrule the general demurrer to the petition, as the petition did not disclose the length of time or duration of the contract, and was otherwise vague, indefinite, and uncertain. The petition shows that the plaintiff was unable to purchase the property at the price at which the defendant was willing for it to pay. It is not alleged that the plaintiff's negotiations amounted to the procuring cause and cumulated in the purchase of the property by the defendant, or that the plaintiff discharged his full duty in the premises. See, in this connection, *Roberts v. Martin*, 15 Ga. App. 208, 208, 82 S. E. 813.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by the G. A. Mercer Company against I. Center. Judgment for plaintiff, and defendant brings error. Reversed.

Shelby Myrick, of Savannah, for plaintiff in error.

Geo. W. Owens, of Savannah, for defendant in error.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 227)

McGEE v. STATE. (No. 13154.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 14, 1922.)

(Syllabus by the Court.)

Criminal law §1160—Verdict supported by evidence and approved by trial judge not disturbed.

The motion for a new trial contains the general grounds only. The evidence excluded every reasonable hypothesis save that of the guilt of the accused, and was sufficient to support the verdict, which has the approval of the trial judge, and this court will not interfere.

Error from Superior Court, Harris County; Geo. P. Munro, Judge.

Ira McGee was convicted of an offense, and he brings error. Affirmed.

Hardy & Peavy, of Hamilton, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 227)

McGEE v. STATE. (No. 13155.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 14, 1922.)

(Syllabus by the Court.)

1. Criminal law §594(1)—Denial of continuance not error when absent witnesses not subpoenaed and showing not made that testimony was expected at next term.

The court did not err in overruling the defendant's motion for a continuance of the case. The ground of the motion was the absence of three material witnesses for the defense, and upon the hearing of the motion it was shown that none of these witnesses had been subpoenaed, and the defendant did not state that he expected to have their testimony at the next term of the court.

2. Criminal law §935(1)—New trial properly denied when conviction authorized.

The defendant's conviction was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Harris County; Geo. P. Munro, Judge.

Roy McGee was convicted of an offense, and he brings error. Affirmed.

Hardy & Peavy, of Hamilton, for plaintiff in error.

O. F. McLaughlin, Sol. Gen., of Columbus, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 329)

I. M. SHAINÉ & SON v. BLOCK.
(No. 13100.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

1. Appeal and error §588, 639(2)—Questions dependent on evidence not considered without proper brief of evidence; judgment affirmed in absence of brief of evidence or of questions not dependent on the evidence.

Where no proper brief of evidence is sent up, this court cannot decide any question which is dependent upon a consideration of the evidence. "If all the assignments of error are of that class, a judgment of affirmance will result. If there are assignments of error, such as rulings on demurrers, or the like, which do not involve a consideration of the evidence, they may be passed on." *Crumbley v. Brook*, 135 Ga. 723, 70 S. E. 655.

2. Appeal and error §588—Stenographic report of proceedings with objections and rulings not proper brief of evidence.

What purports to be a brief of the evidence in the instant case is evidently a copy of the stenographic report of the proceedings therein, and contains all the questions propounded by counsel on both sides to the witnesses, the answers thereto, the objections of counsel to the admission of evidence, and the rulings of the court thereon. Such a paper is not a substantial compliance with the law as to the bringing of a brief of evidence to this court; and, as all the grounds of error involve a consideration of the evidence, an affirmance must result.

Error from City Court of Greensboro; W. H. Fisher, Judge pro hac.

Action between I. M. Shaine & Son and I. Block. Judgment for the latter, and the former bring error. Affirmed.

J. A. Mitchell, of Crawfordville, for plaintiff in error.

J. G. Faust, of Greensboro, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 367)

CHARLESTON & W. C. RY. CO. v. GAY.
(No. 12981.)(Court of Appeals of Georgia, Division No. 1.
March 9, 1922.)*(Syllabus by the Court.)***Appeal and error** \Leftrightarrow 1005(2)—Approved verdict not disturbed.

The sole question raised in this case is whether the evidence authorized the verdict. All questions raised were for determination by a jury, and there is some evidence to authorize the verdict. The verdict having been approved by the trial judge, and no error of law appearing, it was not error to overrule the motion for a new trial.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by J. R. Gay, administrator, against the Charleston & Western Carolina Railway Company. Judgment for plaintiff, and defendant brings error. **Affirmed.**

F. B. Grier, of Greenwood, S. C., and Cumming & Harper, of Augusta, for plaintiff in error.

C. H. & R. S. Cohen, of Augusta, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 389)

RILEY v. HAMLIN. (No. 12709.)(Court of Appeals of Georgia, Division No. 2.
March 9, 1922.)*(Syllabus by the Court.)*

New trial \Leftrightarrow 71, 99—Denial not abuse of discretion when conflicting evidence supports verdict, and newly discovered evidence is cumulative, impeaching, and not likely to produce different result.

The verdict for the plaintiff in his suit for the recovery of money alleged to have been erroneously paid to defendant for the repair of the plaintiff's automobile after the defendant's assurance that such repairs had been made in a first-class workmanlike manner, when in fact they had not been so made, was supported by evidence, although conflicting; and the only ground additional to the general grounds being based upon certain newly discovered evidence, which, upon examination of the record, appears to be solely of cumulative and impeaching character in reference to testimony already produced and not likely to produce a different result, the trial judge did not abuse his discretion in refusing a new trial.

Error from City Court of Macon; Will Gunn, Judge.

Action by L. M. Hamlin against W. R. Riley. Judgment for plaintiff, and defendant brings error. **Affirmed.**

W. E. Martin, of Macon, for plaintiff in error.

Walter De Fore and Jas. C. Esten, both of Macon, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 387)

HANCOCK v. MILLER. (No. 12380.)(Court of Appeals of Georgia, Division No. 2.
March 9, 1922.)*(Syllabus by the Court.)*

Receivers \Leftrightarrow 174(1)—Suit not maintainable against receiver without leave of court; suit for breach of contract to furnish cars not within exception to rule.

Except as modified by the provisions of Civ. Code 1910, §§ 2788, 2789, it is the general rule that before a suit can be maintained against a receiver of a railroad company it is necessary that the consent of the court appointing him be first obtained. *Fried v. Sullivan*, 27 Ga. App. —, 108 S. E. 127. The petition in the instant case having failed to show a compliance with this requirement, and not being governed by the provisions of the Code sections mentioned, it not being a suit based on tort, for damage to personality on account of the failure of the defendant to comply with its common-law duty to furnish cars for the transportation of freight within a reasonable time after demand (*Southern Ry. Co. v. Moore*, 183 Ga. 806, 67 S. E. 85, 26 L. R. A. [N. S.] 851), but under its plain and explicit terms being a suit for breach of a specific contract, wherein it is alleged that the defendant failed to furnish the cars by a specified hour on a named day, after having through its duly authorized agent expressly contracted so to do (*Chattanooga Southern R. Co. v. Thompson*, 133 Ga. 127[3], 65 S. E. 285; *Ga. Northern Ry. Co. v. Snellgrove*, 16 Ga. App. 344, 85 S. E. 790), it was subject to the specific ground of defendant's demurrer raising the question of the court's jurisdiction to entertain the same.

Error from Superior Court, Upson County; W. E. H. Searcy, Jr., Judge.

Action by S. B. Hancock against H. W. Miller, receiver. Judgment for defendant on demurrer, and plaintiff brings error. **Affirmed.**

Jas. R. Davis, of Thomaston, for plaintiff in error.

J. E. Hall and C. J. Bloch, both of Macon, and M. H. Sandwich, of Thomaston, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 333)

OCILLA SOUTHERN R. CO. v. PRICKETT.
(No. 12668.)(Court of Appeals of Georgia, Division No. 2
March 9, 1922.)*(Syllabus by the Court.)***Grounds of motion for new trial and exceptions to charge overruled.**

Under the evidence submitted, this court does not feel authorized to set aside the verdict and judgment on the general grounds of the motion for a new trial. See *Whitcomb v. Payne* (Ga. App.) 109 S. E. 703. The portion of the charge complained of is in all respects substantially the same as that reported and approved by this court in *Ocilla Southern R. Co. v. McInvale*, 26 Ga. App. 106, 105 S. E. 451, and the exceptions taken thereto are controlled by the rulings made in that case.

Error from Superior Court, Ben Hill County; O. T. Gower, Judge.

Action between the Ocilla Southern Railroad Company and B. O. Prickett. Judgment for the latter, and the former brings error. **Affirmed.**

Wall & Grantham, of Fitzgerald, and Quincey & Rice, of Ocilla, for plaintiff in error.

Eldridge Cutts and A. J. & J. C. McDonald, all of Fitzgerald, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 335)

HENDRICKS v. JONES. (No. 13113.)(Court of Appeals of Georgia, Division No. 1
March 7, 1922.)*(Syllabus by the Court.)*

Damages \$49 — Innkeepers \$10 — Petition held to show want of ordinary care in using unlighted stairway; no recovery for mental anguish unaccompanied by physical injury or pecuniary loss.

Neither count of the amended petition set out a cause of action, and the court erred in overruling the general demurrer interposed.

Error from Superior Court, Bibb County; H. A. Matthews, Judge.

Action by Mrs. L. M. Jones against B. L. Hendricks. Judgment for plaintiff, and defendant brings error. **Reversed.**

Robt. G. Plunkett, Walter De Fore, and Jas. C. Estes, all of Macon, for plaintiff in error.

Herrington & Napier, of Macon, for defendant in error.

BROYLES, C. J. This was a renewal suit brought within six months from the dismissal of the first suit. The petition as amended was brought in two counts. Conceding that the present suit was for substantially the same cause of action as the first suit, and that in other respects it was a proper renewal thereof, and conceding further that the second count of the amended petition was sufficiently complete within itself, we do not think that either count of the petition set out a cause of action. The first count of the petition alleged that the defendant owned and was in full charge and control of a certain hotel in which the plaintiff lived; that on January 7, 1918, about 3 o'clock p. m., the plaintiff had occasion to go upstairs from the first to the second floor, and that when she subsequently came down the stairs from the second floor, about 6 p. m. on the same day, on account of insufficient light upon the stairway she fell when three or four steps from the bottom step, and thereby sustained the injuries sued for; that prior to this occasion the stairway was always sufficiently lighted for one to make his way safely up and down it, but that on this occasion, through the gross and wanton negligence of the defendant, the usual and necessary light for the stairway was not provided. The petition further alleged that—

"Petitioner was not aware that there was not sufficient light on the stairway *when she went up to the second floor*, and after she completed her errand to the second floor, and, desiring to descend to the lobby on the first floor, and there being [only] one stairway leading to said lobby, she was compelled to use said stairway, although *it was darkened*. Said stairway was not dangerous when lighted [and if it had been lighted] she would not have sustained the fall and the injuries incident thereto." (Italics ours.)

These averments of the petition, properly construed most strongly against the plaintiff, clearly show that when the plaintiff had finished her errand on the second floor and started to return to the first floor, she became aware that the stairway was not sufficiently lighted for her to safely attempt to descend by it, and that in attempting to use it in the darkness she was not in the exercise of ordinary care. See, in this connection, *Flournoy v. American Hat Mfg. Co.*, 21 Ga. App. 599, 94 S. E. 835; *Day v. Graybill*, 24 Ga. App. 524, 101 S. E. 759; *Lebby v. Atlanta Realty Corporation*, 25 Ga. App. 369, 103 S. E. 433; *Ogain v. Imperial Café, Inc.*, 25 Ga. App. 415, 103 S. E. 594.

In the second count of the petition the plaintiff sought to recover damages for an alleged willful and wanton trespass upon her premises. It was alleged in this count that the trespass caused her mental pain and anguish, and prolonged an illness from which she was then suffering. In our opinion this

count did not set forth a cause of action, as the law is well settled in this state that there can be no recovery for damages on account of mental pain and anguish unaccompanied by any physical injury to the person or any pecuniary loss. *Chapman v. Western Union Telegraph Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183; *Seifert v. Western Union Telegraph Co.*, 129 Ga. 181, 58 S. E. 699, 11 L. R. A. (N. S.) 1149, 121 Am. St. Rep. 210; *Goddard v. Watters*, 14 Ga. App. 722, 82 S. E. 306; *Western Union Telegraph Co. v. Knight*, 16 Ga. App. 203, 84 S. E. 986; *Dresbach v. Davis*, 17 Ga. App. 79, 86 S. E. 256.

From what has been said it follows that neither count of the petition set forth a cause of action, and that the court erred in overruling the general demurrer to the amended petition.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(2 Ga. App. 376)

HOWARD v. LOUISVILLE & N. R. CO. et al.
(No. 12621.)

(Court of Appeals of Georgia, Division No. 2.
March 9, 1922.)

(Syllabus by the Court.)

Railroads §484(3, 4)—Negligence causing fire held for jury.

When this case was here before, the verdict and judgment in favor of the plaintiff was set aside because, under the ruling of the Supreme Court in *Seaboard Air-Line Ry. v. Jarrell*, 145 Ga. 688, 89 S. E. 718, the evidence was not deemed sufficient to authorize the jury to find that the engine of the defendant caused the fire by the emission of sparks. *Louisville & Nashville R. Co. v. Howard*, 25 Ga. App. 83, 102 S. E. 456. On the second trial (in which a verdict for the defendant was directed by the court) there was additional testimony submitted by the plaintiff on this point, and also relative to the handling of the engine. There was evidence to show the slipping of the driving wheels of the locomotive, and the too rapid and unnecessary forcing of steam in the steam chest, attended by the emission of an unusual quantity of sparks, which flew upward and higher than the house toward which the wind was blowing. Such evidence, when taken with the entire testimony, was sufficient to have authorized a finding that the fire was occasioned by sparks emitted from the defendant's locomotive; and, while (contrary to the facts in *Central of Georgia Ry. Co. v. Trammell*, 23 Ga. App. 25, 97 S. E. 461), we do not think the record discloses any testimony to combat the evidence submitted by the defendant, that the engine was then and there properly equipped with an approved spark arrester, still, under the testimony disclosed by the record, it was for the jury to say whether the fire was occa-

sioned by sparks emitted from the locomotive, and, if so, it became their duty to determine whether or not the engine was then being operated with ordinary and reasonable care and safety. *Western & Atlantic R. Co. v. Maynard*, 139 Ga. 407(1), 77 S. E. 399.

Error from Superior Court, McDuffie County; H. C. Hammond, Judge.

Action by Mrs. Ocran Howard against the Louisville & Nashville Railroad Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

John T. West & Son, of Thomson, for plaintiff in error.

Cumming & Harper, of Augusta, for defendants in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 383.)

CHATHAM ABATTOIR & PACKING CO.
et al. v. H. K. PAINTER ENGINEER-
ING CO. (No. 12662.)

(Court of Appeals of Georgia, Division No. 2.
March 9, 1922.)

(Syllabus by the Court.)

1. Account, action on §2—Action may be brought on open account when written contract fully performed by plaintiff; contract may be used only as evidence in action on open account for goods sold or services rendered.

An action may be brought and sustained on open account for goods sold or services rendered, although there may have been a special contract in writing governing the subject-matter of the suit, where it appears that the plaintiff has fully performed his part of the agreement and nothing remains to be done except for the other party to make payment. *Tumlin v. Bass Furnace Co.*, 98 Ga. 594(2, 3), 20 S. E. 44; *Burch v. Harrell*, 93 Ga. 719, 20 S. E. 212; *Southern Printers Supply Co. v. Felker*, 125 Ga. 148, 54 S. E. 196; *Shedd v. Standard Sewing Machine Co.*, 21 Ga. App. 373, 376, 94 S. E. 646. In such a suit, the contract not being declared on, its breach does not constitute the cause of action, but the contract can be used merely as evidence of the indebtedness. *Chapman v. Conwell*, 1 Ga. App. 212(2), 58 S. E. 137; *Pittman v. Hodges*, 13 Ga. App. 25, 26, 78 S. E. 688; *Ittner v. Farmers' State Bank*, 15 Ga. App. 235, 82 S. E. 909.

2. Account, action on §6(1)—Counts on open account for goods sold or services rendered and for breach of contract may be joined.

Under the system of pleading in this state, there was nothing to prevent the plaintiff from embracing in his petition a separate and inde-

pendent count based upon a breach of contract. Southern Ry. Co. v. Chambers, 126 Ga. 404(5), 410, 55 S. E. 37, 7 L. R. A. (N. S.) 926; McMillan v. Heard National Bank, 19 Ga. App. 148(1), 151, 91 S. E. 235.

3. Petition not subject to demurrer.

The petition as amended was not subject to demurrer.

Error from City Court of Savannah; John Rourke, Jr., Judge.

Action by the H. K. Painter Engineering Company against the Chatham Abattoir & Packing Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Aaron Kravitch and Jno. E. Schwarz, both of Savannah, for plaintiffs in error.

Lewis A. Mills, Jr., of Savannah, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 293)

RINGWALD et al. v. J. R. WATKINS MEDICAL CO. (No. 12851.)

(Court of Appeals of Georgia, Division No. 1. March 7, 1922.)

(Syllabus by the Court.)

1. Evidence \Leftrightarrow 185(1)—Notice to produce letters, etc., held too indefinite and extensive in range.

This case was before this court upon a former writ of error, and is reported in 24 Ga. App. 308, 100 S. E. 781. Subsequently the defendant served upon the plaintiff the following notice to produce: "All letters, documents, correspondence, and any other written communication written by the defendant M. O. Ringwald to the plaintiff above set out, or to any one connected with said company, or to any individual of said company, between the dates of December 1, 1914, and December 25, 1917." Upon motion of the plaintiff, the court held that this notice was not sufficiently definite, and was too vague and uncertain in description and too extensive in range to direct the plaintiff to produce the papers called for in the notice. This court is convinced that the notice is too indefinite and too extensive in range to require the production of the letters. By the notice the plaintiff is commanded to produce every kind of written communication to the plaintiff or to any one connected with the company, or to any individual of said company. See Ga. Iron & Coal Co. v. Etowah Iron Co., 104 Ga. 396, 30 S. E. 878, and cases cited;

Hamby Mountain Gold Mines v. Findley, 85 Ga. 431 (2), 11 S. E. 775.

2. Denial of new trial not error.

The evidence in this case authorized the verdict, and for no reason assigned did the court err in overruling the motion for a new trial.

Error from City Court of Statesboro; Remer Proctor, Judge.

Action by the J. R. Watkins Medical Company against M. O. Ringwald and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Anderson & Jones and Johnston & Cone, all of Statesboro, for plaintiffs in error.

Brannen & Booth, of Statesboro, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 323)

DARLEY v. WILLIAMS. (No. 13088.)

(Court of Appeals of Georgia, Division No. 1. March 7, 1922.)

(Syllabus by the Court.)

Certiorari \Leftrightarrow 70(8)—First grant of new trial not set aside when verdict not demanded.

"The judgment of the judge of the superior court sustaining the certiorari in this case has the effect of granting a new trial; and this being the first grant of a new trial, and the evidence not having demanded the verdict, under repeated rulings of the Supreme Court and of this court the judgment of the judge of the superior court will not be set aside. See Shirley v. Swafford, 119 Ga. 43, 44 (45 S. E. 722), and cases cited." Nickajack Milling & Grain Co. v. International Vegetable Oil Co., 28 Ga. App. 473, 106 S. E. 300.

Error from Superior Court, Wheeler County; Eschol Graham, Judge.

Action between A. J. Darley and T. B. Williams. Judgment for Darley, and certiorari sustained by superior court, and Darley brings error. Affirmed.

Wm. B. Kent, of Alamo, for plaintiff in error.

H. W. Nalley, of Alamo, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 311)

GLASS v. AUSTIN. (No. 13068.)(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)*(Syllabus by the Court.)*

1. Chattel mortgages ⇐280—Sale not suspended on affidavit of illegality, unless bond substantially as statute requires.

"The giving of a bond is a condition precedent to the return of the papers to court for trial, where an affidavit of illegality is tendered to the execution issued on the foreclosure of a chattel mortgage, and if the bond be not conditioned substantially as the statute requires, the papers ought not to be returned to court and sale suspended." *Brantley v. Baker*, 75 Ga. 676(1).

2. Chattel mortgages ⇐280—Bond on affidavit of illegality held not in compliance with statute.

The statute provides that, when such an affidavit of illegality is filed by the mortgagor, the bond shall be "conditioned for the return of the property when called for by the levying officer," and "shall be made payable to the plaintiff." Civ. Code 1910, § 3301. These requirements are not met by a bond the condition of which is that, should the defendant "well and truly deliver said property so levied upon at the time and place of sale, in the event said illegality shall be dismissed by the court or withdrawn, then this obligation to be void, else of full force and effect," and which is made payable to the sheriff of the county. *Brantley v. Baker*, supra. See, in this connection, *Hayes v. Savannah Chemical Co.*, 17 Ga. App. 376, 83 S. E. 1073.

3. Chattel mortgages ⇐280—Leave to file new bond with affidavit of illegality held properly denied.

The trial judge did not err in refusing to allow the defendant to file a new bond after he had announced ready for trial, nor in sustaining the motion to dismiss the affidavit of illegality. This case differs from *Lytle v. De Vaughn*, 81 Ga. 226, 7 S. E. 281, and *Gelders v. Mathews*, 6 Ga. App. 144, 64 S. E. 576, cited and relied upon by plaintiff in error. In each of those cases the motion was to amend the bond given so as to make it conform to the terms of the statute. In this case "the defendant tendered a written amendment asking that he be allowed to amend his affidavit of illegality in said case by filing a new bond." The "new bond" had only one security, the old two, and it does not appear that the "new bond" had been accepted by the levying officer. In *Fountain v. Napier*, 109 Ga. 226, 34 S. E. 851, in referring to a bond given under Civ. Code 1910, § 3301, supra, the Supreme Court said: "In order to make such a bond a binding contract between the parties and to render the person signing the bond as an obligor liable thereon, it is essential, not only that the bond should be signed by the obligors, but that the same should be accepted by the levying officer as a forthcoming bond."

Error from City Court of Miller County;
W. I. Geer, Judge.

Proceeding on an affidavit of illegality filed by D. G. Glass to an execution in favor of T. M. Austin. Judgment for the latter, and the former brings error. Affirmed.

N. L. Stapleton, of Colquitt, for plaintiff in error.

P. D. Rich, of Colquitt, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 228)

KING v. STATE. (No. 13158.)(Court of Appeals of Georgia, Division No. 1.
Feb. 14, 1922.)*(Syllabus by the Court.)*

1. Names ⇐19—Issue of idem sonans is for court.

Where a demurrer to a plea of misnomer raises the issue of idem sonans, and the two names, although spelled differently, necessarily sound almost alike, the issue is to be determined, as matter of law, by the court and not by the jury. *Veal v. State*, 116 Ga. 589, 42 S. E. 705, and authorities cited.

2. Names ⇐16(2)—"Keen" and "King" held idem sonans, and plea of misnomer properly stricken.

The defendant was indicted under the name of "Sampson King." He filed a plea of misnomer in which he alleged that his true name was "Sampson Keen," that he had always been known and called by that name, and that he had never been known or called by the name of "Sampson King." Upon motion of the state the court struck the plea as being insufficient in law. *Held*, the names "King" and "Keen" are idem sonans, as a matter of law, and the court did not err in its ruling. *Roland v. State*, 127 Ga. 401, 56 S. E. 412, and citations.

3. Criminal law ⇐828—Timely written request for charge on impeachment of witnesses is necessary.

Under repeated rulings of the Supreme Court and of this court, it is not error for the trial judge to fail to charge upon impeachment of witnesses, in the absence of a timely written request therefor.

4. Charge held sufficiently full in absence of request.

The charge of the court upon the subject of a reasonable doubt was sufficiently full, in the absence of a timely written request for a more detailed charge thereon.

5. Remaining grounds of motion.

The remaining grounds of the amendment to the motion for a new trial are without merit.

8. Criminal law \S 935(1)—New trial properly denied when verdict authorized by evidence.

The verdict was amply authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Houston County; Malcolm D. Jones, Judge.

Sampson King was convicted of an offense, and he brings error. Affirmed.

M. Kunz, of Perry, for plaintiff in error.
Chas. H. Garrett, Sol. Gen., of Macon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 218)

LYNN v. CITY OF HAZLEHURST.
(No. 13130.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 14, 1922.)

(Syllabus by the Court.)

Criminal law \S 1071—Petition for certiorari not sanctioned when giving or acceptance of bond not properly shown; statements in petition and clerk's certificate as to compliance with law held conclusions.

The petition for certiorari does not affirmatively allege that such a bond as is required in certiorari cases from a police or recorder's court was filed in the police court, or that such bond was approved and accepted by the clerk of said court (it appearing that there was such a clerk); no certified copy of the bond is attached to the petition; and the certificate of the clerk of the police court does not show that the bond was approved or accepted by him. The statement in the petition that the petitioner had "complied with the requirements of law in such cases," and in the certificate of the clerk that the accused "has given bond and security as required by law," are but conclusions. See *Hubert v. Thomasville*, 18 Ga. App. 756 (1-a), 90 S. E. 720. This being true, the judge of the superior court did not err in refusing to sanction the petition for certiorari. See *Gillespie v. City of Macon*, 19 Ga. App. 1, 90 S. E. 970.

Error from Superior Court, Jeff Davis County; J. P. Highsmith, Judge.

Action between Melvin Lynn and the City of Hazlehurst. Judgment for the latter and petition for certiorari denied, and the former brings error. Affirmed.

Gordon Knox, of Hazlehurst, for plaintiff in error.

John Rogers, Jr., of Hazlehurst, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 233)

MADDOX v. STATE. (No. 13190.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 14, 1922.)

(Syllabus by the Court.)

1. No error in excluding evidence.

There is no merit in any of the grounds of the amendment to the motion for a new trial which are based upon the refusal of the court to admit evidence.

2. Criminal law \S 1064 $\frac{1}{2}$ —Ground of motion not approved cannot be considered.

Ground 11 of the amendment to the motion for a new trial is not approved by the trial judge, and cannot be considered by this court.

3. Failure to charge not erroneous.

For no reason alleged was it error for the court to fail to charge as complained of in ground 12 of the amendment to the motion for a new trial.

4. Criminal law \S 1180—Approved verdict authorized by evidence not disturbed.

The evidence authorized the verdict, which has the approval of the judge who tried the case, and, as no error of law is pointed out, this court is powerless to interfere.

Error from Superior Court, Jackson County.

Action between W. H. Maddox and the State. Judgment for the State, and Maddox brings error. Affirmed.

Jere S. Ayers, of Jefferson, and Thos. J. Shackelford, of Athens, for plaintiff in error.
W. O. Dean, Sol. Gen., of Monroe, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(25 Ga. App. 215)

TODD v. STATE. (No. 13094.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 14, 1922.)

(Syllabus by the Court.)

1. Failure to charge on involuntary manslaughter not error.

Under the evidence and the defendant's statement to the jury, the failure of the court to charge upon the law of involuntary manslaughter was not error.

2. Remaining grounds without merit.

The remaining grounds of the amendment to the motion for a new trial are without substantial merit.

3. Criminal law \S 935(1)—New trial properly denied, when verdict supported by evidence.

The verdict was amply supported by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Elliott Todd was convicted of homicide, and he brings error. Affirmed.

H. H. Elders and E. C. Collins, both of Reidsville, for plaintiff in error.

J. Saxton Daniel, Sol. Gen., of Claxton, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 215)

SWAIN v. STATE. (No. 13097.)

(Court of Appeals of Georgia, Division No. 1
Feb. 14, 1922.)

(Syllabus by the Court.)

1. Specific grounds of motion without merit.

There is no merit in any of the special grounds of the motion for a new trial.

2. Criminal law — Verdict supported by evidence and approved not disturbed.

There is ample evidence to support the verdict, which has the approval of the judge who tried the case, and this court will not interfere.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action between Floyd Swain and the State. Judgment for the State, and Swain brings error. Affirmed.

B. B. Earle, of Thomasville, for plaintiff in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 215)

BUSH v. MIAMI TRAILER CO. (No. 12980.)

(Court of Appeals of Georgia, Division No. 1
Feb. 14, 1922.)

(Syllabus by the Court.)

Trial — Error to direct verdict where there were issues of fact for the jury.

Under the evidence adduced there were issues of fact which should have been submitted to the jury, and the court erred in directing a verdict for the plaintiff.

Error from Superior Court, Ben Hill County; O. T. Gower, Judge.

Action by the Miami Trailer Company against J. C. Bush. Judgment for plaintiff, and defendant brings error. Reversed.

D. E. Griffin, of Fitzgerald, for plaintiff in error.

A. J. & J. C. McDonald, of Fitzgerald, for defendant in error.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 317)

OWENS v. JONES-KENNEDY FURNITURE CO. (No. 13078.)

(Court of Appeals of Georgia, Division No. 1
March 7, 1922.)

(Syllabus by the Court.)

1. Sales — Title held not to pass where check given as cash payment was not paid.

Where personal property was sold on the installment plan and by the contract the first payment was to be made in cash, and a check was given for this "cash" payment, on the faith of which the property was delivered to the purchaser, the title to the property did not pass from the vendor to the vendee if the bank refused to pay the check because of "insufficient funds" and the vendor within a reasonable time demanded possession of the property from the vendee.

(Additional Syllabus by Editorial Staff.)

2. Landlord and tenant — Buyer's landlord held not in position of bona fide purchaser without notice of fraud.

Where a tenant was in arrears with her rent when she purchased furniture and gave a worthless check therefor, and the landlord levying distress warrant thereon did not extend credit or part with anything on the faith of her possession of the property, he was not in the position of a bona fide purchaser.

3. Sales — Where check not good, seller not required to tender contract and check before claiming goods.

Where payment of the check given as the cash payment on property purchased on an installment contract was refused, it was not necessary for the seller to formally tender the contract and unpaid check to the buyer before making claim to the property; they being introduced in evidence on the trial of the claim case.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Proceedings on a claim filed by the Jones-Kennedy Furniture Company to property levied on under a distress warrant in favor of J. S. Owens. Judgment for the claimant, and Owens brings error. Affirmed.

Etheridge, Sams & Etheridge, of Atlanta, for plaintiff in error.

Leon C. Greer, of Atlanta, for defendant in error.

BLOODWORTH, J. [1] Mrs. Lady P. Kinsey rented a house from John S. Owens. She obtained from Jones-Kennedy Furniture Company certain furniture which it delivered at her house, the same being the house rented from Owens. As a part of the purchase price of the furniture, she gave a check for \$50 and executed a contract in which it was stated that she was to pay \$50 cash and the balance of the purchase price at the rate of \$10 per week. The check for \$50 which she gave was returned by the bank marked "insufficient funds." The agent of the sellers notified Mrs. Kinsey that "if she could not pay the check she would have to return the furniture." The check was not paid. The agent finally obtained from her the key to the house, and with a conveyance went there to remove the furniture. When he reached the house he found that the furniture had been levied upon by virtue of a distress warrant in favor of the landlord, John S. Owens. The Jones-Kennedy Company filed a claim to the furniture, and a trial of this claim in the municipal court resulted in a judgment in favor of the claimant. Certiorari was sued out, the certiorari was overruled, and Owens excepted.

"Fraud voids all contracts." Civil Code 1910, § 4234. See, also, sections 4111, 4112, and 4113 of the Code. In *Starnes v. Roberts*, 128 Ga. 718, 58 S. E. 348, the Supreme Court said:

"If personal chattels be sold upon the express condition that they are to be paid for on delivery, and they are delivered upon the faith that the condition will be immediately performed, and performance is refused upon demand in a reasonable time, no title passes to the buyer. *Bergan v. Magnus*, 98 Ga. 514."

Demand for the property was made in a reasonable time. See *Wilson v. Comer*, 125 Ga. 500, 54 S. E. 355, 114 Am. St. Rep. 245; *Newman v. Claffin Co.*, 107 Ga. 89 (1), 32 S. E. 943; *Landauer v. Cochran*, 54 Ga. 533; *Jaffrey v. Brown* (C. C.) 29 Fed. 477 (8), and cases cited on page 482, and especially cases cited in note on page 485.

[2] The record shows that at the time Mrs. Kinsey contracted to purchase this furniture she was a tenant of Owens and in arrears with her rent, and it is clear that the landlord did not extend credit to her, nor did he pay anything or part with anything "on the faith of the property in the possession of the tenant." *Sutton v. Ford*, 144 Ga. 596, 87 S. E. 799, L. R. A. 1918D, 561, Ann. Cas. 1918A, 106; *Matthews v. Kennedy*, 113 Ga. 378, 38 S. E. 854. He does not stand in the position of a bona fide purchaser for value and without notice of the fraud. In *Exchange Bank v. Claffin*

Co., 100 Ga. 642 (1), 28 S. E. 439, the Supreme Court said:

"A title obtained by fraud is voidable in the vendee and is good only when set up by a bona fide purchaser without notice." Civil Code, § 3540 (section 4120 of the Civil Code of 1910).

A creditor by mortgage who did not extend credit on faith of the property, title to which was obtained by fraud, is not such a purchaser as will be protected. *Dinkler v. Potts*, 90 Ga. 103, 15 S. E. 690. All the cases cited by the plaintiff in error can be distinguished from the one under consideration. The question of fraud, which enters into this case, differentiates it from several of those cited by counsel for the plaintiff in error. As an illustration, take the case of *Gartrell v. Clay*, 81 Ga. 327, 7 S. E. 161. In that case there was no suggestion of fraud. Besides, the Supreme Court in the opinion in that case (81 Ga. 330, 7 S. E. 162), said:

"The debt which the distress warrant was sued out to secure was a contract by Sophie Johnson with Clay some time after the goods had been purchased by her from Gartrell. She rented the house from Clay, and had this furniture in her possession. Perhaps it was on the faith of her having this furniture in her possession that Clay gave her credit."

In the case sub judice, as shown above, the furniture was purchased after the house was rented. Mrs. Kinsey gave a check for the initial payment. That this payment was to be "cash" is shown by the contract, and it is evident that the seller accepted the check as cash, and when the bank refused payment of the check because of "insufficient funds," there was really no payment, and the title to the property did not pass to Mrs. Kinsey. "A bank check tendered in payment is not such until paid." *Sims v. Bolton*, 138 Ga. 73 (1), 74 S. E. 770; Civil Code 1910, § 4314. In the case just cited the Supreme Court held that—

"The transaction of purchase and sale being a cash one, the title to the mule did not pass from the vendor to the vendee on the failure of the bank to cash the check."

[3] Under the ruling in that case it was not necessary for the vendor to formally tender to the vendee the contract and the unpaid check, as they were introduced in evidence upon the trial of the case.

Under the facts of this case, title to the furniture never passed into Mrs. Kinsey; it was not subject to the distress warrant, and the certiorari was properly overruled. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 388)

CENTRAL OF GEORGIA RY. CO. v. THOMPSON. (No. 12687.)(Court of Appeals of Georgia, Division No. 2.
March 9, 1922. Rehearing Denied
March 20, 1922.)*(Syllabus by the Court.)*

1. Railroads \Rightarrow 382(6)—Presence on track in helpless condition did not defeat recovery, where evidence to excuse presence was not insufficient.

The evidence by which the plaintiff sought to account for and excuse the presence of the deceased, lying helpless on the track, at the time and place of the homicide, although weak and circumstantial, is not absolutely insufficient, and was coupled with testimony tending to negative the fact of his being then and there intoxicated. It follows that the ruling in *Parish v. Western & Atlantic Railroad Co.*, 102 Ga. 285, 291, 29 S. E. 715, 40 L. R. A. 364, does not control the case adversely to the plaintiff. It was held in that case that the presence of the injured person, lying at night on the track of the defendant company in a helpless and exposed position, amounted *prima facie* to a failure on her part to exercise ordinary care, that such negligence, except in a case where the injury is willful or wanton, would *prima facie* operate to prevent a recovery, and that the burden of explaining and excusing presence in such a helpless and exposed position rests upon the plaintiff, and not upon the defendant. See, in this connection, *Fairburn & Atlanta Ry. & Electric Co. v. Latham*, 26 Ga. App. 698, 107 S. E. 88.

2. Railroads \Rightarrow 391(4) — Contributory negligence does not defeat recovery for wanton injury.

Under the law of this case as formerly adjudicated by this court, and under the evidence disclosed by the record, the verdict for the plaintiff could not be disturbed, even though it were to be held that the jury were unauthorized to find that the plaintiff had succeeded in satisfactorily explaining and excusing the presence and helpless condition of the deceased on the track at the time and place of the homicide. "While it is true that a railroad track is a place of danger, and one who trespasses thereon is guilty of negligence, yet when the company discovers this negligence, or has reason to anticipate it, and if such a trespasser is on the track in an apparently helpless condition, ordinary diligence requires the use of every means then available to avoid running down and killing him; and if, under such circumstances, this degree of care is not exercised, and death results, the killing will be deemed in law to have been willful and wanton. Contributory negligence on the part even of a trespasser will not defeat a recovery for a wanton homicide." *Central of Ga. Ry. Co. v. Thompson*, 25 Ga. App. 715 (2), 104 S. E. 515. See, also, *Crawford v. Southern Ry. Co.*, 106 Ga. 870, 873, 33 S. E. 826; *Southern Ry. Co. v. Chatman*, 124 Ga. 1026 (5), 53 S. E. 692, 6 L. R. A. (N. S.) 283, 4 Ann. Cas. 675. There was some evidence sufficient to authorize the

jury to find that the defendant was then under the duty of anticipating the presence of the deceased, and was actually aware of his presence in such helpless and exposed condition in time to have avoided the injury by the exercise of ordinary care in the performance of the special duty thus arising and owing to him. *Tice v. Central of Ga. Ry. Co.*, 25 Ga. App. 346 (1), 103 S. E. 262, and cases cited.

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Action by Mrs. W. O. Thompson against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. W. Johnson, of Savannah, for plaintiff in error.

C. H. & B. S. Cohen, of Augusta, H. J. Fullbright, of Atlanta, and E. V. Heath, of Waynesboro, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STÉPHENS and HILL, JJ., concur.

(28 Ga. App. 384)

CITY OF TALLAPOOSA v. BROCK.**BROCK v. CITY OF TALLAPOOSA.**

(Nos. 12671, 12689.)

(Court of Appeals of Georgia, Division No. 2.
March 9, 1922.)*(Syllabus by the Court.)*

1. Appeal and error \Rightarrow 655(2)—Bill of exceptions presented in time not dismissed though held by the judge for verification.

The motion to dismiss the bill of exceptions must be denied. The certificate of the judge shows that within the time prescribed by law it was presented to him by counsel for plaintiff in error, to be certified by him in terms of the law, and that it was held by him for certain purposes of verification, without any fault on the part of plaintiff in error or its counsel. The mere fact that the judge in his certificate may have specified an additional part of the record as material to a clear understanding of the case would not operate to change the rule.

2. Limitation of actions \Rightarrow 130(10)—Suit held to toll statute though demurrable for failure to show presentation of claim.

Although, under the ruling made by the Supreme Court in *City of Tallapoosa v. Brock*, 138 Ga. 622, 75 S. E. 644, the former suit was demurrable, in that it failed in its attempt to set forth a substantial compliance with the provisions of section 910 of Civil Code 1910, relative to a presentation of the claim to the governing authorities of the municipality for adjustment, it nevertheless was not such an

absolute nullity that it could not operate to toll the statute of limitations so as to allow the bringing of another suit within six months after its dismissal. The statute embodied in section 4381, providing for the renewal of suits, is remedial in its nature, and is intended to afford relief from such mistakes, accidents, and errors. *Lamb v. Howard*, 150 Ga. 12, 102 S. E. 436.

3. New trial \S 35—Admission of evidence of death in action for injuries not ground for new trial when limited.

In an action for damages for physical injuries, pain, and suffering, the admission of evidence showing that the injuries set forth in the petition subsequently resulted in the death of the plaintiff's intestate does not afford ground for a new trial where the judge, in admitting such testimony, plainly and expressly limited its probative value "as a circumstance showing the extent of the injuries," and in his charge repeated the substance of such ruling, and plainly instructed the jury that they could not consider the death as an element of damage. *Chattanooga R. Co. v. Liddell*, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169.

4. Appeal and error \S 1033(5)—Trial \S 255(13)—Failure to define "patent defects" and "latent defects" not reversible error; instruction referring to patent and latent defects, but giving only rule of liability for latent defects, held favorable to defendant.

The failure of the judge to define or elaborate without request, the meaning of the terms "patent defects" and "latent defects" does not authorize the setting aside of the verdict and judgment. The meaning which the law attaches to those terms is in accordance with their ordinary acceptation, and the sense in which they were employed was such as to make clear the idea intended to be conveyed. The charge, while making reference to both patent and latent defects, was especially favorable to the defendant, in that it treated the alleged defect, if a defect, as latent in character, and amounted to such an instruction, since the only rule of liability given was such as might arise out of the negligence of defendant on account of latent defects, of which, under the evidence, the jury might determine the defendant had actual notice, or ought in the exercise of ordinary care to have discovered and remedied. *City of Columbus v. Anglin*, 120 Ga. 785 (9), 48 S. E. 818.

5. Appeal and error \S 1033(5)—Instruction as to nonliability if injury resulted from accident held not confusing or prejudicial to defendant.

The excerpt from the charge complained of in the eighth ground of the amendment to the motion for a new trial, set forth below, does not constitute reversible error, as being calculated to confuse the jury to the prejudice of the defendant. It was given for the defendant's benefit, and the only ordinary and reasonable meaning of the excerpt is that the city would not be liable if it had exercised ordinary and reasonable care, even though the plaintiff might be likewise blameless.

6. Sufficiency of evidence and excessiveness of damages.

Under the evidence disclosed by the record, it is not possible to hold either that the verdict was without any evidence to support it or that the amount of the verdict (\$8,500) is excessive.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Action by W. B. Brock, administrator, against the City of Tallapoosa. Judgment for plaintiff, and defendant brings error, and plaintiff brings cross-bill of exceptions. Cross-bill dismissed, and judgment affirmed.

M. J. Head and Lloyd Thomas, both of Tallapoosa, for plaintiff in error.

Edwards & Edwards, of Buchanan, and U. G. Brock and H. J. McBride, both of Tallapoosa, for defendant in error.

JENKINS, J. This was a suit for personal injuries, pain, and suffering, alleged to have been occasioned plaintiff on account of the failure of defendant to comply with its duty of keeping and maintaining a portion of one of its sidewalks in a reasonably safe condition. The petition alleges that a section of a certain wooden ventilator covering a portion of defendant's sidewalk, on which petitioner was standing, gave way, causing her to fall through, thereby inflicting serious personal injuries. The evidence shows that the wooden grate had been constructed and had been in use for a long number of years prior to the date of the injury. The suit is alleged to be in renewal of a former suit for the same cause of action, and is maintained by her administratrix, the original plaintiff having died subsequent to its institution. The jury returned a verdict for the plaintiff in the sum of \$8,500, and exception is taken to the overruling of the defendant's motion for new trial. The grounds of the motion relied upon in the briefs filed by counsel for plaintiff in error are:

[1, 2] (1) The cause of action is barred by the statute of limitations, and the suit cannot be maintained in renewal of the former suit, for the reason that the former suit was void on account of its failure to show a substantial compliance by the plaintiff with the provisions of Civil Code 1910, § 910, relative to a presentation of the claim to the municipal authorities for adjustment (grounds 3, 13, 18, 19, and 20 of the amendment to the motion). Exception is taken to the failure of the court to state to the jury the defendant's contention in this respect (ground 4).

[3] (2) The court erred in admitting, over defendant's objection, the testimony of certain physicians, to the effect that the death of the plaintiff resulted from the injuries set forth by the plaintiff in her petition (grounds 1, 2, and 19 of the amendment to the motion).

This evidence was admitted, expressly, only "as a circumstance showing the extent of the injuries," and in his charge the judge again plainly so limited its probative value, and expressly confined the measure of damages to the pain and suffering sued for.

[4] (3) The charge was confusing in that it referred to the rule governing liability for both patent and latent defects, without defining these terms, and because there was no evidence to authorize any reference to a patent defect (ground 7).

[5] (4) The court erred in charging the jury as follows:

"If this damage resulted from a mere accident for which nobody would be liable after the city has exercised ordinary and reasonable care and diligence as I have charged you, then the city would not be liable."

This charge, it is alleged, was error, for the reason that it was confusing, and tended to mislead the jury; that, if damage resulted from a mere accident, for which nobody would be liable, the defendant, as a matter of course, would not be liable under any circumstances; that this charge "might well lead to the conclusion in the minds of the jury that for a mere accident the defendant would be liable, unless it had previously exercised all the care and diligence required in case of injury not to the result of the mere accident" (ground 8).

[6] (5) The verdict is not supported by the evidence, and is excessive (grounds 15, 16, and 17). The special contention in this respect is that the evidence showed that the sidewalk was not being used by the plaintiff at the time and place of the injury in an ordinary manner and by herself alone, but that the plaintiff and three other persons were standing upon the grate at the time the defective bar gave way; that the evidence showed that this particular portion of the sidewalk and grate was not in fact constructed by the city, but by the owner of the abutting property, and that the grate was used to ventilate the basement of the building; that the evidence showed that all of the grate bars were sound except the one which gave way, and that the unsound and decayed portion of the defective bar was confined to the under side, and that such rotten condition was not apparent to ordinary inspection, and that the city had neither actual nor constructive notice of the defect; that "the only evidence of actual notice is the testimony of J. A. Davis, a former marshal, that he notified Stephens N. Noble, a councilman, that the grate was in a bad condition, without specifying in what respect the condition was bad, or giving any further notice to the mayor or other councilman, or the owner, and without taking any steps whatever to have the defects removed. This was during the year 1906, and it so

happened that Mr. Noble was the only member of council for that year who was dead at the time the evidence of said Davis was taken.

It is not necessary to add anything further to the headnotes.

Judgment affirmed on the main bill of exceptions; cross-bill dismissed.

STEPHENS and HILL, JJ., concur.

(122 Va. 681)

JACOBS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Homicide §13—Law implies malice from killing with pistol.

Even though the defendant and deceased had been on good terms prior to the shooting, the law implies malice from the fact that defendant had armed himself with a pistol "for use if anything should happen," and that with the pistol he shot deceased in the back and killed him.

2. Homicide §43—Provocation does not reduce killing to manslaughter unless it arouses passion.

Provocation will not reduce homicide from murder to manslaughter unless it has so aroused the anger of the assailant as temporarily to affect his reason and self-control, since both provocation and passion must exist.

3. Homicide §282—Whether provocation produces passion sufficient to reduce offense to manslaughter is jury question.

When there is room upon the evidence for difference of opinion, the question whether the alleged provocation sufficiently operated on the mind of accused to rebut the presumption of malice arising from the killing, and reduced the grade of the offense to manslaughter, is one for the jury to determine, under instructions from the court as to the nature and extent of provocation.

4. Homicide §11, 22(2)—Test of murder is malice; deliberation and premeditation elements of first degree murder.

The test of murder is malice, and every malicious killing is murder in the first or second degree; the former if deliberate and premeditated, and the latter if not.

5. Homicide §146, 147, 152—Malice, but not deliberation and premeditation, presumed; every homicide is prima facie second degree murder.

There is a prima facie presumption of malice arising from the mere fact of a homicide, but no presumption of deliberation and premeditation, and every homicide is prima facie murder in the second degree, and the burden is on the accused to reduce and on the commonwealth to elevate the grade of the offense.

6. Criminal law §557—Defendant may rely on extenuations shown by prosecution's evidence.

Defendant may rely upon circumstances of extenuation appearing in the evidence produced by the commonwealth to the same extent as if they were brought out in his evidence in reducing the grade of the homicide.

7. Homicide §269—Existence of malice is generally question for jury.

Whether malice exists in a particular case is usually a question for a jury, and the significance of the words and conduct addresses itself peculiarly to the consideration of the jury; but in perfectly clear cases the evidence may be held not to show malice though the jury found its existence.

8. Homicide §271—Sufficiency of provocation is question of law, and its existence a question of fact.

The sufficiency of provocation to excuse or extenuate murder is generally a question of law, but whether such provocation exists in a particular case is a question of fact.

9. Homicide §48 — Assault on defendant's mother is sufficient provocation to reduce killing to manslaughter.

An assault by deceased upon defendant's mother, in which he struck her with his fist and knocked her down, is ample provocation for passion on the part of accused which would reduce the killing from murder to manslaughter.

10. Homicide §239—Evidence held to sustain finding killing was malicious, and not caused by provocation.

In a prosecution for homicide, committed after deceased had knocked defendant's mother down, where defendant did not claim to have acted in sudden passion produced by the assault on his mother, but falsely testified deceased was threatening his mother with a pistol, and that he fired the first shot to defend his mother, and the other shots to defend himself, evidence held to sustain a finding that the provocation did not produce passion on the part of defendant.

Burks, J., dissenting.

Error to Circuit Court, Northampton County.

James Jacobs was convicted of murder in the second degree, and he brings error. Affirmed.

J. Brooks Mapp, of Keller, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

KELLY, P. Upon an indictment for the murder of Harvey Palmer, James Jacobs was found guilty and sentenced to a term of 10 years in the penitentiary.

The defendant excepted to the giving of a number of instructions, and also to the

overruling of a motion for a new trial, but the sole contention presented to us is that the evidence was not sufficient to warrant a conviction of murder in the second degree.

All of the parties involved were colored persons. The killing occurred about 2 o'clock on the morning of August 5, 1920, at the home of the prisoner and his mother, Ellen Carpenter. Beginning earlier in the night there was a drinking and dancing party at the house, those present having been invited there by Ellen Carpenter and her niece, Leah Douglas. Some 30 or 40 guests were in attendance. Ellen Carpenter sold food from one table and Leah Douglas sold whisky from another table in the same room. This was a continuous performance, and the drinking was rather general. Both the prisoner and the deceased were among those who bought and drank whisky. Most of the guests had left the place before the shooting occurred. Some trouble arose between the deceased and his wife. Ellen Carpenter interceded in an apparently inoffensive way, saying to Harvey Palmer, the deceased, "Your wife has not done anything, let her alone," whereupon he struck Ellen Carpenter with his fist, knocking her down, and Leah Douglas exclaimed, "Lord, he has killed Aunt Ellen."

There is an irreconcilable conflict of evidence in some of the particulars of the shooting. Upon the testimony of the commonwealth the jury might have believed, and from their verdict evidently did believe, that before Jacobs opened fire Ellen Carpenter was getting up on her feet; that Buck Palmer, without making further demonstration or exhibiting any weapon, had turned and was walking away, having gone a distance variously estimated by the witnesses at from a few feet to five or six yards, when Jacobs stepped forward and said, "Buck, you are not going to hit my mother like that," at the same time firing three shots at Palmer, two of which took effect. It is conceded that the deceased was shot in the back.

On the other hand, according to the testimony of the prisoner and some of his witnesses, the deceased was leaning over the prostrate form of Ellen Carpenter, with a pistol in his hand, and the prisoner, after exclaiming, "Don't you kill my mother," fired the first time for the purpose of defending his mother, and continued to fire because he feared for his own life. He does not claim to have acted in hot blood, or under the propulsion of a sudden fit of anger.

The conflict in the evidence was, of course, to be settled by the jury, and it is pertinent to observe that the testimony for the defense was materially discredited in several respects, particularly by the admitted fact that the witnesses for the accused who had previously testified at the coroner's inquest on the day after the shooting did not at that time

say anything about a pistol in the hands of the deceased.

[1] It is true that the prisoner and the deceased seem to have been on good terms prior to the shooting, but the prisoner was armed with a pistol which he said he put in his pocket that night "for use if anything should happen." With this deadly weapon he shot the deceased in the back and killed him. From these facts the law implies malice, and the jury was warranted in finding that he did not sustain the burden of rebutting the presumption thus arising against him.

[2, 3] In the brief of counsel for the defendant it is insisted that he acted under great provocation. It must be remembered, however, that provocation cannot be relied upon to reduce murder in the second degree to manslaughter unless the provocation has so aroused the anger of the assailant as to temporarily affect his reason and self-control. The authorities for this familiar proposition are cited hereafter. In this case the defendant does not claim to have been thus affected. He expressly negatives any such defense by claiming that he shot the deceased because he thought that action necessary to save his mother and himself, and he does not in his testimony rely upon provocation as a defense. When there is room upon the evidence for a difference of opinion, the question whether the alleged provocation sufficiently operated on the mind of the accused to repel the presumption of malice arising from the killing, and thus reduce the grade of the offense, is one for the jury to determine. In every such case it is the province of the court to instruct the jury as to the nature and extent of the provocation sufficient to reduce a homicide from murder to manslaughter, but it is the province of the jury to determine whether, under the facts of the particular case, the alleged provocation rather than a malicious purpose actuated the perpetrator.

[4-6] The test of murder is malice. Every malicious killing is murder, either in the first or second degree—the former if deliberate and premeditated, and the latter if not. Furthermore, there is a *prima facie* presumption of malice arising from the mere fact of a homicide, but there is no presumption therefrom of deliberation and premeditation. This is merely another way of stating the familiar rule of law that every homicide is *prima facie* murder in the second degree, and that the burden is on the accused to reduce, and on the commonwealth to elevate, the grade of the offense. *Hill's Case*, 2 Grat. (43 Va.) 595; *Potts' Case*, 113 Va. 732, 73 S. E. 470; *Bryan's Case*, 131 Va. —, 109 S. E. 477, 478. This, of course, does not mean that the accused may not rely upon circumstances of extenuation appearing in the evidence produced by the commonwealth with the same effect as if brought out in evidence offered by him.

[7] Whether malice exists in a particular case is usually a question for the jury. We have held in perfectly clear cases that the evidence was not sufficient to show malice even where the jury had found to the contrary, but malice is a subjective condition of mind, discoverable only by words and conduct, and the significance of the words and conduct of an accused person, wherever there can be doubt about such significance, addresses itself peculiarly to the consideration of the jury.

"The determination of the grade or degree of homicide is a question for the jury." 2 *Michie on Homicide*, p. 1388.

[8] "The sufficiency of the provocation to excuse or extenuate murder is generally a question of law. Whether such provocation existed in the particular case is a question of fact." 21 Cyc. 1028, and cases cited in note 67.

In *State v. Morrison*, 49 W. Va. 211, 38 S. E. 481, the defendant, Morrison, upon a sudden quarrel struck the deceased with a heavy stick, and claimed to have acted in self-defense. He was indicted for murder and convicted of that offense in the second degree. The defendant and a man named Dempsey were the only eyewitnesses to the tragedy. They both testified, and their testimony, which was practically identical, constituted the only evidence upon which the state could rely for a conviction. There was room under this evidence to claim that the accused acted in hot blood, and still, as stated above, he relied upon self-defense. The opinion of the court by Judge Poffenbarger dealt with the law of the case in both aspects as follows:

"The instrument with which the wound was inflicted is proved by the result to have been a deadly weapon. It was for the jury to say whether the act was done in the heat of blood, and therefore amounted in law to manslaughter only, or in self-defense, and justifiable. They have failed to find, as matters of fact, that the act was done as the result of passion and heat of blood, or in self-defense, but on the contrary, that the blow was administered with a deadly weapon, and with the intent, at least, to do severe bodily harm, and from it death resulted; and there is evidence to support each of these findings. From these facts the jury might rightfully infer that the act was done maliciously."

See, also, *Bryan's Case*, *supra*; *State v. Dillard*, 59 W. Va. 197, 53 S. E. 117; *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781; *State v. Hoyt*, 13 Minn. 132, 147 (Gil. 125) *Seals v. State*, 3 Baxt. (Tenn.) 459.

In the light of the foregoing principles and authorities, it would seem that the language of the West Virginia Supreme Court in *State v. Beatty*, 51 W. Va. 232, 41 S. E. 434, is peculiarly applicable here. In that case the accused was convicted of murder in the first degree, and one of the questions involv-

ed was whether the killing was the result of passion. The court said:

"If, in any case the finding of a jury on this peculiar question might be set aside by the court, it cannot be done in this instance."

[8] To be sure there was ample evidence of provocation in the case at bar. The deceased had just made a violent attack on the mother of the accused, and that was legal ground for anger on his part (Davis' Crim. Law, 84). But we must not lose sight of the fact that the effect of the provocation on the defendant's state of mind was the material and decisive question.

In Davis' Crim. Law, p. 84, it is said:

"The indulgence shown to the first transport of passion, in these cases, is plainly a condescension to the frailty of human nature, to the temporary madness which, while the frenzy lasts, renders the man deaf to the voice of reason. And therefore the provocation which extenuates in the case of homicide must be something which the man is conscious of, which he feels and resents at the instant the act which he would extenuate is committed; not what time or accident may afterwards bring to light. Passion arising from sufficient provocation is evidence of the absence of malice, and reduces homicide to manslaughter; but passion without provocation, or provocation without passion, is not entitled to this indulgence; and where there are both provocation and passion, the provocation must be sufficient."

In Minor's Synopsis of Criminal Law, p. 46, it is said that the provocation, in order to extenuate homicide to manslaughter, must be such as to have—

"actually excited strong passion, so as to have temporarily unsettled the reason. Adequate provocation and ungovernable passion must concur"—citing several Virginia cases.

In Read's Case, 22 Grat. (63 Va.) 924, 938, it is said:

"It is not only necessary in such a case and for such an effect that a reasonable provocation should be received, but it is also necessary that the provocation should have the effect of producing sudden passion under the influence of which alone the offense is committed. It must be a sudden transport of passion, which the law calls *furor brevis*. If a person on receiving the gravest provocation, is unmoved by passion, but wantonly and willfully and wickedly kills his adversary otherwise than in self-defense, he is guilty of murder. The law mitigates the offense to manslaughter, only as an indulgence to the infirmity of human nature. Provocation without passion or passion without provocation will not do; both must concur to reduce the offense to the grade of manslaughter."

In State v. Ellis, 74 Mo. at page 218, the court said:

"It is to be observed, also, that it is the state of mind, when produced by lawful provocation and not the provocation itself, which makes the killing manslaughter, for, although

there may have been what is denominated lawful provocation, yet if such provocation did not, in fact, produce the state of mind above described * * * the killing would be murder at common law, and, under our statute, murder in the first degree."

[10] No doubt the accused was mad, but anger and malice frequently accompany each other, and neither he nor any other witness in this case testified to any overpowering passion on his part. On the contrary, his effort and the effort of his mother and his cousin, Leah Douglas, were to prove that he shot purely to save his mother's life and his own. This was the only theory which his testimony and that of his witnesses seemed designed to establish. The jury evidently believed, as they might well have done under the evidence, that the assault on his mother had ended, and that he was in no danger. Their verdict concluded that question. The case, therefore, comes to us as one in which, at an unlawful drinking and dancing party, sponsored by his mother, the accused armed himself with a pistol for use "if anything should happen," and used it to kill a man on a false pretext. The evidence which he himself adduced, if it does not preclude the question entirely, certainly brought about such a state of facts as that the question of whether the provocation produced the state of mind necessary to extenuate the killing to manslaughter clearly rested with the jury.

For the reasons stated we are of opinion that the judgment complained of was free from error, and that the same must be affirmed.

Affirmed.

BURKS, J. (dissenting). I concur with the majority of the court in saying that the plaintiff in error did not kill the deceased in order to protect his mother, or in self-defense. His whole tale on this subject is a fabrication, whether from fright or other cause I do not know. He had not previously given an account of the shooting to any one else. He did not kill to protect his mother, but because he was mad, and justly and lawfully mad. Just as he came around the corner of the house he saw the deceased knock his mother down, and heard the exclamation, "Lord, he has killed aunt Ellen." He rushed up at once and began firing at such close range that there were powder marks on the clothing of the deceased. It is wholly immaterial that the deceased was retreating. It is inconceivable to me that there was no passion arising from the transaction. In such case—

"passion arising from sufficient provocation is evidence of the absence of malice, and reduces homicide to manslaughter." Davis Cr. Law, 84.

This is one of the few cases in which the law recognizes the frailty of human nature

and reduces the crime from murder to manslaughter.

The author just cited says at pages 83, 84:

"The provocation that will be allowed to extenuate the guilt of voluntary homicide must be of a nature which, regarding man as he is, might reasonably and naturally have excited his passions beyond the power of his reason to control his conduct. Thus, if a man were to find another in the act of adultery with his wife, and thereupon to kill him in the first transport of passion, he would only be guilty of manslaughter, and that of the lowest degree, because there could not be a greater provocation. Thus, also, any assault made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, if it be resented immediately by the death of the aggressor, and it appears that the party acted upon the heat of blood upon that provocation, will reduce the crime to manslaughter. * * *

"The indulgence shown in the first transport of passion, in these cases, is plainly a condescension to the frailty of human nature, to the temporary madness which, while the frenzy lasts, renders the man deaf to the voice of reason. And therefore the provocation which extenuates in the case of homicide must be something which the man is conscious of, which he feels and resents at the instant the act which he would extenuate is committed; not what time or accident may afterwards bring to light. Passion arising from sufficient provocation is evidence of malice, and reduces homicide to manslaughter; but passion without provocation, or provocation without passion, is not entitled to this indulgence; and where there are both provocation and passion, the provocation must be sufficient. * * *

"Between persons nearly connected by natural or civil ties, the law admits the force of a provocation given to one to be felt by the other. Therefore homicide committed by the husband or wife, parent or child, master or servant, of the person injured, is entitled to the same construction as if such injury had been done to the person resenting it."

Under the circumstances, I think the offense of the plaintiff in error was manslaughter, and not murder.

This case was argued before Judge WEST took his seat on the court.

(182 Va. 379)

WILLIAMS v. MARINE BANK OF NORFOLK.

(Supreme Court of Appeals of Virginia.
March 16, 1922. Rehearing Denied April 5, 1922.)

1. Contracts §189—Promise to "settle" contract with bank held not unconditional promise to pay contract price.

A promise by an owner, indorsed on a contract for the construction of a house, to "settle the above contract" with a bank, which was

a transfer by the contractor of the owner's obligation, does not unconditionally promise to pay the full amount of the contract price to the bank, since the meaning of the word "settle" depends on the context in which it is used and upon the subject-matter and the circumstances surrounding its use.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Settle—Settlement.]

2. Contracts §189—Owner held required to pay bank, on assignment of contract, only amount due contractor after potential liens were discharged.

A promise, indorsed by an owner on the contract for construction of buildings, to settle the contract with the bank which advanced money to the contractor, requires the owner to pay the bank only the amount due contractor after potential liens against the building which the contractor could not, under Code 1904, § 2482a, defeat by any transfer or assignment.

Error to Circuit Court of City of Norfolk.

Action by the Marine Bank of Norfolk against H. A. Williams, Jr. Judgment for the plaintiff, and defendant brings error. Reversed and remanded for a new trial.

Thos. H. Willcox, Jas. G. Martin, and H. B. G. Galt, all of Norfolk, for plaintiff in error.
Tomlin & Maupin, of Norfolk, for defendant in error.

BURKS, J. The Marine Bank recovered a judgment against Williams for \$5,120 in an action of assumpsit on a contract dated August 25, 1917. The errors relied on for the reversal are the refusal of the trial court to set aside the verdict as contrary to the law and the evidence, and errors committed in granting and refusing instructions.

On August 25, 1917, Bundick & Carner, building contractors, entered into a written contract with Williams to furnish the materials and build for him two bungalows in the city of Norfolk for the price of \$5,120, which amount Williams agreed to pay as follows: \$200 when the houses were framed and raised, \$200 when the roofs were on, and the balance in 10 days after the completion of the buildings. No time was fixed for the completion. This contract was signed C. A. Bundick and C. V. Carner, contractors and H. A. Williams, owner. Immediately under the signature is the following made at the request of the contractors: "Will settle above contract with the Marine Bank. H. A. Williams, Jr." This was a transfer by the contractors of Williams' obligation to pay. The buildings were completed and delivered to Williams, and accepted by him some time in the summer of 1918. The exact date at which the above addition was made to the contract does not appear, but it appears to have been made in the summer of 1918, on the request of

Bundick & Carner. These contractors were building a number of houses for Williams, as well as for other persons, and had a line of credit with the Marine Bank for probably something like \$18,000, and they asked Williams to make the addition above mentioned for the purpose of raising money at the Marine Bank. They then took the contract to the bank and executed a collateral note, using the contract as collateral, and borrowed money to pay lumber bills and pay rolls for the Williams houses and others. The amount of this collateral note does not appear, but the lumber bills amounted to \$1,200 or \$1,500. The collateral note was in the usual form and made the collateral bound, not only for that note, but for any other indebtedness of Bundick & Carner to the bank. Williams states that he did not know of the physical delivery of this contract to the bank until about four months before he testified in this case, and, when brought to his attention by the president of the bank, stated that he had forgotten all about it. The president of the bank states that he brought it to Williams' attention about a year previous but we do not regard that point as material. On June 26, 1918, Williams negotiated a loan on these houses to be secured by a deed of trust thereon. In order to get this loan he had to pay off the bills for the materials that went into the houses, and he accordingly paid them, amounting to a large sum. During the progress of the work, he also executed notes to Bundick & Carner for different amounts, which showed that they were executed on account of these houses, and which were discounted by the Marine Bank. Williams claims that he was compelled to pay for the material and labor used about the construction of his houses, in order to perfect the title to his property, as they were potential liens thereon, and that he should have credit therefor on the contract aforesaid; while the bank contends that it was a tripartite agreement between the parties and that he is not entitled to any such credit. It is not distinctly stated in the record, but the case seems to have proceeded on the concession that Bundick & Carner are insolvent, and that at the time Williams paid for the materials the parties could have docketed liens therefor, but had not done so.

[1] The correct decision of the case is dependent largely on the proper construction to be put on the words of the addition to the contract, signed by Williams, "Will settle above contract with the Marine Bank." As Williams did not undertake, by the contract, to do anything but to pay the money called for by it, counsel for the bank insists that the addendum constituted an unconditional promise on the part of Williams to pay to the Marine Bank the sum of \$5,120 ten days

after the completion of the buildings, and this was manifestly the view of the trial court. If it erred in this respect, then the verdict should have been set aside as contrary to the law and evidence. The word "settle" is one of equivocal meaning, depending not only on the context in which it is used, but upon the subject-matter and the facts and circumstances surrounding its use. In the case at bar, the bank had not only the imputed knowledge of the right of materialmen to docket liens for supplies, but, from its location in a populous city where such liens were frequently acquired, it must have had actual knowledge of the existence of such right, and the inability of a general contractor by transfer or assignment to defeat it except by paying the bills. Williams, too, who was building many houses at this time, could hardly have been supposed to have been willing to contract to pay unconditionally the full price for building the houses, and leave unpaid all bills for labor, materials, and supplies, with the right on the part of these persons to docket liens on his property. Furthermore, the parties themselves do not appear to have put that construction on the contract. When the contract was delivered to the bank, it was not accepted by it as a direct and unconditional contract to pay to it \$5,120, but was taken as collateral, and, instead of relying upon the promise to settle in the addendum, it took a collateral note, with the promise therein contained, and the contract as collateral. The president of the bank testified that the bank "took it as usual on a collateral note." It is manifest also that the bank expected some adjustment of differences between the builders and Williams, some ascertainment and agreement as to the amount due by Williams, some "settlement" between them before there would be anything coming to the bank. This appears from the testimony of the president of the bank, who was the only witness examined by it on this feature of the case. He testified, amongst other things, as follows:

"Q. Did you ever make any inquiries about the houses?

"A. I asked them (Bundick & Carner) constantly how Williams was getting along. They were building houses for him and could not get a settlement, and, as far as I knew, they couldn't get a settlement at all, they tell me. . . .

"Q. What advice did you receive regarding the completion of the houses?

"A. That they had not been settled for. . . .

"Q. How much money did you give them?

"A. . . . I knew they were building a great many houses for Mr. Williams, and as they got through building those houses they were getting pay rolls every day, and I couldn't tell what they were building, and I asked them from time to time what about these houses that

the contracts had not been settled, so I considered that as a contract of Williams to pay me for whatever went into his houses. * * *

"Q. Did you advance any money that went into these two houses, so far as you know?

"A. Paid for that lumber that went into these two houses, as far as I know. As far as I know, I thought it all went into those houses; but it seems it didn't. That contract was regarded by the bank officials as security for \$5,100 in Williams' houses. It said, 'I promise to settle with the bank,' and it means they are going to come to the bank and settle, and I understand he has not finished settlement with them yet."

[2] While Williams admits he had forgotten his promise to settle with the bank, that could not subject him to any greater liability than if he had not forgotten it. It seems fairly clear that the promise to "settle," as used in this case, was not a promise to pay the contract price for building the houses. The president of the bank does not so claim in his testimony. On the contrary, he "considered that as a contract of Williams to pay me for whatever went into his houses." We think that the fair deduction from the testimony is that the addendum to the contract was not given or received as an unconditional promise to pay to the Marine Bank \$5,120 ten days after the completion of the buildings, but was an undertaking on the part of Williams to make his settlement with the Marine Bank instead of with Bundick & Carner, and that whatever was coming to the latter should be paid to the bank, that the addendum to the contract was never given as an original undertaking to pay any greater sum, that the bills for materials that went into the houses were potential liens on such houses, which the general contractors could not defeat by any transfer or assignment (Code 1904, § 2482a), and that as against the bank Williams had the right to pay them off and use them as credits in his settlement under the contract, although no liens had at the time of payment of said bills been docketed against Williams' property. The instructions given by the trial court were to the contrary and were, therefore, erroneous, and resulted in an erroneous verdict which will be set aside as plainly contrary to the law and evidence. We cannot tell from the record what judgment would be right and just. The verdict of the jury will therefore be set aside and the judgment of the trial court reversed, and the case be remanded to the trial court for a new trial to be had in conformity to the views hereinbefore expressed.

Reversed.

PRENTIS, J., absent

This case was argued before Judge WEST took his seat on the court.

(132 Va. 824)

WILSON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Disorderly house \S 17—Evidence sustaining conviction for keeping house of prostitution.

In a prosecution for keeping a house of prostitution, evidence held to sustain conviction.

2. Disorderly house \S 17—Proof of general reputation held unnecessary.

In a prosecution under Code 1887, § 3790 (Code 1919, § 4548), prohibiting any person to keep "a house of ill fame resorted to for the purpose of prostitution or lewdness," the commonwealth need not prove the general reputation of the place as a bawdyhouse, but it is sufficient to show that it was such in fact.

3. Disorderly house \S 2—"Bawdyhouse" and "house of ill fame" synonymous.

"Bawdyhouse" and a "house of ill fame," as used in law, are convertible and synonymous terms.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bawdyhouse; House of Ill Fame.]

4. Disorderly house \S 16—Proof of general reputation inadmissible in absence of statute.

In prosecution for keeping a bawdyhouse, proof of the general reputation of the house is inadmissible unless expressly made so by statute.

Appeal from Corporation Court of Norfolk.

Bessie Wilson was convicted of keeping a house of ill fame, and she appeals. Affirmed.

James S. Barron, of Norfolk, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazlle, Second Asst. Atty. Gen., for the Commonwealth.

KELLY, P. The defendant, Bessie Wilson, was convicted in the police court of the city of Norfolk on a warrant charging her with keeping "a house of ill fame resorted to for the purpose of prostitution and lewdness." On appeal to the corporation court she was tried by a jury and again found guilty, and the sentence pronounced upon her by that court is before us for review.

The only ground upon which we are asked to interfere with the sentence is that the evidence did not warrant the verdict.

The statute upon which this prosecution rests is as follows:

"If any person keep a house of ill fame, resorted to for the purpose of prostitution or lewdness, he shall be confined in jail not exceeding one year and fined not exceeding two hundred dollars; and, in a prosecution for this offense, the general character of such house

may be proved." Code 1887, § 8790; Code 1919, § 4548.

The contention of the defendant is that to sustain a conviction under the foregoing statute the commonwealth must prove two things: First, that the house in question was in fact a bawdyhouse or brothel; and, second, that it had a general reputation as such.

With respect to the first proposition embraced in this contention, we shall not go into the details of the evidence. The defendant introduced no testimony. The commonwealth's evidence as to the actual character of the house consists of the testimony of four men who appear to have visited the place at the instance of the police to investigate conditions and procure evidence. They did not while there personally witness or personally indulge in any unlawful acts, but they evidently allowed the defendant and another woman who was in the house at the time to suppose that they had come for immoral purposes. There were some unimportant and circumstantial conflicts in the testimony of these four men, but otherwise their credibility was not shaken or even questioned, except by the effect of such caution as should be used in giving credence to evidence obtained under representations which are not true. Their respective narratives are reasonable and consistent, and are in a measure corroborated by the entries in a book or register kept by the defendant and introduced at the trial. Moreover, the question of the weight and credibility of their evidence was one for the jury to determine.

[1] Attaching to the evidence of the commonwealth the weight which, under familiar rules, it must be accorded in this court, there is no room to doubt that the defendant was keeping a house resorted to for purposes of lewdness and prostitution. The arrangement of the house and its furnishings, the large number of alleged guests whose names appeared on her register, the method of keeping the register, together with her explanation of that method, the overtures which she and the other woman in the house made to the four men who testified, her declarations and admissions to them as to her ability to procure more women if desired, and her assurances that there would be no danger of detection, made it perfectly plain that she was then, and had been for some time prior thereto, plying her nefarious trade on a large scale.

[2] The second proposition, namely, that it was incumbent upon the commonwealth to prove that the general reputation of the place was that of a bawdyhouse, appears to be the one mainly relied upon by the defendant, but in our opinion is without merit.

It is, of course, in a sense true that a house of ill fame is a house with a bad name, but the offense aimed at by the statute is the

keeping of such a house, and not the establishment of its bad reputation.

Some apparent support for the defendant's contention that there must be proof of both the character and the reputation of the house may be found in the fact that the statute, after using the expression "house of ill fame," also adds the words "resorted to for purposes of prostitution or lewdness." It seems plausible to argue that it was not necessary to use both of these expressions if the fame of the house was not a material part of the offense. This argument, however, is satisfactorily repelled both by the language of the statute as a whole, and by the prevailing current of authority. The concluding sentence of the statute expressly provides that, "in a prosecution for this offense, the general character of such house may be proved." The words "general character" are evidently used here in the sense of "general reputation," because it is universally held that before there can be a conviction for keeping a house of ill fame there must be proof that it was in fact a house of bad character; that is to say, a house actually resorted to for immoral purposes. The language of the statute, quoted last above, was manifestly intended to make it clear that the general reputation of the house could be used as evidence tending to show that it was in fact a bad house. This being true, it necessarily follows that the gist of the offense aimed at was the keeping of such a house, and not its reputation. The right to prove its reputation as tending to establish the offense was inserted for the express purpose of allowing the commonwealth to use evidence which otherwise might be excluded as immaterial and irrelevant, on the ground that the fame of the place is no part of the offense. This is illustrated by the case of *State v. Plant*, *infra*, wherein it was held that proof of general reputation was irrelevant and improper.

There is no Virginia case in point, and the decisions elsewhere are not entirely in accord upon the question under consideration. This may be, and doubtless is, in some measure due to varying provisions of the several statutes on the subject. We are satisfied, however, that when proper effect is given to the language of the Virginia statute, the decided weight of both authority and reason supports the view we have adopted.

[3] It seems clear that if our statute had used the term "bawdyhouse" instead of "house of ill fame," there would be no room whatever to contend that the fame or reputation of the house must be proved in order to sustain the conviction. If this proposition be conceded, as we think it must be, it follows that there is no force at all in the defendant's position. "Bawdyhouse" and "house of ill fame," as used in law, are convertible and synonymous terms. 1 *Bouv Law Dict.* 193; *Webster's New International*

Dictionary, 194; Rapalje & Lawrence, Law Dict. 119, 618; State v. Lee, 80 Iowa, 75, 45 N. W. 545, 20 Am. St. Rep. 401, 405; Henson v. State, 62 Md. 231, 50 Am. Rep. 204; State v. Smith, 29 Minn. 193, 12 N. W. 524; State v. Boardman, 64 Me. 523; Cotton v. City of Atlanta, 10 Ga. App. 397, 73 S. E. 683, 684.

In State v. Lee, supra, the court was dealing with a statute similar to ours. The act prohibited was the keeping of "a house of ill fame resorted to for the purposes of prostitution or lewdness" (Code 1873, § 4013), and the statute permitted proof of the general reputation of the place "for the purpose of establishing the character of the house" (Laws 1884, c. 142, § 4). Referring to the latter provision, the court said:

"In our opinion, this section was not designed to add to the ingredients of the crime, by requiring that the house should be generally reputed to be a house of ill fame, but to enlarge the means of proving its true character."

And the court specifically held that a conviction under the Iowa statute did not require proof that the house was in fact one of bad repute.

In State v. Smith, supra, the court said:

"The term 'house of ill fame' is no doubt a mere synonym for 'bawdyhouse,' having no reference to the fame of the place, but denoting the fact."

The gist of the offense is the keeping of the house for purposes of prostitution and lewdness, and not its reputation.

In 18 Corpus Juris, pp. 1241, 1242, § 24(e), it is said:

"Ordinarily it is not necessary that a house or place have the reputation of being a bawdy-house or house of ill fame to make it such a house. But some statutes prohibiting the keeping of a house of ill fame have been construed as requiring the house to have the reputation of a house of ill fame. Where the statute merely declares that evidence of the reputation of the house is admissible, it does not thereby make its reputation an element of the offense of keeping such a house."

In State v. Plant, 67 Vt. 454, 458, 32 Atl. 237, 48 Am. St. Rep. 821, 823, 824, the statute involved appears to have been exactly like ours, except that it did not provide for proof of the general reputation of the house. In that case the court said:

"The statute makes penal the keeping of 'a house of ill fame, resorted to for the purpose of prostitution or lewdness.' In some of the states similar statutes are construed to require proof that the house had an ill fame in

order to convict. That construction has prevailed to some extent in this state at nisi prius; but we regard it as illogical and unsound. It amounts to saying that however bad the house is in point of fact, it is no offense under the statute to keep it if it has not an ill fame. * * *

The words 'ill fame' are used in the statute to give name and character to the house, and do not refer to its reputation. Both at common law and in common parlance, the words 'house of ill fame' mean a house resorted to for the purpose of prostitution. * * * The gist of the offense is the keeping of the house, irrespective of its fame. The statute aims at the fact, not the fame; at the substance, not the shadow.

"It follows, therefore, ill fame of the house not being an element of the offense, that it was not only unnecessary to prove it, but that evidence of it was irrelevant to any issue involved, for all the cases hold that the character of the house cannot be shown by proof of its reputation; for that purpose the testimony is mere hearsay.

"It is unnecessary to refer at length to the authorities on this question. We think the weight of judicial opinion sustains the view we take. A pretty full discussion of the subject will be found in Henson v. State, 62 Md. 231, 50 Am. Rep. 204, and note, and in State v. Lee, 80 Iowa, 75, 20 Am. St. Rep. 401. * * *

See, also, State v. Foley, 45 N. H. 466; Toney v. State, 60 Ala. 97; State v. Brunell, 29 Wis. 435.

The cases of Cadwell v. State, 17 Conn. 467, 472, State v. Blakesley, 38 Conn. 523, 524, People v. Gastro, 75 Mich. 127, 42 N. W. 938, People v. Pinkerton, 79 Mich. 110, 44 N. W. 180, Drake v. State, 14 Neb. 535, 17 N. W. 117, and King v. State, 17 Fla. 183, 191, cited and relied on by the defendant, support the general proposition that there must be proof of the bad name of the place to sustain a conviction upon the charge of keeping a house of ill fame. These cases are out of line with the current of authority, and, moreover, would undoubtedly have been decided differently if the statutes in Connecticut, Michigan, Nebraska and Florida had provided, as ours does, for the proof of general reputation for the purpose of establishing the charge.

[4] Indeed, according to much respectable authority, no proof of general reputation of the house is admissible at all on such a charge unless expressly made so by statute. State v. Plant, supra; 9 Am. & Eng. Enc. (2d Ed.) p. 532, and cases cited in note 1.

We find no error in the judgment complained of, and it must be affirmed.

Affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 229)

GORDON METAL CO. v. KINGAN & CO., Limited, et al.(Supreme Court of Appeals of Virginia.
March 16, 1922.)**Railroads** §81—"Reserve" from operation of deed held equivalent to exception.

A railway company's deed was made subject to reservation of rights belonging to a railway company for maintenance of its tracks upon the land and the rights growing out of an agreement with a manufacturer for use of the side track passing through the land conveyed. *Held*, under Code 1919, §§ 5149, 5512, that by use of "reserve" the grantor intended to withhold something from the grantee, and by reserving from the operation of the deed the rights of the railway and lessee the grantor intended to except from the deed and retain to itself the rights in relation to the contracts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reserve—Reserved.]

Error to Law and Equity Court of City of Richmond.

Action by the Gordon Metal Company against Kingan & Co., Limited, and another. From judgment for defendants, plaintiff brings error. *Affirmed*.

S. A. Anderson and Smith & Gordon, all of Richmond, for plaintiff in error.

Geo. Bryan, A. W. Patterson, and Thos. B. Gay, all of Richmond, for defendants in error.

PRENTIS, J. This is an action of unlawful detainer, wherein the Gordon Metal Company was plaintiff and Kingan & Co., Limited, and the Southern Railway Company were the defendants. There was a verdict and judgment in favor of the defendants.

The facts are that by agreement under seal, dated July 1, 1891, the Chesapeake & Ohio Railway Company, hereinafter called the C. & O., granted to Kingan & Co., Limited, hereinafter called Kingan, the right to construct or cause to be constructed a railroad track across the basin (or upper dock) of the C. & O. in the city of Richmond, beginning on the line of Fourteenth street and running by a curved line to Dock street, opposite to the end of Fifteenth street. This agreement requires such track to be maintained at all times in good order by the grantee, Kingan, and the space occupied thereby to be only such as is reasonably necessary for its construction and maintenance. It also provides for the occupancy and use of the land occupied by the track for 10 years, subject to certain qualifications which it is unnecessary at present to recite, and thereafter until one year's notice in writing from either party to the other, and Kingan agreed to remove the track upon receiving no-

tice from the C. & O. so to do. It was further agreed that Kingan might arrange with the Richmond & Danville Railroad Company to construct, maintain, and operate the track, which company was bound to observe all of the requirements of the agreement binding on Kingan, and Kingan agreed that, all things being equal, it would route its business for Virginia points, and such business as went south via Virginia Junction by the C. & O. Pursuant to such agreement Kingan and the Richmond & Danville Railroad Company entered into an agreement under seal dated July 31, 1891, whereby the railway company undertook to construct and operate such track and agreed to observe all of the covenants of Kingan under the agreement of July 1, 1891, with the C. & O. Pursuant to these agreements the curved track or switch across the property of the C. & O. was constructed, and since has been used as a private siding for the accommodation of Kingan's business, and occasionally, apparently by consent, for other business. The Southern Railway Company, hereinafter called the Southern, became the successor in title of the Richmond & Danville Railroad Company as to the rights here involved. By the thirteenth clause of an agreement of November 2, 1899, between the Southern and the C. & O., the fourth clause of the agreement of July 1, 1891, between the C. & O. and Kingan as to the routing of the Kingan business was modified in the interest of the Southern.

By deed dated January 25, 1905, the C. & O. conveyed to the plaintiff (Gordon Metal Company) a certain parcel of land in the city, which included a portion of the strip occupied by this Kingan side track, the remaining portion of such strip being the land of the Richmond Properties Corporation, which side track was continuous, and crossed in a curved line both the property of the plaintiff and that of the Richmond Properties Corporation. This deed of January 25, 1905, to the plaintiff conveyed the land with general warranty, and this language was used therein:

"Together with all the right, title, interest and estate of the said Chesapeake & Ohio Railway Company in and to the said land up to the east line of Fourteenth street, subject, however, to all the rights which the Mayo Bridge & Land Company, or other owner, may have acquired in the strip of land on the northwest corner of said lot above described, now occupied by a row of small brick buildings."

The C. & O. also covenanted that it had the right to convey, and for further assurance of the land. The deed also contains this language:

"And whereas the said the Chesapeake & Ohio Railway Company has sold the property hereinbefore described to the party of the second part, the said property being no longer

necessary or expedient to be retained for use in connection with said railway, and now requires, in accordance with the resolution hereinabove recited, the trustees in the several deeds of trust or mortgage hereinafter referred to to release said property from the lien thereof in order to give perfect title to the purchaser. * * * It is further expressly understood, covenanted and agreed that this conveyance of the said piece or parcel of land is made subject to the following terms and conditions, to-wit:

"1. The Chesapeake & Ohio Railway Company reserves from the operation of this deed all the existing rights of whatever nature belonging to the Southern Railway Company for the maintenance and operation of its track, or tracks, and structures upon, along, or near the piece or parcel of land hereinbefore described.

"2. The Chesapeake & Ohio Railway Company further reserves from the operation of this deed all the rights of the Kingan Company, growing out of or in any way connected with the agreement bearing date the 1st day of July, 1891, and recorded in the chancery court of the city of Richmond, Virginia, clerk's office, in Deed Book 144C, page 359, for the maintenance, use and operation of the side track which passes through the northwestern portion of the lot hereby conveyed, and this conveyance is made subject to all the rights of entry and transit of Kingan & Co. and of the Southern Railway Company for the maintenance, use and operation of said side track and trestles connected therewith."

On October 10, 1913, the plaintiff notified the defendants to remove the said side track from its land on or before November 15, 1914, thus giving one year's notice in accordance with the agreement of July 1, 1891, between the C. & O. and Kingan. The defendants refused to vacate the premises, and thereupon this action was instituted to recover possession of the strip of land occupied by the said side track.

The court construing the contract gave an instruction requiring the jury to find for the defendants, and refused an instruction presenting the contrary view of the plaintiff.

Several errors are assigned, but it is perfectly apparent that the decisive question which was presented to the trial court, and now to be determined here, is whether or not the deed of January 25, 1905, conveying the property, should be construed to grant to the Gordon Metal Company the right to terminate the agreement of July 1, 1891, between the C. & O. and Kingan, under which the side track was constructed and has ever since been operated. Whether the trial court erred in the admission or rejection of evidence has become entirely immaterial, for, whether admitted or rejected, the merits of the controversy are fully presented and must be determined by a construction of this conveyance of the C. & O. to the plaintiff.

The case has been thoroughly argued and many propositions of law relating to the construction of written instruments have been presented and supported by authorities.

These well-established doctrines are all helpful, but no one of them appears to us to be conclusive, for all discussions of the questions involved lead back to the provisions of the conveyance, which must determine this doubtful controversy.

It certainly cannot be doubted, and this is urged by the plaintiff, that the grantee in a deed for land conveyed without any words of limitation usually succeeds to every right of his grantor therein, or, as expressed in Virginia statutes, such a deed passes the fee simple or whole estate or interest which the grantor had power to dispose of, unless a contrary intention shall appear by the conveyance. Code 1919, § 5149. It is likewise true that, under Code 1919, § 5512:

"A grantee or assignee of any land let to lease, or of the reversion thereof, and his heirs, personal representative or assigns shall enjoy against the lessee, his personal representative or assigns, the like advantage, by action or entry for any forfeiture, or by action upon any covenant or promise in the lease, which the grantor, assignor, or lessor, or his heirs, might have enjoyed."

So that this deed passes every right of the C. & O. to the plaintiff unless a contrary intention is expressed therein. It is necessary, therefore, to consider and determine whether or not there was any intention on the part of the C. & O. to reserve its right to terminate the Kingan agreement, and to withhold from the plaintiff any such right, which was sufficiently expressed to be effective.

Reverting, then, to the clause which we have quoted from the conveyance to the plaintiff, and bearing in mind the then existing facts, we observe that it was not necessary in that instrument for the protection of the existing rights of Kingan and the Southern to refer to the switch or side track. These had been fully secured, defined, and limited by the agreement of July 1, 1891, which had been duly recorded. It is also observed that, if the intention of the conveyance was simply to give the plaintiff specific notice of Kingan's contract, this precaution was taken, as is shown by the concluding language in the clause under scrutiny, namely, that—

"This conveyance is made subject to all of the rights of entry and transit of Kingan & Co. and of the Southern Railway Company for the maintenance, use and operation of the said side track and trestle connected therewith."

When it is borne in mind that this deed was drawn and accepted under the advice of counsel, it seems to us at least suggestive that the grantor was not content merely to use language clearly sufficient to convey the property subject only to Kingan's rights. There are other words in the same clause of the conveyance, the meaning of which we must determine, for it is fundamental that, in construing written instruments, all the

language used must be considered and its true meaning determined if possible. What, then, is the significance of this other language—that is, that “the Chesapeake & Ohio Railway Company further reserves from the operation of this deed all the rights of the Kingan Company, growing out of or in any way connected with the agreement bearing date the first day of July, 1891, for the maintenance, use and operation of the side track”—and why was it necessary to enumerate this among the conditions for the performance of which the plaintiff was required to sign the deed and expressly covenant that the conveyance was subject to certain terms and conditions? It is frequently helpful in determining the meaning of obscure and doubtful language to consider the surrounding circumstances and the probable motives of the parties, and, pursuing this inquiry, we find that the side track here involved is a small part of a continuous track leading from the lines of the Southern, and while the C. & O. has now no property interest either in the track or in the land upon which it is located, it was and is substantially interested in the business of Kingan & Co. They are large shippers over the lines of the C. & O. from the west into the city of Richmond, who receive and dispatch substantial quantities of freight, whereby the business and revenues of the C. & O. are greatly augmented. This supplies a motive to the C. & O. in making the conveyance, for desiring the continued maintenance of the side track, because to destroy it will injuriously affect its own business. It is possible that this injury might be only temporary, but this does not change the fact that the C. & O. had a substantial motive for desiring the continued operation of this side track.

Then consider the use of the word “reserve.” While that is an appropriate word when given its obvious and technical meaning to indicate that the grantor (C. & O.) intended thereby to withhold something from the grantee (plaintiff), it is quite inappropriate and unnecessary if intended merely to preserve the existing rights of Kingan which were already otherwise fully safeguarded. Then observe further that the C. & O. reserves something “from the operation” of the deed. That language seems to us to be most significant, for, if the deed was intended not to operate in favor of the plaintiffs upon the rights of Kingan & Co. under the side track agreement, it leaves those rights just as they existed before the conveyance was made, and, while the land upon which the track is located belongs to the plaintiff, it has no right to terminate an agreement upon which its deed was not to operate. To reserve from the operation of a deed appears to be the equivalent of excepting therefrom and retaining in the gran-

tor some right, title, or interest in the subject-matter which, but for such reservation, would pass thereunder to the grantee. To hold otherwise here would be to ignore the language used, to attach no significance thereto, and to construe the conveyance just as if it had been omitted. Express notice of the existing contract with Kingan was thereby given to the grantee, and by excepting it from the operation of the deed the right to change the existing status by the independent action of the grantee was apparently withheld.

We do not feel that any further elaboration of the question presented can clarify its manifest obscurities and difficulties, but, giving it our best thought and attention, our judgment accords with that of the learned judge of the trial court.

Affirmed.

BURKS, J., absent.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 692)

JENKINS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Criminal law \S 308, 351(3), 552(1)—Flight raises no presumption of guilt, but may be considered by jury and given such weight as they deem proper.

In a prosecution for maiming, where the evidence showed that immediately after the shooting accused ran away to another county, an instruction that the flight of a person after the commission of a crime raised a presumption of guilt was incorrect, as such flight is merely evidence, tending to show guilt, to be considered by the jury, and given such weight as they deem proper in connection with other facts and circumstances.

2. Criminal law \S 741(6), 782(4)—Defendant's explanation of flight a jury question; and court should instruct on manner of weighing evidence of flight.

In a prosecution for maiming, defendant was entitled to have the jury pass on his explanation as to why he fled to another county, and it was important that the jury be properly instructed as to the manner in which they should consider and weigh evidence of flight.

3. Criminal law \S 823(9)—Error in instruction on flight as presumption of guilt not cured by instruction on presumption of innocence.

Error in an instruction that flight raised a presumption of guilt was not cured by an instruction that accused is presumed innocent till proven guilty.

Error to Circuit Court, Rappahannock County.

Ray Jenkins was convicted under the maiming statute (Code 1919, § 4402), and he brings error. Reversed.

Grimsley & Miller, of Culpeper, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

KELLY, P. Upon indictment under what is known as the maiming statute (Code, § 4402) the defendant, Ray Jenkins, was found guilty of feloniously shooting one Walter G. Miller, and sentenced to a term in the penitentiary. Thereupon the case was brought here by writ of error.

[1, 2] The shooting occurred on a dark night in the village of Washington, Rappahannock county. There were several persons in the immediate vicinity from which the shot was fired, and the evidence is in serious conflict as to the identity of the person who did the shooting. The defendant, after testifying that he did not even have a pistol on that occasion, stated that his brother did the shooting, and he was corroborated by the latter in that statement. After Miller was shot the defendant and his brother ran away to Madison county, where after a month or more they were arrested and brought thence to Rappahannock county, where the defendant was tried. He explains his flight by saying that he was afraid he would be arrested for shooting in town. This explanation does not seem very satisfactory in view of the fact that he denied having done any shooting, and yet, when it is recalled that he and his brother were together at the time, it does not seem unreasonable that he should have feared that they would both be involved in a charge of shooting on the street. At any rate, he was entitled to have the jury pass upon his explanation. The pertinency of this comment upon his flight and his explanation thereof will be apparent when we consider, as we shall proceed to do, the first assignment of error, which is based upon the allegation that the court erred in giving commonwealth's instruction No. 2 as follows:

"(2) The court instructs the jury that the flight of a person after the commission of a crime raises a presumption of guilt; and if they believe from the evidence that the prisoner, Ray Jenkins, did immediately after the shooting of Walter G. Miller, flee from the place where said Miller was shot to the county of Madison, Va., you may take this fact into consideration in determining his guilt or innocence, which question of flight you may consider, together with all the other facts and circumstances introduced in determining the guilt or innocence of the prisoner."

This instruction starts out with an erroneous proposition of law, namely, "that the flight of a person after the commission of a

crime raises a presumption of guilt." So far as we have found, and so far as the Attorney General's office appears to have found, the only authority for this proposition appears in certain of the Missouri cases, wherein it is held that the flight from a charge of crime raises a presumption of guilt which may be rebutted and overcome by proof that the flight was occasioned by other causes than consciousness of guilt. See *State v. King*, 78 Mo. 555; *State v. Brooks*, 92 Mo. 542, 583, 5 S. W. 257, 330; *State v. Lewkowicz*, 265 Mo. 613, 178 S. W. 58.

The better doctrine, supported by the clear weight of authority, is that such flight as is described in the instruction under review does not measure up to the standard of presumptive evidence of guilt, but is merely evidence tending to show guilt, to be considered by the jury and given such weight as they deem proper in connection with other pertinent and material facts and circumstances in the case. 22 Am. & Eng. Enc. (2d. Ed.) 1265; 12 Cyc. 395; 9 R. C. L. p. 192, § 188; *Hickory v. U. S.*, 160 U. S. 408, 16 Sup. Ct. 327, 40 L. Ed. 474; *Alberty v. United States*, 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051; *Wharton's Crim. Ev.* §§ 750, 751.

Upon principle it would seem manifest that the only safe and just rule upon the subject is as last above announced, because the circumstances surrounding the flight of a person after the commission of a crime will vary greatly in individual cases. In this connection, the language of Mr. Justice Brown, in *Alberty v. U. S.*, supra, is in point. He said:

"While there is no objection to that part of the charge which permits the jury to take into consideration the defendant's flight from the country as evidence bearing upon the question of his guilt, it is not universally true that a man, who is conscious that he has done a wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper;' since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Innocent men sometimes hesitate to confront a jury—not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves. The criticism to be made upon this charge is, that it lays too much stress upon the fact of flight, and allows the jury to infer that this fact alone is sufficient to create a presumption of guilt."

The precise question before us in this case does not appear to have been passed upon in

this state, this court not having heretofore had occasion to decide whether the flight of a person accused of crime, or in a position rendering it likely that he would be accused thereof, could be said to raise a presumption of his guilt. There are, however, cases in which this court has held that proof of the flight is a circumstance to be considered by the jury. *Williams v. Commonwealth*, 85 Va. 607, 613, 8 S. E. 470; *Anderson v. Commonwealth*, 100 Va. 860, 863, 42 S. E. 865. In the latter case Judge Cardwell, delivering the opinion of the court, said:

"When a suspected person attempts to escape or evade a threatened prosecution, it may be argued that he does so from consciousness of guilt; and *though the inference is by no means strong enough by itself to warrant a conviction*, yet it may become one of a series of circumstances from which guilt may be inferred. An attempt to escape or evade prosecution is not to be regarded as a part of the *res gestae*, but only as a circumstance to be considered by the jury along with other facts and circumstances tending to establish the guilt of the accused. The nearer, however, to the commission of the crime committed, the more cogent would be the circumstance that the suspected person attempted to escape, or to evade prosecution, but it should be cautiously considered, because it may be attributable to a number of other reasons, than consciousness of guilt"—citing *Wharton's Crim. Ev.*, secs. 750, 751. (Italics added.)

It was error to tell the jury, as was done in instruction No. 2, that the flight of a person after the commission of a crime "raises a presumption of guilt"; and we are unable to say upon evidence before us that this error did not operate to the prejudice of the prisoner. The case is not one in which we can say that no other verdict could have been properly found. It is not for us to say that the defendant was, or that he was not, guilty as charged, but the case was peculiarly one to be settled by the verdict of the jury upon correct instructions. Two persons other than the prisoner had the opportunity to do the shooting with which he was charged. He testified that one of these, his brother Hubert Jenkins, fired the shots, and the latter corroborated him in this statement. The other person, one Willie Sisk, was arrested just after the shooting, and at that time denied any knowledge as to who did it, but later on, while in jail and after being admonished by the attorney for the commonwealth that the Jenkins brothers, if arrested, "might frame up the shooting on him," changed his story, and said, as he afterwards testified in court, that he was present and knew that Ray Jenkins did the shooting.

In this state of the evidence it was of especial importance to the prisoner that the jury should be properly instructed as to the manner in which they should consider and weigh the evidence of his flight.

It is true that the instruction complained

of, after announcing the erroneous proposition pointed out above, proceeded to tell the jury that they might take the fact of the defendant's flight "into consideration in determining his guilt or innocence, * * * together with all the other facts or circumstances introduced." But how were they likely to consider and weigh this fact? They had just been plainly told that the fact itself raised a presumption of guilt, and this meant that they could convict on that presumption alone. Was it not highly probable that they would be misled by the opening sentence of the instruction into the conclusion that they must approach the consideration of this feature of the evidence with the understanding that the burden was on the defendant to show that he was not guilty? If they followed the first part of the instruction, they could hardly have come to any other conclusion. While we do not consider the error in the instruction under review as glaring or as plainly prejudicial to the prisoner as the instruction which was condemned by the United States Supreme Court in *Hickory v. U. S.*, supra, one of the comments of the court in that case appears to us to be pertinent here. After pointing out that the instruction in that case erroneously told the jury "that flight raised a presumption of guilt," the court said:

"It is true, the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as a matter of law, the court declared they were entitled to have; that is, as creating a legal presumption so well settled as to amount virtually to a conclusive proof of guilt."

[3] There was an instruction given in the instant case at the request of the defendant by which the jury were told that he was presumed to be innocent until proven guilty, and that the presumption of innocence followed him throughout the case, but we do not think this instruction, any more than the qualification or modification appearing in the commonwealth's instruction No. 2, cured the error in the latter. There was either a conflict between the two propositions as thus announced to the jury, or such a confusion of the rules of evidence as would tend to mislead them. If they gave full force and effect to the instruction which told them that the defendant was presumed to be innocent until proved guilty, they would still be confronted with the other proposition, as announced by instruction No. 2, that he was in fact proved guilty by proof of his flight, and they might thus have felt bound to find

that the presumption of his guilt arising from his flight was sufficient to overcome the presumption of his innocence announced in the defendant's instruction.

Being of opinion that there was error in the commonwealth's instruction No. 2, and being unable to say that such error was without prejudice to the defendant, the judgment complained of must be reversed.

As the case must be sent back to the circuit court for a new trial, we do not pass on the assignment of error questioning the sufficiency of the evidence to warrant the verdict.

There were several other assignments, but they involve questions which are not likely to arise at the next trial, and therefore need not be considered.

Reversed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 257)

LEHIGH PORTLAND CEMENT CO. v. VIRGINIA S. S. CO.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Judgment \Rightarrow 183—Bill of particulars and notice of motion for judgment on claim for breach of shipping contract held sufficient.

In a steamship company's action for breach of a contract for the shipment of 40,000 barrels of cement, a bill of particulars claiming the balance due for transporting the whole 40,000 barrels, and, without waiving plaintiff's right to rely thereon, giving, in additional items, the loss suffered while the steamship was lying idle waiting for shipments, the salaries paid during such time, the reasonable return on the investment, the approximate loss by diverting the steamship from a different route, the reasonable amount of profits on earnings on the contract, and the pecuniary value of the portion of the contract not performed, held sufficiently full, especially where the notice of motion for judgment contained a detailed statement of the claim.

2. Judgment \Rightarrow 183—Remedy for insufficient bill of particulars is to move to reject evidence of matters not sufficiently described.

If a bill of particulars was insufficient, defendant might have moved to reject any evidence offered by plaintiff touching any matter not described in the notice of its motion for judgment or other pleading so plainly as to give notice of its character.

3. Shipping \Rightarrow 108—Evidence of damages from idleness while waiting for goods to be transported admissible in action for breach of contract.

In an action for breach of contract for the shipment of 40,000 barrels of cement to be unloaded by the carrier, a steamship company, from the cars as they arrived at the shipping

point and carried to destination, by failing to furnish the full quantity, where it appeared that after the steamship company was informed that there were still six to ten cars to be shipped, it received only a few shipments during a period of several months, evidence of the damages suffered by reason of the idleness of its boat was admissible.

4. Shipping \Rightarrow 108—Performance of shipping contract not excused because contract on which cement was being used was canceled by government.

Where a contract for the shipment of 40,000 barrels of cement by steamship was unqualified, nonperformance by the shipper was not excused because the government canceled the contract on which the consignee was using the cement as permitted by its contract with the consignee.

5. Shipping \Rightarrow 104—Jury authorized to find company taking up contract, making payments, etc., assumed obligations of party to contract.

Where a cement company contracted to ship cement by steamship, and another cement company, acting through its own officers, took up the contract, conducted correspondence in its own name, made payments under the contract at the rates therein stated, and when a claim was made for a breach failed to suggest that the liability was that of the contracting company, the jury was warranted in finding that it had assumed its obligations.

6. Shipping \Rightarrow 108—Government's cancellation of contract held not frustration of adventure excusing further performance of contract for transportation of cement purchased by contractor.

Where one selling cement to a government contractor contracted for the transportation of the cement with a steamship company which had no knowledge of the terms of the contract between the government and the contractor, the continuance of the work on the government contract to final completion was not the basis and implied condition on which the liability of the parties to the shipping contract rested, and the government's cancellation of the contract did not cause such impossibility of performance or frustration of adventure as excused further performance.

7. Shipping \Rightarrow 108—Verdict for breach of contract for shipment of cement not excessive.

In a steamship company's action for breach of contract to ship 40,000 barrels of cement, where it saved only about \$307 in fuel and oil by keeping its boat idle while waiting for the cement, and the jury deducted over \$1,100 from the amount of its claim, damages held not excessive.

Error to Circuit Court of City of Richmond.

Action by the Virginia Steamship Company against the Lehigh Portland Cement Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The action was instituted by filing notice of a motion for judgment which stated the

items of plaintiff's claim, the credits thereon, and the balance due as follows:

Aug. 11, 1919—To amount of cement contracted to be hauled from West Point, Va., to Yorktown, Va., aggregating 40,000 barrels, weighing 15,300,000 pounds, at 16% cents per cwt.....	\$25,480 00
Aug. 11, 1919—By amount paid for carrying 28,025 barrels cement weighing 9,839,500 pounds, at 16% cents per cwt.....	16,564 91
Aug. 11, 1919—By balance of contract price of residue of quantity of cement contracted to be carried, but not hauled, through your default, amounting to 13,975 barrels, weighing 5,810,500 pounds, at the rate of 16% cents per cwt., now due us	8,895 09
To amount brought forward.....	\$ 8,895 00
Nov. 4, 1919—By amount paid for carrying 3,196 bags of cement since August 11, 1919	541 09
Nov. 4, 1919—By amount of balance now due on above contract.....	\$ 8,354 00

In response to an order requiring plaintiff to file the particulars of its claim it filed the following bill of particulars:

(1) The entire amount sued for, to wit, \$8,354.00 and interest is due to the plaintiff by the defendant, because it is balance due the plaintiff by the defendant, which the defendant promised to pay the plaintiff for carrying 40,000 barrels of cement, as set forth in the notice of motion for judgment.

Without waiving its right to rely on the above solely and to claim the above amount for the breach of the contract and promise to pay, as aforesaid, in addition thereto the plaintiff sets forth the following items as also constituting its damage and loss:

(2) Loss suffered by the plaintiff by having its steamship lying idle 80 days awaiting orders and shipment from the defendant at \$200 per day.

(3) Salaries paid officers and crew and employees generally and other expenses of the company during the time the plaintiff was ready and willing and awaiting to carry the cement per orders of the defendant company and defendant failed to ship, \$8,500.

Reasonable return on investment in equipment of plaintiff that was held idle awaiting orders from the defendant as per contract, \$2,000.

(5) Approximate loss of the plaintiff by diverting its steamship from the usual schedule from West Point to Pointer's, Va., and loss of freight and trade it otherwise would have carried, all of which was done in order to be in readiness to carry the cement the defendant contracted to ship, \$8,500.

(6) Reasonable amount of profits or earnings on contract had plaintiff been allowed to fulfill its part, \$8,354.

(7) Plaintiff claims the pecuniary value of that portion of the contract it was not permitted to perform through the default of the defendant was \$8,354, with interest, and it has suffered loss to that extent.

Page & Leary, of Richmond, for plaintiff in error.

Frank T. Sutton, Jr., of Richmond, for defendant in error.

WEST, J. The Virginia Steamship Company, hereafter called steamship company,

recovered a judgment against the Lehigh Portland Cement Company for \$7,854, and the defendant thereupon obtained a writ of error.

The material facts and circumstances out of which the litigation arose are substantially as follows:

On the 24th day of June, 1918, the United States government entered into a contract with F. W. Mark Construction Company, Inc., to construct and complete at the fuel oil station at Yorktown, Va., 12 reinforced concrete oil reservoirs, which contract contained a clause permitting the United States government to curtail the amount of the work under the contract, under certain conditions. The F. W. Mark Construction Company entered into a contract with the Virginia Portland Cement Company (the predecessor of the Lehigh Portland Cement Company) to furnish it cement for this work. The steamship company had no knowledge of the terms of this contract. Afterwards the Virginia Portland Cement Company made a contract with the steamship company to transport the cement from West Point, Va., to Yorktown, Va., the contract providing that the steamship company should unload the cars at West Point, and that the cement company was to furnish labor to unload the steamer at Yorktown.

The original contract was for the carriage of 10,000 barrels of cement, which was afterwards increased to 40,000 barrels. The freight charge agreed upon was 16% cents per 100 pounds. This contract appears from certain letters and telegrams filed as evidence in the case, being consummated in the letter from the steamship company to the Virginia Portland Cement Company, dated November 5, 1918.

The Virginia Portland Cement Company began the shipment of cement, and the steamship company transported it, in accordance with the terms of the contract.

In its letter of April 22, 1919, the Lehigh Portland Cement Company, acting through the same officers who had acted for the Virginia Portland Cement Company, approved a bill in favor of the steamship company and promised to send check, and from that time on made the shipments of the cement and conducted all correspondence in regard to the movement of the cement and payments for same, and made payments as per the original contract.

These officers acted for the Lehigh Portland Cement Company without explanation, and in July, 1919, wrote that they were unable to advise as to when balance of cement would be shipped, but stated that Mark Construction Company would need six to ten cars more to complete the work.

The steamship company wrote the Lehigh Portland Cement Company on July 28, 1919, that it had been informed that the shipment

of the residue of the 40,000 barrels of cement to Yorktown would be discontinued, and advised it that under the terms of the contract with its predecessor (Virginia Portland Cement Company) it had a definite contract to transport 40,000 barrels, and informing the cement company that the steamship company would make claim against the Lehigh Portland Cement Company for freight on approximately 15,000 barrels which had not been hauled, 26,924 barrels having been hauled and paid for. The Lehigh Portland Cement Company replied to this letter, but did not deny that it was the successor of the Virginia Portland Cement Company, nor deny its liability for freight on the cement which had not been shipped. Its letter stated that it was not fully informed as to the suspension of the construction at Yorktown and would go into the situation in detail and communicate with the steamship company further at an early date. They failed to communicate further with the steamship company until November 4, 1919, and the last few shipments were scattered through a period of about four months—from July to November, 1919.

The assignments of error involve the action of the trial court in overruling the defendant's motion to reject the plaintiff's bill of particulars of its claim, in giving and refusing instructions, in refusing to strike out certain evidence, and in refusing to set aside the verdict of the jury and award a new trial on the ground of misdirection of the jury by the court, that the verdict was contrary to the law and the evidence, and that the damages are excessive.

[1,2] Not only is the bill of particulars full enough to give the defendant notice of every item of its claim, but the notice of motion also contained a detailed statement of the plaintiff's claim. If the bill of particulars was insufficient, the defendant might have moved the court to reject any evidence offered by the steamship company touching any matter not described in its notice or other pleading so plainly as to give notice of its character. This it did not do, and it is manifest that the matters in evidence were plainly described in the notice of motion and bill of particulars. There is no merit in this assignment of error.

[3] At the conclusion of the evidence the defendant moved the court to strike out all of the evidence in the cause, which was introduced over its objection tending to show any damage to the plaintiff by reason of the idleness of its boat subsequent to July 25, 1919. The action of the court in overruling this motion is also excepted to by the plaintiff in error.

The contract between the cement company and the steamship company required the latter to transport 40,000 barrels of cement from West Point to Yorktown and to unload same

from the cars and take it to Yorktown whenever the shipments arrived at West Point. The Lehigh Portland Cement Company had informed the steamship company that there were six to ten more cars to come forward to complete the work, and these shipments were scattered through a period of several months. The steamship company was kept in idleness waiting for the arrival of these cars. If the cement company did not desire the steamship company to hold itself in readiness to unload and transport to Yorktown the remaining six to ten cars of cement immediately upon its arrival at West Point, in accordance with the terms of the contract, it should have so informed the steamship company, and discharged it from liability under the contract. We think the evidence was clearly admissible.

The defendant's main ground of defense is that—

"Even though the contract were entered into and assumed by the Lehigh Portland Cement Company, the parties, and particularly the defendant, were, prior to the institution of this suit, and are now discharged and excused from performance of the same, because of supervening impossibility of performance and frustration of adventure by the act of the United States government in canceling its contract with the F. W. Mark Construction Company and prohibiting the further construction of the government work thereunder."

This contention will be disposed of in the consideration of the remaining assignments of error.

The following instructions were granted by the court:

"1. (Requested by the plaintiff.) "The court instructs the jury that the letters and telegrams that passed between the plaintiff and the Virginia Portland Cement Company mentioned in the notice of motion and introduced in evidence contain the terms of the original contract involved in this suit; and if the jury believe from the evidence that the Lehigh Portland Cement Company afterwards succeeded to the business of the Virginia Portland Cement Company and continued to ship cement to the F. W. Mark Construction Company at Yorktown to be carried by the plaintiff company from West Point, Va., to Yorktown, Va., and continued to pay the plaintiff for carrying the same at the same rates the Virginia Portland Cement Company had been paying, and treated said contract as its own, then the defendant company by such conduct undertook and assumed the obligations originally undertaken by the Virginia Portland Cement Company and became bound thereby to ship the full amount and pay the price therefor agreed upon in the original contract."

2. (Requested by plaintiff, amended by court.) "The court instructs the jury that, if they believe from the evidence that the plaintiff made a contract with the Virginia Portland Cement Company to carry for said company 40,000 barrels of cement at 16½ cents per cwt., as charged in the notice of motion, and

that subsequently the Lehigh Portland Cement Company succeeded to the business of the Virginia Portland Cement Company and assumed and undertook to carry out said contract, but failed to carry out its part by delivering to the plaintiff for carriage by it all of the 40,000 barrels of cement and failed to pay the plaintiff all of the sum of \$25,460, the entire contract price for such carriage, then the defendant was guilty of a violation of its contract to the extent it did not deliver to the plaintiff for carriage from West Point, Va., to Yorktown, Va., the 40,000 barrels of cement, and to the extent that it did not pay therefor at the rate of 16½ cents per cwt. Provided you shall further believe from the evidence that the plaintiff was always ready and willing to perform its part of said contract."

3. (Requested by plaintiff, amended by court.) "The court instructs the jury that, should they believe from the evidence there was such a contract and breach thereof, causing damage as charged in the notice of motion for judgment in this cause, it nevertheless became incumbent upon the plaintiff to make reasonable efforts to minimize the damage done it by such breach. But this duty did not arise and become incumbent upon the plaintiff until notified by the defendant company or it was reliably informed from other reliable sources that it would not carry out its said contract, and, so long as the defendant company allowed the plaintiff to remain in doubt as to whether the defendant company would continue to ship cement as per its contract, there was no duty upon the plaintiff company to seek similar employment from other sources in order to minimize, unless you shall believe from the evidence that as a matter of fact the plaintiff from other reliable sources knew that the defendant would not carry out its contract."

4. (Requested by plaintiff.) "The court instructs the jury that there is no evidence in this case that either the government of the United States or the F. W. Mark Construction Company was a party to the contract; and, although the jury may believe from the evidence that the United States government canceled its contract with the F. W. Mark Construction Company, yet that fact did not release the defendant company from its contract made with the plaintiff."

5. (Requested by defendant.) "The court instructs the jury that the burden of proof rests upon the plaintiff in this case to establish by a preponderance of the evidence the contract alleged by it, the alleged breach by the defendant, and to establish with reasonable certainty the amount of the damages actually suffered by it by reason of the alleged breach."

6. (Given by the court.) "The court instructs the jury that in case of breach of contract the broad general rule is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained by reason of the breach of contract; that this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into contemplation of the parties when they made the contract—that is, must be such as may naturally be expected to follow its violation—and they must be certain both in their nature and in respect to the cause from which they proceed.

"The court further instructs the jury, if they should find for the plaintiff in this case, the measure of damages is the value of the bargain to the plaintiff or the loss which the fulfillment would have prevented or which the breach has entailed. The intent of the law is to put the injured party so far as can be done by money in the same position as if the contract had been performed; therefore the measure of damages for the breach of such a contract as that sued upon in this case is the difference between the contract price remaining unpaid and the cost of delivery."

The following instructions were refused by the court:

"Certificate No. II.

"The court instructs the jury that, if they believe from the evidence that at the time this contract was entered into both parties thereto assumed under all the circumstances and conditions then existing, as the basis of their agreement, even though not expressly provided in their contract, the continuance of the government work at Yorktown for which the cement was to be furnished, and that it may be fairly implied that both parties assumed that the performance of their contract was based upon the continued existence of this government work, and that this work was discontinued by the government without fault on the part of the defendant, then the court instructs the jury that there has been no breach of this contract for which the defendant is liable to the plaintiff and they should find for the defendant.

"Certificate No. III.

"The court instructs the jury that, if they believe from the evidence that the defendant in this case violated the contract existing between it and the plaintiff without excuse for so doing, as is explained in instruction No. —, they must find for the plaintiff, and that the measure of damages is the difference between the contract price remaining unpaid, to wit, \$8,354, and the cost the plaintiff would have been put to in performing the contract, and that in estimating this cost they must take into consideration the length of time it would have required the plaintiffs to haul the cement remaining undelivered under the terms of the contract, the costs and expenses of operating the boat during this time, including the salaries of officers, the wages of the crew, the cost of feeding the crew, fuel, sundry expenses, insurance, interest charges, loss, and damage and taxes, but in so doing the jury are instructed that they must apportion such expenses between the transportation of the unshipped cement and the other business done by the plaintiff during the said period.

"The court further instructs the jury that the evidence of the said costs and expenses during the period in which the plaintiff was engaged from September 1, 1918, to July 28, 1919, in hauling the cement delivered to it under the contract, may be considered by it in arriving at the plaintiff's costs and expenses in transporting the undelivered portion of the cement.

"Certificate No. IV.

"The court instructs the jury that, should they find for the plaintiff, then the measure of

its damages is the difference between the contract price for carrying the cement remaining unpaid and the additional cost it would have been put to had it actually carried the cement, instead of lying at the wharf ready and waiting to carry, provided you shall believe from the evidence that such was the case."

In *L. R. A. 1916F*, at page 48, it is said:

"The rule appears to be that if one undertakes unconditionally to perform an act which is not inherently impossible, but merely requires the acquiescence or consent of a third party, or the performance of a preceding act by the latter, nonperformance is not ordinarily excused by the fact that it subsequently proves impossible for the promisor to comply with his contract, because of the refusal of the third party to give his consent or perform the act; in other words, the contract will not, merely from the fact that acquiescence in or performance of an act by a third party must precede compliance therewith, be construed as conditional upon such acquiescence or performance. Thus it has been held that one contracting to construct a canal on certain lands is not excused from performance by inability to obtain from the landowners the right to construct the canal on their lands."

In *Danenhower v. Hayes*, 35 App. D. C. at page 67, 33 *L. R. A. (N. S.)* at page 702, this is stated:

"This is simply a case of the appellant's undertaking to do a perfectly lawful thing which he was unable to perform. Such contracts, in the absence of fraud, are enforceable. In 2 *Parsons on Contracts*, p. 673, it is said: 'If one, for a valid consideration, promises another to do that which is, in fact, impossible, but the promise is not obtained by actual or constructive fraud and is not on its face obviously impossible, there seems no reason why the promisor should not be held to pay damages for the breach of the contract; not, in fact, for not doing what cannot be done, but for undertaking and promising to do it. [Cases cited.] So, if it becomes impossible by contingencies which should have been foreseen and provided against in the contract, and still more, if they might have been prevented, the promisor should be held answerable. So, if the impossibility applies to the promisor personally, there being no natural impossibility in the thing, this will not be a sufficient excuse.' Such contracts, when fairly and honestly made, are enforceable."

To the same effect is *Van Etten v. Newton* (Com. Pl.) 8 N. Y. Supp. 478, and *Cobb v. Harmon*, 23 N. Y. 148.

In *L. R. A. 1916F*, 31, it is said:

"It is well settled, as a general rule, that if performance is rendered merely difficult or burdensome or unprofitable, the promisor is not excused; and the same is true generally if the impossibility is personal to the promisor, and does not inhere in the nature of the act to be performed. On the latter point, it was said in *Oregon case* [*Reid v. Alaska Packing Co.*, 43 Or. 429]: 'It is no excuse for the non-performance of a contract that it is impossible for the obligor to fulfill it, if the performance

be in its nature impossible. * * * There is a marked distinction, not to be overlooked in this connection, between a mere disability or inability of a party to perform a contract and the absolute and inherent impossibility of performance in the true sense. * * * Unless an act is inherently impossible within itself, a contract to do it is binding, although the performance may be improbable, or even impossible, to the promisor. To excuse performance, the impossibility must be simply more than merely a great inconvenience, hardship, or even impracticability."

See *American Towing & Lightering Co. v. Baker-Whiteley Coal Co.* (1912) 117 Md. 660, 84 Atl. 182, Ann. Cas. 1914A, 146; *Ward v. Haren* (1909) 139 Mo. App. 8, 119 S. W. 446; *Howell v. National Portland Cement Co.*, 9 Northampton Co. Ct. Rep. (Pa.) 108; *Jenkins v. Wheeler* (1867) *42 N. Y. 645.

In 6 *Ruling Case Law*, p. 1000, we find this statement:

"Where performance is thus rendered impossible the inquiry naturally arises whether there was a purpose to covenant against such an extraordinary, and therefore presumably unapprehended event, the happening of which it was not within the power of the covenantor to prevent. In other words, there can be no doubt that a man may, by an absolute contract, bind himself to perform things which subsequently become impossible, or to pay damages for the nonperformance; and this construction is to be put upon an unqualified undertaking where the event which caused the impossibility was or might have been anticipated and guarded against in the contract. * * *"

In 6 *Ruling Case Law*, p. 1014, § 875, we find this:

"*Act of Third Party.*—Generally speaking, it may be said that, where a party undertakes expressly for the performance of some act, his positive engagement casts upon him a duty, the discharge of which cannot be excused by showing his inability by reason of the lawful interference of some third person. By neglecting to qualify his contract, so as to make such an excuse available, he waives it as a defense against a recovery of damages for non-performance. * * * A promise may, of course, be conditioned upon the act or consent of a third person. But the performance of an absolute promise is not excused by the fact that a third person refuses or fails to take action essential to performance. * * * The nonperformance of a contract ordinarily is not excused by the mere fact that the promisor has no control over the third person."

In the case of *Alleghany Iron Co. v. Teaford*, 96 Va. 378, 31 S. E. 525, it is held that a plaintiff may recover damages sustained by him for loss resulting from unreasonable delay on the part of the defendant in permitting him to perform his contract, and, when he has been prevented by the defendant from completely performing his contract, he may also recover the profit he would have realized if he had been permitted to perform fully.

This is not a double recovery. The object of the law in awarding damages is to make amends or reparations by putting the party injured in the same position, as far as money can do it, as he would have been if the contract had been performed.

The plaintiff in error relies with great earnestness upon the principles of law enunciated in the case of *Virginia Iron Co. v. Graham*, 124 Va. 700 et seq., 98 S. E. 859, as being applicable to the facts in the instant case. But this case is easily distinguishable from the case under consideration.

In the *Graham Case*, which involved a mining contract, the foundation of the contract was the existence of sufficient iron ore to justify the operations of the mines for 40 years, and both parties assumed its existence and contracted with reference thereto.

When it appeared that the ore did not exist, it was clear that each party had entered into the contract under a mistake of fact which affected the substance of the contract, and the contract became inoperative for a failure of the consideration, and the lessee was plainly entitled to be relieved from the payment of the royalty provided for in the lease.

[4] In the instant case the basis of the contract was the transportation of 40,000 barrels of cement. The cement was in existence, and the cement company had agreed to ship and the steamship company had agreed to carry it from West Point to Yorktown; and the cement company cannot be excused from the performance of its contract because of the lawful interference of a third party. It should have qualified its contract so as to make this excuse available.

In view of the foregoing authorities, we find no error in the action of the court in granting or refusing instructions, of which the plaintiff in error can complain.

[5] We cannot sustain the contention of the plaintiff in error that there is no evidence to prove the assumption of the original contract by that company. The conduct of its own officers in taking up the contract where the *Virginia Portland Cement Company* left it, and conducting all correspondence in its own name, and the payment by it of amounts due under the contract at rates therein stated, and failure to suggest, when the claim sued on was asserted against it by the steamship company, that the liability, if any, was against the *Virginia Portland Cement Company*, was sufficient evidence to warrant the jury in holding that the *Lehigh Portland Cement Company* had assumed the obligations

of the contract of the *Virginia Portland Cement Company*.

[6] Nor can we sustain the defense of the plaintiff in error that it was and is now discharged and excused from performance of the contract because of supervening impossibility of performance and frustration of adventure by the act of the United States government in canceling its contract with *F. W. Mark Construction Company, Inc.*

The government was not a party to the contract sued on, and its action in curtailing the work at Yorktown simply destroyed the demand for cement at that place, without making the transportation of the cement impossible.

The steamship company having no knowledge of the terms of the contract between the government and the *F. W. Mark Construction Company*, it is apparent that the continuance of the work upon the cement reservoirs at Yorktown to final completion was not the basis and implied condition upon which the liability of the parties to perform the contract sued on rested.

[7] Are the damages assessed by the jury excessive? It appears from the record that from July to November the steamship company was forced to keep its boat idle two-thirds of the time, waiting the arrival of the last six to ten cars of cement at West Point, during which time the company paid out for overhead expenses more than it would have paid for overhead expenses in transporting the residue of the 40,000 barrels of cement to Yorktown.

The failure of the cement company to release it from the contract prevented the steamship company from seeking other business.

Only fuel and oil were saved while the boat was idle, and it is in evidence that the fuel and oil used in making the 20 round trips necessary to haul the remaining 13,200 barrels of cement would have cost approximately \$307.

The plaintiff's claim was for \$8,354, with interest from August 11, 1919, making a total claim of \$9,019.54, the day the verdict was rendered, while the jury returned a verdict for only \$7,854, without interest, showing they deducted for expenses over \$1,100.

In view of the evidence, we cannot say the damages are excessive.

For the foregoing reasons, we find no error in the rulings of the trial court, or in the judgment under review, and the case will be affirmed.

Affirmed.

(132 Va. 226)

GARRETT v. RAHILY et al.(Supreme Court of Appeals of Virginia.
March 18, 1922.)**Trial** Ⓔ253(5)—Instruction excluding issue of innocent purchase of automobile held erroneous.

An automobile was sold and delivered, with title reserved by recorded contract of conditional sale, to be resold by vendee, and was purchased and paid for by defendant. *Held*, error to instruct that, if jury found that the automobile purchased was the same car mentioned in the contract of sale, they should find for the plaintiffs, as excluding the question of whether or not defendant was an innocent purchaser for value and without notice.

Appeal from Law and Chancery Court of City of Norfolk.

Action of detinue by Daniel Rahily and James R. Martin, trading as Rahily & Martin, against W. F. Garrett, for an automobile. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

A. Johnston Ackiss, of Norfolk, for plaintiff in error.

S. M. Brandt and Moses Ehrenworth, both of Norfolk, for defendants in error.

PRENTIS, J. W. F. Garrett, defendant, complains of an adverse judgment entered in favor of Daniel Rahily and James R. Martin, partners trading as Rahily & Martin, plaintiffs, in an action of detinue for a Jackson touring automobile.

The pertinent facts are that the plaintiffs, who lived in Petersburg, were the general agents of the Jackson Motor Corporation, of Jackson, Mich., and on or about the 16th of March, 1920, appointed one L. N. Crawford, an automobile dealer in Norfolk, Va., their subagent for the sale of such automobiles. This agency contract required Crawford to purchase the machines directly from the manufacturers in Michigan, and to pay them therefor. On March 31, 1920, the plaintiff sold and delivered the automobile here involved in Petersburg to their subagent, Crawford, knowing that Crawford would take it to Norfolk for use in connection with his business, as they say, however, for demonstration purposes only. They reserved title thereto by a contract of conditional sale, which was recorded in the city

of Petersburg April 5, 1920, and thereafter, before its recordation in Norfolk, following negotiations opened by one of Crawford's clerks April 17, 1920, this automobile was sold by Crawford to Garrett, defendant, April 22, 1920, and according to his testimony fully paid for.

Crawford, his vendor, had a place of business in Norfolk, and advertised Jackson automobiles for sale in his front window as well as in a local newspaper.

Under these circumstances, as is stated in the brief of the attorneys for the plaintiffs, it was a question for the jury to determine whether or not the defendant was a purchaser for value without notice, and they insist that the jury has properly found that he was not such an innocent purchaser. That it was a question for the jury is undoubtedly true, and if they had been permitted by the trial court to consider this question, which is fairly raised by the evidence, this court would not have disturbed the verdict. It appears, however, that the trial court refused all of the instructions which were asked for, except one, which was granted at the instance of the plaintiffs, in this language:

"If the jury believe from the evidence that the car in the possession of the defendant, Garrett, is the same car mentioned in the contract of March 31, 1920, then they should find for the plaintiffs."

This instruction takes away from the jury the determination of every question involved in the case save the identity of the automobile with the car referred to in the conditional sale contract. Under the evidence in this case, the jury should have been instructed that, if the vendee was an innocent purchaser of the car for value and without notice, they should find in his favor, for the very elect might have been deceived into believing that Crawford, the dealer, owned it, while the wayfaring man, whether wise or unwise, would have been his easy mark.

The case is controlled by the doctrines so recently announced in the cases of *O'Neil v. Cheatwood*, 127 Va. 96, 102 S. E. 596; *Boice v. Finance & Guaranty Corp.*, 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654; *General Securities Co., Inc. v. Driscoll* (C. C. A.) 271 Fed. 295.

Reversed and remanded.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 621)

DALEY v. COMMONWEALTH.**MALES v. SAME.**(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Criminal law §1092(4), 1144(17)—Bills of exceptions must be tendered for signature within 60 days; judgment presumed correct.

Code 1919, § 6252, is mandatory, and court properly refused to sign bills of exceptions not tendered within 60 days from the date of final judgment, and, there being no exceptions in the record and no reversible error on the face thereof, the judgment of the trial court was presumed to be correct in every respect.

2. Criminal law §1092(9)—Failure to enter order in common-law order book did not extend time for presentation of bills of exceptions.

The fact that order was not actually spread upon the common-law order book of the court, but only a memorandum thereof was made by the clerk in the minute book regularly kept by him in which to note the daily proceedings of the court, did not extend time for the preparation and presentation of bills of exceptions, in view of Code 1919, § 5962.

Error to Hustings Court of Portsmouth.

John Daley and A. P. Males were convicted of selling ardent spirits in violation of the statute, and bring error. Affirmed.

S. M. Brandt and R. T. Thorp, both of Norfolk, for plaintiffs in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. [1] John Daley and A. P. Males have each been convicted of selling ardent spirits in violation of the statute. There are six errors assigned in the petition, but they are each based upon bills of exception which are not signed by the judge of the trial court. He refused to sign them because they were not tendered within 60 days from the date of the final judgment.

The statute (Code 1919, § 6252) is mandatory, and, there being no exceptions in the record before this court, and no reversible error on the face of the record, the judgment of the trial court is presumed to be correct in every respect (Bragg v. Justis, 129 Va. 354, 106 S. E. 335; Harley v. Commonwealth, 131 Va. —, 108 S. E. 648).

[2] There is a memorandum made by the judge to the effect that on the date of such final judgment the order was not actually spread upon the common-law order book of the court, but only a memorandum thereof made by the clerk in the minute book regularly kept by him in which to note the daily proceedings of the court. The fact that the

order was not entered on the order book and signed by the judge on the date of the judgment does not extend the time for the preparation and presentation of the bills of exception. It is not the practice in this state, and indeed it would be physically impossible for the clerk to record all of the orders on the order book immediately, or for the judge forthwith to sign them. The universal practice is that the clerk extends the orders upon the permanent record of the court just as soon as possible, and they are thereafter read in open court and signed as orders of the date when the judgments were pronounced. This practice is recognized by Code 1919, § 5962, which provides, among other things, that—

"The proceedings of each day shall be drawn up at large, and read in open court, by the clerk thereof, at the next session of the said court, except those of the last day of a term, which shall be drawn up and read the same day. After being corrected where it is necessary, the record shall be signed by the presiding judge."

Affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 760)

KITCHEN v. COMMONWEALTH.(Supreme Court of Appeals of Virginia.
March 30, 1922.)

1. Criminal law §1159(3)—Conviction on conflicting evidence not reversed.

A conviction of rape on conflicting evidence will not be disturbed.

2. Criminal law §829(18)—Instructions covered by other instructions held properly refused.

Instructions on reasonable doubt, covered by instructions given, were properly refused.

3. Indictment and Information §159(4)—Changing name of accused in indictment during trial held proper.

Under Code 1919, §§ 4875, 4878, as to nomenclature and amendment, the court, during the trial, properly permitted the attorney for the commonwealth to change the name of accused in an indictment for rape from "R. A." to "Ira" K.; the identity of accused not being at any time questioned or doubted.

Error to Corporation Court of Roanoke.

Ira Kitchen was convicted of rape, and brings error. Affirmed.

John G. Challice, of Roanoke, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile,

Second Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. The accused has been found guilty of rape, and is here assigning four errors.

[1] 1. The facts which the jury were justified in finding from the evidence of the commonwealth are that the crime was committed upon a female child under the age of 15 years. The physical condition of the child, who was examined by a physician on the night of the occurrence, showed beyond peradventure that some one had committed the alleged offense, and her testimony that the prisoner ravished her is clear, positive, and distinct. While the accused denied every incriminating fact, this issue was determined by the jury, and will not be disturbed here; so that the motion to set aside the verdict as contrary to the law and the evidence was properly overruled.

[2] 2. Two other errors were assigned—one the refusal of the court to give two instructions offered by the defendant, and the other the giving of two instructions offered by the commonwealth. It is unnecessary to say anything as to those which were refused, both of which were to the effect that the prisoner's guilt must be proved beyond a reasonable doubt, except that, as the court gave six other instructions which emphasized with unnecessary repetition the same rule, the refusal to give these was justified. The prisoner objects to the giving of two of the instructions offered by the commonwealth, but no reason is suggested in support of the assignment, except the assertion that there was no credible evidence of the crime. As to this, what we have already said as to the evidence is sufficient, in our opinion, to justify the instructions, as they fully safeguard every right of the accused.

[3] 3. The other error assigned is that during the progress of the trial the court permitted the attorney for the commonwealth to change the name in the indictment from R. A. Kitchen to Ira Kitchen. The identity of the accused was never at any time questioned or doubted, and the action of the court is fully authorized by Code 1919, § 4875, which, among other things, provides that no indictment shall be abated for any misnomer of the accused, but the court may, in case of misnomer, appearing before or in the course of a trial, forthwith cause the indictment or accusation to be amended according to the fact; and Code 1919, § 4878, provides for amending indictments, provided the amendment does not change the nature of the offense charged, with the right to the defendant to have a continuance of the case if the amendment operates as a surprise to him.

We find no reversible error.
Affirmed.

(112 Va. 606)

BROWN v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Homicide ~~§314~~—Jury cannot fix less punishment on convict for murdering guard than electrocution.

Under Code 1919, § 5051, the jury cannot fix any less punishment of a convict for murdering his guard than electrocution.

2. Homicide ~~§144~~—In prosecution for murdering guard, commonwealth must prove accused was convict.

In a prosecution of a convict for murdering his guard, under Code 1919, § 5051, the commonwealth must prove that at the time of the homicide accused was a convict.

3. Criminal law ~~§446~~—Certified copy of judgment and order of condemnation held sufficient to identify defendant as convict.

In a prosecution of a convict, under Code 1919, § 5051, for murdering his guard, a certified copy of the judgment and order of condemnation of defendant for a felony, for which the indictment charged he had been sentenced to a penitentiary term, which he was serving as a member of the convict road force, held sufficient to identify defendant as such convict.

Error to Circuit Court, Orange County.

Ernest Brown, a convict, was convicted of murdering his guard and he brings error. Affirmed.

E. H. De Jarnette, Jr., of Orange, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen. and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

BURKS, J. [1-3] The plaintiff in error, hereinafter called the accused, was a penitentiary convict, and murdered the guard who had him in custody. He was convicted of the offense and sentenced to be electrocuted, which is the only punishment provided by statute. The jury had no option to fix any less punishment. Code, § 5051. It was essential for the commonwealth, in a proceeding for this offense, to prove that, at the time of the homicide, the accused was a convict; and the only error assigned is that the record does not show that he is the same Ernest Brown as the Ernest Brown who was convicted of a felony in Surry county, and sentenced to a term of years in the penitentiary. The assignment of error is without merit. The accused was indicted as Ernest Brown, alias "Fern," and the indictment charged that he had been previously convicted of a felony in the circuit court for the county of Surry, and sentenced to a term of five years in the penitentiary, and that, at the time of the homicide, he was

undergoing his punishment as a member of the state convict road force, at the camp in Orange county. In support of the charge of such conviction, the commonwealth introduced a certified copy of the judgment and order of condemnation of "Ernest Brown, alias 'Fern'" from the circuit court of Surry county. The trial court certified the facts, not merely the evidence, established in the case, and, among them, "that Ernest Brown was, on the 1st day of March, 1921, in the custody of Walter E. Snow and D. N. Kyger, guards of the penitentiary of Virginia, working at a stone quarry in Orange county, Va.," and that the certified copy of the order of the circuit court of Surry county above referred to was "the paper under which the said Ernest Brown was held in the said custody, and under which he was received into said camp as a convict." This abundantly identifies the accused as the convict under the judgment aforesaid of Surry county. The murder was fully proved, and is not here denied. It is plain that the judgment complained of must be affirmed.

Affirmed.

WEST, J., absent.

(132 Va. 609)

EVANS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

Criminal law §1159(3)—Finding of fact by jury conclusive.

In a prosecution for the manufacture and sale of ardent spirits, where the evidence was conflicting, a finding of fact by a jury will not be disturbed on appeal.

Error to Circuit Court, Halifax County.

Houston M. Evans was convicted of the manufacture and sale of ardent spirits, and he brings error. Affirmed.

McKinney & Settle, of South Boston, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. The plaintiff in error, who has been convicted under the statute (Laws 1918, c. 888) prohibiting the manufacture and sale of ardent spirits, is here assigning one error—that is, that the court erred in overruling the motion to set aside the verdict as contrary to the law and the evidence.

It is unnecessary to recite all of the evidence because it appears from the evidence introduced on behalf of the commonwealth that the federal prohibition agents and the

county police had located a distillery in Halifax county; that the accused and another were seen and recognized by two of these officials, who saw the accused filling up fruit jars with whisky which he was dipping out of a tub at the distillery; that they had filled up 11 fruit jars and were about to fill another when, having evidently seen some of the officers, they ran away; that another witness saw them running through the woods from the direction of the distillery; that they took an automobile which had been waiting; and that they were arrested in that automobile a few minutes afterwards by another one of the officers. The defendant introduced evidence tending to contradict all of these incriminating circumstances, but as the jury heard and saw all of the witnesses, and credited the evidence which so clearly indicates the guilt of the accused, their finding is conclusive. The attorney for the accused appears to realize that this result is inevitable, and undertakes to escape it by stating in his petition that the "officers testified falsely against the petitioner, * * * and that they were actuated so to do solely through malice." It is sufficient to say as to this that there is nothing in the record to justify this imputation against the witnesses for the commonwealth. Affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 814)

TRENT v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Larceny §55—Evidence sufficient to support conviction.

On trial for larceny of a diamond ring intrusted to defendant and claimed by him to have been lost while he was intoxicated, evidence held sufficient to make a case for the jury and support a verdict of guilty.

2. Criminal law §1159(3)—Verdict on conflicting evidence not disturbed when evidence sufficient, if believed, to support it.

Though the testimony is conflicting and not altogether satisfying as it appears in print, where the evidence to support the commonwealth's theory is sufficient, if believed, to warrant the verdict, the credibility of the witnesses and the weight of the testimony is for the jury, and an appellate court is not warranted in interfering with their finding.

3. Embezzlement §48(1)—Modified instruction as to concealment of ring, lost while intoxicated and subsequently found, not erroneous.

Under Code 1919, § 4451, relative to the embezzlement of property lawfully coming into one's possession, the modification of an in-

struction as to loss of a diamond ring while intoxicated by adding that, if defendant, after regaining consciousness, discovered the ring and concealed or aided and abetted another to conceal it with intent to deprive the owner thereof, he would be guilty of larceny, was not erroneous.

4. Criminal law — 806(1)—Instructions similar to instructions given on defendant's motion not subject to criticism.

An instruction, which simply repeated in substance part of similar instructions given on defendant's motion, was not subject to criticism.

Error to Corporation Court of Roanoke.

C. E. Trent was convicted of grand larceny, and he brings error. Affirmed.

Hairston & Hopkins and Hoge & Darnall, all of Roanoke, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. The accused has been convicted of grand larceny, and sentenced to confinement in the penitentiary for 18 months in accordance with the verdict.

[1] The pertinent facts relied upon by the prosecution are these: One Nolan received from a pawnbroker in the city of Roanoke a diamond ring which he contemplated purchasing. The price named was \$900. He borrowed it with permission to have the ring examined by an expert in order to enable him to estimate its value. The jeweler whose estimate he desired not being at his place of business, he was told to return at a later time. Nolan then went to a pool room, where he met the accused and several others, who began drinking together, and then they went to a baseball game played by negroes. Nolan asked the accused to take the ring and wear it, as it did not fit his (Nolan's) finger. The ring was exhibited to a number of people by being handed around for examination. The accused did not return after the ballgame with Nolan, but in a different automobile. He was very much intoxicated when he reached home, and his doctor found him in an unconscious condition and critically ill. Nolan followed him quickly, and sought to recover the ring, but could not find it either on his hand or on his person, and he was too drunk then to give any explanation of its disappearance. A woman of bad reputation, who was in the habit of using some stupefying drug, testified that she was an inmate of the house of the accused as a servant; that she discovered the ring hidden in the refrigerator, and reported the matter to the wife of the accused, who told the witness not to say anything about it; that when the accused and his wife on one occasion had

an altercation, when he started to leave his home, his wife told him to take the ring and take it over to his mother's home; that they could do as much with her for concealing goods as with him. She also testified that she saw the accused take the ring out of the refrigerator. All of this incriminating evidence is flatly contradicted by the accused and his witnesses.

[2] One of the assignments of error is that the evidence is not sufficient to justify the verdict of guilty, and that the trial court erred in refusing to set it aside. Questions similar to this have been so frequently discussed by the courts that we do not deem it necessary to do more than repeat a recent expression of this court in *Harris v. Commonwealth*, 129 Va. 751, 105 S. E. 541:

"Of this it is sufficient to say that we have carefully considered the record; and, while the testimony is involved in conflict, and is not altogether satisfying as it appears in print, the evidence tending to support the theory of the commonwealth was sufficient, if believed by the jury, to warrant the verdict. The question of the credibility of the witnesses and the weight of the testimony was peculiarly for the jury, and we would not be warranted in interfering with their finding."

[3] The other assignment of error is that the court erred in an addition made to instruction No. 5. The first clause of the instruction reads as follows:

"The court instructs the jury that if they believe from the evidence that the defendant, Trent, came into the possession of the ring in question fairly and legally, and that at the time of coming into such possession he entertained no criminal intent to commit larceny thereof, and that thereafter he became so much under the influence of ardent spirits as to have been incapable of forming and entertaining criminal intent, and that while under such influence, and without the knowledge of what he was doing, he lost the ring, or misplaced it, or allowed it to get out of his possession, then he would not be guilty of the larceny thereof."

The addition thereto reads:

"You are further instructed, however, that if after regaining consciousness he discovered the said ring or its whereabouts and concealed the same, or aided and abetted another in its concealment, with the intent to deprive the owner of the possession thereof permanently, then he would be guilty of the larceny thereof."

This assignment is based upon the statute (Code 1919, § 4451), relating to the embezzlement or appropriation of property to one's own use which came lawfully into his possession. The pertinent language of the statute relied on reads thus:

"If any person wrongfully and fraudulently use, dispose of, conceal, or embezzle . . . personal property, tangible or intangible, which he shall have received for another, or for his

employer, principal, or bailor * * * or which shall have been intrusted or delivered to him by another * * * he shall be deemed guilty of larceny thereof, and may be indicted as for simple larceny. * * *

[4] There were four other instructions which fully and repeatedly cautioned the jury that there was a presumption of innocence, which followed the accused throughout the case, that he could not be convicted until the commonwealth overcame that presumption beyond a reasonable doubt by clear, distinct, and reliable evidence, and that he could not be convicted of larceny unless it was shown beyond all doubt by clear, distinct, and reliable evidence, that after the ring was given to him he disposed of it for his own use, or fraudulently and unlawfully concealed the ring for the purpose of converting it to his own use. *Wadley v. Commonwealth*, 98 Va. 803, 35 S. E. 452, cited in support of this assignment, has no application to the facts of this case. There it was held error to refuse an instruction which was supported by evidence, to the effect that unless the act was done with criminal intent, and that if the conversion was made under an honest belief of the accused that he has a bona fide claim of right to do so, the jury could not convict. There is no evidence here that the accused ever made any claim to the ring. On the contrary, he admitted that he received it from Nolan, and only claimed that because of his insensibility from drunkenness he did not know what had become of it. The criticism of the instruction is without justification, for it simply repeated in substance a part of similar instructions which had been given to the jury upon the motion of the accused.

We find no reversible error.

Affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 624)

DICKERSON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 16, 1922.)

Criminal law \Rightarrow 720(9)—Statement of commonwealth's attorney in murder case held unsupported by evidence.

In a prosecution for murder, a statement of the prosecuting attorney that deceased was killed at a certain point and was carried by accused to the place where his body was found, after having put on another person's shoes, held unsupported by evidence.

Error to Circuit Court, Halifax County.

George Dickerson was convicted of murder in the second degree, and brings error. Reversed, and new trial granted.

The verdict in this case found the accused guilty of murder in the second degree, and fixed his punishment at 10 years in the penitentiary. The judgment under review was entered accordingly.

The deceased, a white man, named Will Rickman, was murdered on the night of Saturday, March 19, 1921, in a most brutal manner. There were two wounds, both of which, according to the testimony for the commonwealth, were mortal wounds, if inflicted while Rickman was living—one consisting of a fracture of the skull about 1¼ inches in length on the right side of the head above the ear, and the other consisting of the fracture of the spine on a level with the hip bones, the skin being scraped off at this place in the center of the back, making an abrasion underneath the clothing of the size of a half dollar. In addition to these wounds there was laceration about the lips, the right corner of the mouth was cut; there were marks of the teeth on the inner surfaces of the lower and top lips, one tooth broken, one missing; there was laceration back of the right ear, about half an inch in length; and there were a number of bruises on the forehead about an inch long, some distance apart, running up and down the forehead. The testimony of the physician, who examined the body as a member of the coroner's jury on the next day after the murder, concerning the appearance of the wounds, is to the effect that of those on the head and face "some looked like they were caused by a blunt instrument and some with an instrument that had a sharp point to it;" that the wounds on the face and head could have been caused by a pistol such as the pistol in evidence belonging to the accused; that the bruises on the forehead might have been made by the butt-end of that pistol, and the fracture above the ear could have been made by the hammer of the pistol; and that the wound in the back causing the fracture of the spine could have been caused by a blunt instrument, such as the club in evidence, which was found at the place at which, according to the theory of the commonwealth, the murder was committed. This witness testified further, however, that he could not say that the wounds on the face and head were made by the pistol; that there was nothing about these wounds that indicated to the mind of the witness that they were made by the pistol; that they could have been made by some other instrument; and that he could not say that the lick which fractured the spine was hit by the club in evidence. And the evidence fails to disclose that there was any blood stain on the pistol or club, or other evidence that either of them was an instrument used by the murderer.

The body of the deceased was found lying in the public road "right across one of the

tracks made by vehicles." The witness for the commonwealth, who testified to first seeing the body, was in an automobile, with some young ladies, returning from a dance. One of the young ladies was driving the car. This witness, as the car passed along the road, saw in the road what afterwards proved to be the body of the deceased. As to the time of night when this occurred this witness testified as follows:

"Q. Will you please state to the jury what hour that was that you saw that body?

"A. It was about quarter after 12.

"Q. That was 15 minutes after 12 o'clock?

"A. Yes, sir.

"Q. State to the jury how you arrive at that.

"A. I left down the road about four miles, at Mr. Tracey's, about 12 o'clock, and I think it took about 15 minutes to drive it.

"Q. It certainly would not take over 15 minutes to drive it?

"A. No, sir.

"Q. It is good gray soil road?

"A. Yes, sir.

"Q. And no hills between the two points?

"A. No, sir."

Cross-examination:

"Q. Did you look at your watch when you left Mr. Tracey's?

"A. Yes, sir.

"Q. After you left or before?

"A. I got in the automobile and looked at my watch. * * *

"Q. One of the young ladies was driving?

"A. Yes, sir.

"Q. And she was driving it slowly?

"A. Yes, sir.

"Q. She was not an experienced driver?

"A. I think she was.

"Q. She was not driving fast?

"A. She was not speeding."

Redirect examination:

"Q. You are satisfied that it was not later than 12:15 when you reached that point?

"A. Yes, sir."

Another witness for the commonwealth testified that, traveling in an automobile, he passed what afterwards proved to be the body of the deceased lying in the road, between 12:15 and 12:20 o'clock of the night of the murder; that he did not recognize it at the time as the body of any person, and did not stop, but saw something in the road, which afterwards proved to be the body of the deceased.

Another witness for the commonwealth on cross-examination, but without objection on the part of the commonwealth's attorney, testified that he had a conversation with one John Medley the next morning after the murder, and that Medley said that he thought he (Medley) ran over the body of the deceased the night before, and thought at the time that he (Medley) had killed the deceased.

It appears from Medley's testimony, who was a witness for the accused, that Medley was traveling in an automobile truck that

night, and left the home of Jim Coleman, presently to be mentioned, which was about a mile from the place in the road where the body was found, not earlier than 12:15 o'clock, so that if his automobile struck the body of the deceased as it lay in the road this must have been some time not earlier than about 12:30 o'clock of such night. Medley, however, was not asked any question about running over the body of the deceased, and did not testify on that subject.

The coroner's inquest was held the morning following the murder, which was Sunday, at the place in the road where the body was found, the inquest beginning about 10 o'clock that morning. Before the coroner's jury met, however, the news of the murder and of the finding of the body had gone abroad in the neighborhood, and a considerable crowd gathered about the place where the body lay in the road, and around about the body. There is no direct evidence on the subject of whether the body was or was not moved by any one during the morning before the coroner's jury convened.

When the coroner's jury met the body was lying in the road, as aforesaid, on the back, the right arm being flexed and partially across the chest. A tooth and an empty pistol cartridge were found near the body. A bottle of extract of pineapple was lying on the chest of the body and a pint bottle of whisky about two-thirds full, was setting up under the right arm of the body. There was no blood in the road near the body, except that, when the coroner's jury raised the head in their examination of the body, some bloody serum ran out of the nostril on the same side on which the skull was fractured. And the testimony for the commonwealth was to the effect that one of the wounds was near an artery which ordinarily would have bled considerably, and that if the deceased had been killed where the body was found in the road there would have been evidence of blood in the road from the wounds on the head.

The dwelling house of Jim Coleman, a colored man is located on the south side of the public road above mentioned, about 75 yards off from the public road. This dwelling house is about one mile east of the place where the body was found.

On the Saturday night of the murder there was a dance, and what the colored people call "a party," at the house of Jim Coleman, and a large gathering of colored people were there, of men and women, beginning about 8:30 or 9 o'clock that evening and breaking up about 1 o'clock that night. There was the selling of food and drink, and, according to the testimony for the commonwealth, the accused, who occupied a room in Coleman's house, as a lodger, was selling intoxicating liquor that night, sometimes in one of the rooms of the house and at other times in

the yard at the rear of the house. Jim Coleman, assisted by others, was selling food from time to time. The house could not hold the crowd, and many were on the outside of the house, here and there in the rear, on the sides, and in front of the house, while the party was going on.

The testimony for the commonwealth is to the effect that about 10:15 o'clock on the night mentioned, the accused was seen in the public road in front of Coleman's house; and that later, about 11 o'clock, the deceased, (the only white person who appears to have been at the house of Coleman that night), was seen to come, in a somewhat drunken condition, from one side of Coleman's house, as if coming from the rear of the house, and, as he walked out toward the front of the house, the accused engaged in conversation with the colored men, Davis and Wood, who were afterwards among the witnesses for the commonwealth, during which conversation the deceased said, "Some one has been meddling with me" according to Wood's testimony), "Some ——— of a ——— is picking at me" (according to Davis' testimony). Neither Wood nor Davis asked, nor did the deceased say, who was "picking at" him or "meddling with" him. Davis assured the deceased that nobody should bother him while he was with him (Davis). The deceased asked Davis if the latter had any whisky. Davis said "No." The deceased then said, "I have some here, and I want to get some to go with it to make it better." Davis said that he did not have a drop. The deceased then said that, "The whisky he had was not any good," but that if Davis would go with him out to the public road he would give Davis a drink, and also extended the same invitation to Wood. On getting out to the public road just in front of Coleman's house, the deceased, Davis and Wood were seen by Harry Crute, a white man, who was passing along the public road at the time in his automobile, going homeward, which was eastward along such road. Crute stopped his car and talked a few minutes with the deceased, Davis, and Wood. Thereupon, two other persons coming up, the deceased, Davis, and Wood, asked Crute's permission to ride down the public road with Crute, and did so, to a point in front of Bethel Church, a distance of some 50 yards east of the entrance to Coleman's house. There the deceased, Davis, and Wood, got out of Crute's automobile, and Crute went on homeward. This occurred, as Crute, a witness for the accused, testified, at "a few minutes past half past 11" o'clock. Crute fixes this time by saying that when he drove up in front of Coleman's house and stopped, as above stated, he looked at his watch, and that it was then 11:30 o'clock; and that it was a few minutes thereafter that he left the deceased, Davis, and Wood in front of the church.

Davis and Wood, witnesses for the commonwealth as aforesaid, testified that on getting out of Crute's automobile in front of the church, the deceased gave them each a drink of whisky. Davis says the deceased gave them their drinks out of a quart bottle, which was about half full of liquor at the time. These witnesses further testified that they and the deceased then walked back along the public road to the entrance to Coleman's house, and that at that place they parted with the deceased, the latter going on westward along the public road in the direction of his home, and of the place where his dead body was seen in the road within a short time afterwards, and Wood and Davis returning to Coleman's house, from which they not long afterwards departed for their own homes. These witnesses also testified that when they parted with the deceased, as last stated, they saw no one else in sight; met no one, saw no one, and heard no one else, and "heard no difficulty" occur, as they went on to Coleman's house. Their testimony as to the time of night when this parting with the deceased occurred is in accord with Crute's testimony, and fixes such parting at about 11:45 o'clock.

The testimony for the commonwealth developed the following among other facts:

When the body of the deceased and its surroundings were being examined at the inquest, a track on the ground, made by the toe of a shoe with nails in it, was noticed just under one of the arms of the dead man. Outside of the trampling in the road of those who had stood or walked around the body tracks were found and followed, which were the same as the track just mentioned. These tracks led from the body to Jim Coleman's house. He was found with shoes on his feet which made the tracks which led from the body to his house. He was asked if he had been to the place where the body was, and he denied that he had been there, and denied all knowledge of the cause of the death of the deceased and of who killed him.

Coleman was thereupon arrested and lodged in jail that same day, Sunday, March 20, 1921, charged with the murder. That night an armed mob attacked the jail, and, not succeeding in breaking in, called to Coleman, and demanded that he tell them who murdered Rickman. Coleman told them that he did not know who committed the crime. The mob then fired a number of shots at or near Coleman, then paused and said to Coleman that they did not believe that he killed Rickman, but that they did believe that he knew who did, and that, if he did not tell them who it was, they would kill him. Thereupon Coleman again declared that he did not know who killed Rickman, and did this repeatedly. The mob then left the jail, and, going to Coleman's dwelling house, burned it to the ground and all of his property there.

Coleman was then, on the next night, being Monday night, removed to the jail at Lynchburg for safe-keeping, and was kept confined there for some time. Subsequently he was brought back to and kept confined in the local jail, where he was still so confined and still charged with the murder at the time he testified on the trial of the accused. Meanwhile a number of other colored men who were at the party at Jim Coleman's or were seen out in the public road on the night of the murder (including the accused, Wood, and Davis, above mentioned, and others) were under arrest, and confined in jail charged with the murder; and the county had a detective employed, who, as well as the commonwealth's attorney and the sheriff, and a Mr. Bailey, in whom Coleman seems to have had especial confidence, had interviews from time to time with Coleman, and also with others under arrest and not under arrest, some of whom were afterwards used as witnesses for the commonwealth, quizzing them on the subject of who committed the murder. The evidence makes it plain that during this time those who were quizzing Coleman repeatedly impressed upon him the predicament in which he stood and would stand when he came to be tried upon the charge against him of having committed the crime of the murder, unless he should, prior to his trial, name some one, other than himself, who wore his shoes which made the tracks aforesaid the night of the murder, and unless he should furnish some proof pointing to some one else as the person who committed the crime. Nevertheless Coleman repeatedly denied to those who quizzed him all knowledge on the subject of who killed the deceased until he (Coleman) was brought back from Lynchburg to the local jail and was being again confined there and the time was approaching when he would be tried for the crime. Coleman then, on April 20, first, either to the Mr. Bailey above referred to, or to the detective (the record leaving it in some doubt to which in the first instance), and afterwards in the presence of the commonwealth's attorney and others, and subsequently upon the witness stand as a witness for the commonwealth on the trial of the accused, made the statement which charged the accused with the crime, the material portions of which statement are as follows:

Coleman said that the shoes which made the tracks aforesaid were his everyday shoes; that on the night of his dance or party he took them off and left them in the shed-room of his house, which was one of the rooms on the first floor of the house; that he wore that night, while the party was going on, another and lighter pair of shoes; that he went into the shedroom between 10 and 12 o'clock that night, and the lamp was burning and the shoes of the accused, George

Dickerson, "were setting with the toes that way" (indicating), and that he Coleman, looked and said, "Uhm, Good Lord!" that the accused's shoes were standing there, and Coleman's shoes were gone; that the next time he, Coleman, saw the accused, the latter came to the front door and said, "Uhm, you-all here dancing," and Coleman said, "Yes"; that thereupon the accused danced "from the door clean into the kitchen, and asked Miss Chappel to have a treat," and also offered Coleman a treat; that "a good while after that" he, Coleman, heard the accused "talking between the stable and the house; that he, Coleman, was then standing in his kitchen door and saw the accused and two other persons whom he did not know standing with their backs to him, Coleman; that he, Coleman, recognized the accused by his voice; that the accused said, "Somebody is dead"; that he, Coleman, said, "What do you say, George; who is that dead?" that the accused said "nothing," and the three walked away. The statement of Coleman as given on the trial of the accused thereupon continued as follows:

"Q. When was the next time you saw (the accused)?

"A. The next time I saw George he came up to the kitchen door. After he said that, he came up to the kitchen door, and I was standing there, and I went and looked. At the kitchen door I stopped, and I said: 'George,' and he looked at me. I said, 'George, who is that you say is dead *up the road*?' (Italics supplied.) "He didn't say nothing. I said: 'George, who is that dead *up the road*?' (Italics supplied.) "I said: 'George, what did you wear my shoes for? Didn't you wear my shoes *up the road*?' (Italics supplied.) "And he said, 'Yes.' I said, 'Who is that dead *up the road*?' (Italics supplied.) "And he looked in my face, and he said: 'I killed a man.' I said: 'George, Lord, what do you mean? When I had my dance, and you wore my shoes;' and I said: 'What did you want to kill a man for?' and he said: 'Because I am so God damn evil.' * * *

"Q. Did he tell you the name of the man?

"A. No.

"Q. He said, when you asked why he killed the man, because he was so God damn evil?

"A. Yes, sir.

"Q. When did you hear the news of the body being found up there?

"A. Between 2 and 4 o'clock.

"Q. How did you find it out?

"A. Riley Street came back on the mule.

"Q. Did you-all go up there that night?

"A. No, sir.

"Q. Who went there?

"A. Myself and George went up there on my buggy with that little roan horse of mine hooked to it.

"Q. You-all went up there where the body was?

"A. Yes, sir; between 8 and 9 o'clock.

"Q. Did you-all have any conversation coming back?

"A. Coming back he spoke: 'Uhm, Uhm; its

a pity. That man is dead. I wish I did know who killed him.' I didn't say anything until we got the other side of Mr. Luke Anderson's, and I said: 'George what made you want to wear my shoes off last night?'

"By the Court: Talk a little louder.

"A. I asked him what he wanted to wear my shoes for, and he didn't say a word, but cast his eyes in the foot of the buggy. I said: 'George, it's a pity you wore my shoes last night, and this man got killed last night.' He didn't part his lips, and I didn't part mine. * * *

"Q. Why did you tell people you didn't know when you knew it was George?

"A. Because he told me to keep my mouth shut. * * *

"Q. Did he say anything about wearing your shoes off after you were arrested and in jail?

"A. Yonder in Lynchburg.

"Q. What did he say?

"A. I got to a crack where I could peep in the cell, and I said, 'George,' and he said, 'Huh.' I said, 'George, what did you wear my shoes off the night I had that dance?' and he dropped his head and never said a word, only to keep my damn mouth shut.

"Q. Was there anybody present when he said that?

"A. Yes, sir; Daniel Harris was in the cell with him.

"Q. Did he say anything else to you in this jail about this case?

"A. Yes, sir.

"Q. When was that?

"A. The Sunday he got out on bail he told me everything was all right, to keep my mouth shut; that everything would come out all right.

"Q. When was that?

"A. That was the same Saturday that they brought us back here to Houston from Lynchburg.

"Q. At the time he was turned out of jail, did you see him any more after that?

"A. Yes, sir.

"Q. When was it?

"A. If I am not mistaken he came back on Wednesday from home to Houston.

"Q. Did he go down to the side of the jail?

"A. Yes, sir; he gave me a dollar. * * *

"Q. What did he say then?

"A. He gave me the dollar and told me to keep my mouth shut.

"Q. Did anybody else hear that?

"A. Yes, sir.

"Q. Did other people in the jail hear that?

"A. Yes, sir."

On cross-examination Coleman admitted that in talking with his own counsel, prior to his declaration aforesaid, he told his own counsel that the shoes which made the tracks aforesaid sat in his rooms from the time he took them off as he stated, "and hadn't been touched by anybody, until about light, when (he) called for them to go out to get some corn for two men who came there in a wagon," and that, when arrested, on Sunday, March 20, he told the sheriff that the pistol was his, which was introduced in evidence by the commonwealth as belonging to the accused.

Daniel Harris, in his testimony on the trial

of the accused, corroborated the statement of Coleman as to his calling to the accused in the cell of the latter in the Lynchburg jail and asking the accused about wearing the shoes, and that the latter made no reply except to tell Coleman to keep his mouth shut. Daniel Harris, however, was one of those under arrest charged with the same crime; and it was shown that he lived with Coleman; and he admitted having at a previous time denied that he knew anything whatever about the case.

The place at which the deceased, Rickman, was killed, according to the theory of the commonwealth's attorney, was about 35 or 40 yards from the public road above mentioned, just in the edge of a body of woods which stood to the west of Coleman's dwelling house. Between this body of woods and Coleman's house there was a strip of open field, about 45 yards wide. And the public road, as it goes on westward from the entrance therefrom to Coleman's house (at which point the public road is about 75 yards from Coleman's house), curves toward the south, so that the spot at which the deceased was killed, according to the theory aforesaid, while within 35 or 40 yards of the public road, was only about 50 yards from Coleman's house. This spot was somewhat nearer the place where the body was found than Coleman's house, but was practically a mile away from the latter place.

The whole of the evidence on which the commonwealth has to rely to sustain the theory that the deceased was killed at the spot last mentioned consists of the testimony of two witnesses, a Mr. Wagstaff, and Ed Rickman, a brother of the deceased. They made an examination of the premises about Coleman's house on Monday afternoon, the second day following the murder. There had been no rain in the meantime. Later on, just when does not appear in evidence, Wagstaff, in company with the commonwealth's attorney and a Mr. Martin, made another examination of the same locality, with the result stated in the quotations from Wagstaff's testimony as to the latter examination presently to be made.

Wagstaff's testimony, just referred to, is as follows:

"Q. (by the commonwealth's attorney) Did you go to that place after the murder and make an examination of the premises?

"A. Yes, sir.

"Q. What day was that?

"A. Monday evening after he was buried. * * *

"Q. State what you found—did you find any evidence of any blood or murder there?

"A. Yes, sir.

"Q. Where was it?

"A. It was right over there, I guess 50 yards from the house, or it may be not that far. * * *

"Q. Did you find any tracks?

"A. Yes, sir; there was three or four tracks leading from the back part of Jim Coleman's house coming across the field. * * *

"Q. What kind of tracks were they? Do you think you could identify any of those tracks?

"A. It was a shoe, I suppose No. 5 or 6, or maybe larger than that.

"Q. Was it a small track or a large one?

"A. A small track.

"Q. What size man was Will Rickman?

"A. I reckon he would weigh 130.

"Q. Do you know what size shoe he wore?

"A. No, sir.

"Q. To the best of your knowledge from the size of his shoe, would it correspond with his shoe?

"A. Yes, sir.

"Q. That track came from the rear of Jim Coleman's house across the field to the scene of the murder?

"A. Yes, sir.

"Q. Now could you tell from the tracks that were made whether the man was walking or running?

"A. He was running; it looked like pretty good speed.

"Q. The tracks were far apart were they?

"A. Yes, sir.

"Q. What did you find at the scene of the murder?

"A. I saw blood there.

"Q. You saw blood on the ground?

"A. I saw blood on the ground.

"Q. What was the condition of the ground?

"A. It was trampled down.

"Q. Evidence of a scuffle?

"A. Yes, sir.

"Q. Were you later on with Mr. Martin and me when we went down to examine the ground?

"A. Yes, sir.

"Q. Were you present when we found this club here (referring to the club in evidence to which reference is above made)?

"A. Yes, sir.

"Q. See if that is the club?

"A. Yes, sir; that is the club.

"Q. Where was it found?

"A. I don't suppose it was as far as from here to the corner of that table from where I showed you the man was killed.

"Q. What was the condition of the leaves underneath that club?

"A. It looked like it had been laid down [on] a day or so before.

"Q. The leaves were fresh, were they?

"A. Yes, sir.

"Q. You have testified to that, to the best of your knowledge, you identified Will Rickman's track running from the rear of Jim Coleman's house up to this point. Did you find any other tracks?

"A. Yes, sir, there were three or four tracks along there.

"Q. I suppose you could not identify the others?

"A. No, sir; I paid but mighty little attention to them.

"Q. Were they large tracks?

"A. Yes, sir. I called one or two of his brothers when we started across the field.

"Q. Which one of his brothers went there to examine them?

"A. Ed, I think."

The testimony of the brother of the deceased, above referred to, Ed. Rickman, was as follows:

"Q. Did you go with Mr. Fred Wagstaff and examine the premises?

"A. Yes, sir.

"Q. Did you see the place on the edge of the woods where the struggle occurred?

"A. Yes, sir.

"Q. What evidence did you see?

"A. I saw his track coming from the house.

"Q. Whose track?

"A. My brother's.

"Q. Did you identify that as your brother's track?

"A. Yes, sir.

"Q. What size shoe did your brother wear?

"A. Five.

"Q. A small foot?

"A. Yes, sir.

"Q. He was a small man, wasn't he?

"A. Yes, sir.

"Q. Where did the tracks come from?

"A. The west end of the house.

"Q. That is the rear of the house?

"A. Yes, sir.

"Q. And came across the field up to the scene where the struggle appeared to have occurred?

"A. Yes, sir.

"Q. What evidence did you see of a struggle at that place?

"A. I saw a stick there.

"Q. Is that the club there?

"A. Yes, sir.

"Q. What was the condition of the ground there?

"A. The ground looked like it was trampled up right smart.

"Q. Did you see any blood on the ground there?

"A. Yes, sir."

There was no evidence introduced by the commonwealth which tended to show with any degree of definiteness that the accused was outside of the Coleman house at any time on the night of the murder for as long a period of time as half an hour. The most that such testimony could be said to tend to show is that the accused possibly may have been absent from the house for as long as half an hour during some part of the night between about 11 or 11:15 or 11:30 o'clock and 12:15 or 1 o'clock, but this can scarcely be said to be proved by such evidence as a fact, with any degree of probability; certainly not beyond a reasonable doubt. The testimony for the accused was to the effect that he was seen here and there about the house during the night, from the time the party began until after the murder had been done, at no longer intervals than some 10 minutes from time to time.

M. B. Booker, of Halifax, for plaintiff in error.

John R. Saunders, Atty. Gen., and J. D. Hank, Jr., Asst. Atty. Gen. for the Commonwealth.

SIMS, J. (after stating the facts as above). The only evidence there was before the jury to connect the accused with the crime of which he was convicted consisted of (a) the testimony for the commonwealth concerning the instruments with which it is claimed the murder was committed; (b) the testimony of Jim Coleman; and (c) the testimony of other witnesses locating the place of the killing, according to the theory of the commonwealth's attorney, in close proximity to where the accused was shown to be on the night of the murder.

(a) With respect to the instruments with which the crime was committed:

The evidence falls far short of identifying the pistol and club in evidence as having been, beyond a reasonable doubt, the instruments with which the deceased was slain. The evidence leaves it equally probable that the crime was committed with some other instruments.

(b) With respect to the testimony of Coleman:

That testimony, if true, was sufficient to support the verdict of the jury. But it was the testimony of one to whom the physical facts of the tracks of the shoes (owned by and found on his feet when he was arrested) pointed, not merely as an accomplice in the crime, but as the murderer. The narrative of the alleged confession of the accused which such testimony presented to the jury is so inherently improbable and well-nigh incredible in itself, and contains, in its repeated references to the dead body being "up the road," such evidence of knowledge on the part of Coleman of the location of the body, which nothing the accused had then said gave him information about (furnishing, indeed, internal evidence either of the guilt of Coleman of the crime or of other knowledge about it on his part than that derived, as he claimed, from the accused), as to make such narrative doubly unreliable. Moreover, the circumstances of the repeated previous denials by Coleman of all knowledge on the subject (some of such denials made when being shot at by the mob, under threat of instant death if he did not disclose what he knew), make it almost unbelievable that his narrative aforesaid could be true, and that he could have refrained from divulging some portion of it before he did. And further, there are the circumstances that, preceding the telling, Coleman took time to frame the story he told; that he was meanwhile having repeatedly impressed upon him, by the detective and others, the predicament he was in, unless he could lay the crime upon some one else. These considerations convince us that the jury would not have given credence to the testimony of Coleman had they not been satisfied that he was corroborated by other evidence in the case connecting the accused with the commission of the crime.

There was absolutely no evidence before the jury to corroborate the testimony of Coleman, connecting the deceased with the commission of the crime, except the testimony of Daniel Harris, and the testimony with reference to the location of the place at which the deceased was killed.

As to Daniel Harris' testimony, it merely corroborated Coleman in his testimony that while in the Lynchburg jail he asked the accused why the latter wore his, Coleman's, shoes, and that the accused made no reply, except to tell Coleman to shut his mouth. Harris' previous statement to the contrary, and his intimacy with Coleman, and his being himself one of those who had been arrested and charged with the same crime, were circumstances which indicate that the jury would not have given credence to Coleman's testimony upon the mere corroboration afforded by this testimony of Harris.

(c) We come then to the consideration of the testimony with reference to the location of the place at which the deceased was killed.

If the fact was that the deceased was killed at the place within 50 yards of the house of Coleman (the evidence showing that the accused was in and about such house on the night of the murder and about the time the murder was committed), the accused, according to the evidence for the commonwealth, may have been absent from the house, at some time, long enough to have done the killing, and possibly, at another time, long enough to have gone, wearing the shoes of Coleman, and carried the body from such place to the location in the road where the body was found, although the testimony for the commonwealth failed to show affirmatively that the accused was at any time absent from Coleman's house long enough to have so carried the body. That is to say, in such case the evidence would have shown that the accused may have had the opportunity to commit the crime and take the body to the place at which it was found in the road. Whereas, if the fact was that there was no proof of where the killing took place (the evidence showing that the deceased was not killed at the place at which his body was found), there was an absence of evidence to show that the accused had the opportunity to commit the crime and dispose of the body as aforesaid. In such situation the fact that the deceased was killed at the place in close proximity to Coleman's house was an essential link in the chain of the circumstantial evidence relied on by the commonwealth to connect the accused with the commission of the crime.

Accordingly, as appears from one of the bills of exception in the case, the attorney for the commonwealth, in his closing argument before the jury, made the following statement:

"The facts are that George Dickerson was behind that house selling whisky. Rickman went back there and bought whisky from him and accused him of watering it, and they had a row about it. After Rickman left George Dickerson he went back there, and the difficulty was renewed. Of course we do not contend George Dickerson changed his shoes then; he didn't have time; he chased him across that field, killed him, laid him over the fence, and then came back to the house and put on Coleman's shoes, and then carried the body to where it was found in the road."

To such statement of the attorney for the commonwealth the accused by counsel objected, on the ground that it was not supported by the evidence, and that there was no evidence in the case on which to base the statement; that it was an appeal to the prejudice and passion of the jury, and moved the court to tell the jury not to consider this statement; but the court overruled the defendant's objection to said argument, and declined to instruct the jury to disregard the same. This action of the court is made the basis of one of the assignments of error.

We are of opinion that this assignment of error is well taken.

There was before the jury absolutely no evidence of any probative value, even if it had been a civil case, that any human being was killed at the place referred to in the statement of the commonwealth's attorney.

There was no evidence whatever of tracks made by the shoes of Coleman, making the nailprints, or of any other tracks, going from the alleged place of the killing to the place where the body was found in the road. There was no evidence explaining why such vestiges were not apparent on the ground, if they were looked for and were not found; and we find no evidence in the record of the existence of any fence, such as is referred to in the statement of the attorney for the commonwealth.

There was no evidence that the blood seen at this place was human blood, or that the tracks from the house across the open field, made by some person wearing No. 5 shoes, were made by the deceased, rather than by some other person wearing that size shoes. No peculiarity whatever about such tracks was shown in evidence.

Preceding the party, doubtless many fowls, and likely some animals, were killed to provide food which was sold at the party. The whole of the testimony for the commonwealth on the subject under consideration is entirely consistent with the theory that the tracks of the three or four persons seen

across the open ground near the house (not merely of two persons, of the deceased and accused, according to the statement of the commonwealth's attorney) were the tracks of some persons chasing a fowl or a pig; that the blood on the ground was the blood of a fowl or of an animal caught and killed there; and that the disturbance of the ground at that place was caused by a no more serious tragedy. And as to the club: There were doubtless many such lying about that and other bodies of woods in the vicinity. There was no evidence that this club had struck across the body of any person or had been handled by human hands recently before it was found. Indeed the evidence fails to show beyond a reasonable doubt that the wound in the back of the deceased was made with any club whatever. This wound may have been made, consistently with all of the evidence, by some other instrument, possibly by some automobile running over the dead body in the road. This hypothesis is consistent with the evidence as it appears in the record.

And the circumstance of the public disappointment which would naturally ensue if all of the many persons suspected of and charged with the crime should escape conviction rendered it peculiarly a case in which the jury were liable to be misled into drawing inferences and reaching conclusions touching the guilt of the accused not warranted by a calm and dispassionate consideration of the evidence.

It seems plain, therefore, that the action of the trial court in overruling the objection to the statement of the commonwealth's attorney and refusing to instruct the jury to disregard such statement misled the jury into erroneously thinking that there was sufficient evidence before them to sustain the theory of the commonwealth's attorney that the killing took place in close proximity to the house in which the accused was, as aforesaid; and that the testimony of Coleman was thus corroborated. And we are convinced by the considerations aforesaid that but for being so misled the jury would not have convicted the accused upon the other evidence in the case.

Because of such action of the trial court the case must be reversed, and a new trial will be granted to the accused.

Reversed and new trial granted.

BURKS, J., concurs in results.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 335)

RENNOLDS v. AVERY.(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Sales \S 180(4) — Partial acceptance not based on satisfaction with quality does not imply agreement to accept.

Where the buyer accepts a portion of the goods delivered for a reason which is not inconsistent with a subsequent refusal to accept the balance of the goods, which were of the same quality as those accepted, because of their quality, such partial acceptance does not raise an implied acceptance of all of the goods.

2. Sales \S 182(4) — Evidence held to raise question for jury whether partial acceptance was implied agreement to accept.

Testimony by the buyer's inspector that he accepted a part of the piles delivered by the seller, though they were not merchantable, because he thought the defects were occasioned by delay in inspection, and it was the buyer's policy not to require the seller to stand the loss caused by such delay, raised a question for the jury whether the partial acceptance was an implied agreement to accept all, so that it was error to charge that, if part of the goods were accepted, the buyer could not reject the others, which were of the same quality, because they were not merchantable.

Error to Circuit Court, Charles City County.

Action by J. W. Avery against P. J. Rennolds, doing business under the firm name and style of J. A. Rennolds & Bro. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

This action was instituted by J. W. Avery, the defendant in error (who will be hereinafter called plaintiff), against P. J. Rennolds, trading and doing business under the firm name and style of J. A. Rennolds & Bro., the plaintiff in error (who will be hereinafter called defendant). By the action the plaintiff seeks to recover of the defendant damages for the failure and refusal of the latter to accept certain piling delivered by the plaintiff on a certain landing, which the plaintiff claims the defendant agreed to accept and pay for at certain prices when so delivered.

There have been two trials of the case. On the first trial there was a verdict for the plaintiff for \$750 damages, which the trial court, on motion of the defendant, set aside. On the second trial there was again a verdict for the plaintiff, this time for the sum of \$946.92 damages. The trial court entered judgment in accordance with the last-named verdict, and it is that judgment which is under review.

The defendant is a large dealer in piling, and the plaintiff for a number of years has been selling pine piling to the defendant.

This dealing between the plaintiff and defendant had been going on over a period of about 12 years before the present litigation arose. The dealing proceeded under a general contract or understanding between the parties, in accordance with which no specific quantity of piling to be delivered by the plaintiff, or specific prices to be paid by the defendant, were agreed upon; but it was mutually understood that the defendant would from time to time accept in the usual course of business whatever pine piling the plaintiff delivered, of certain standard sizes and lengths, of merchantable quality and condition, at certain landings, the acceptance of the piling by the defendant to be through its inspector, with the right to reject such piling as did not meet the standard size and length requirements, and as was not of merchantable quality and condition; and the prices to be paid were to be the market prices which the defendant was, at the time and place of each inspection and acceptance, paying to others generally for piling of the particular sizes, lengths, quality, and condition which the piling delivered by the plaintiff might be found to conform to, upon the inspection of it.

The plaintiff claims that, acting under the general contract or understanding mentioned, he, between the latter part of July and November 1, 1917, delivered on Courthouse Creek landing, in Charles City county, 800 sticks or pieces of pine piling, of standard sizes and lengths, and of merchantable quality and condition.

There is a sharp conflict between the testimony before the jury for the plaintiff and that for the defendant, on the subject of the condition of the piling when it was delivered on the landing. The testimony for the defendant is to the effect that it was all more or less worm-eaten, rotten, etc., and that none of it was in merchantable condition when delivered on the landing.

Through its inspector, Hall, the defendant did, however, on September 28, 1917, inspect and accept 214 sticks and on October 13, 1917, 125 sticks, making 339 sticks of the piling on the landing aforesaid which were accepted by the defendant, for which the defendant in due course paid the plaintiff. That, however, left of the said 800 sticks, according to the claim of the plaintiff, 461 sticks of the piling still remaining on the landing as of November 1, 1917, unaccepted and unpaid for. This residue of piling the defendant refused to accept, and it was to recover damages for such refusal of the defendant that the action was brought.

Among the grounds of defense filed by the defendant is the claim that the defendant was justified in his refusal to accept such residue of the piling because all of it was more or less worm-eaten, rotten, etc., and

none of it in merchantable condition when it was delivered on the landing. And the testimony for the defendant was to the effect, as aforesaid, that all of the piling the defendant failed and refused to accept was in such condition, and that none of it was in a merchantable condition when delivered on the landing.

It developed, however, from the evidence introduced in the progress of the trial (the last trial, being here referred to), that the piling which the defendant refused to accept and left on the landing was probably in no worse condition than the piling the defendant accepted and paid for. To explain the acceptance of the 339 sticks of piling under such circumstances, Hall, the inspector, and a witness for the defendant testified, in substance, as follows:

That the 339 sticks of piling which were accepted were not in fact in a merchantable condition. That he accepted them, however, under and because of the mistaken impression that they had gotten in that condition while on the landing awaiting inspection, due to the fault of the defendant in not having sent and had them inspected and accepted sooner. That it was the custom of the defendant not to allow any one to lose through his neglect, and that, acting upon that custom, and because of the mistaken impression aforesaid, the witness accepted the 339 sticks as aforesaid. That but for such mistake none of the 339 sticks of piling would have been accepted.

M. H. Barnes, of Providence Forge, and R. E. Peyton, Jr., of Richmond, for plaintiff in error.

Henley, Hall, Hall & Peachy, of Williamsburg, for defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

There are a number of questions raised by the assignments of error, but in the view we take of it we find one of them decisive of the case, and that is this:

(1) Did the court err in giving instruction No. 3 at the request of the plaintiff and in refusing instruction E, asked for by the defendant, on the subject of the effect of the acceptance and appropriation by the defendant of a part of the piling which the plaintiff delivered on the landing and tendered as in performance of the contract on his part?

This question must be answered in the affirmative, in view of the testimony for the defendant on this subject which was taken from the consideration of the jury by this action on the part of the court.

Instruction No. 3, in question, is as follows:

"The court instructs the jury that, if they shall believe from the evidence that the defendant had agreed to purchase from the plaintiff 800 sticks of pine piling, and that said plaintiff

hauled the said piling to the landing on Court-house creek, ready for delivery, and notified the defendant that said piling was ready for delivery, and if the jury shall further believe from the evidence that the defendant, by his agent, O. C. Hall, inspected and accepted 339 sticks of said piling, and that the piling so accepted by the said defendant, through its agent, was of like quality and condition with the rest of the sticks of pine piling left on said landing, it there and then became the duty of said defendant to accept and pay for the rest and residue of said piling. And if the jury believe from the evidence that 461 sticks of pine piling was left upon said landing of like quality with those accepted by said defendant, and that the said defendant has failed or refused to accept and pay for same, then you must find for the plaintiff and assess his damages at the contract price for said piling, less the price received by the plaintiff for the sale of said piling, provided you shall believe from the evidence that the said plaintiff sold and disposed of said piling to the best advantage and with proper diligence in disposing of said piling."

Instruction E in question is as follows:

"The court instructs the jury that, if they believe from the evidence there was an acceptance of a part of the piling by the agent, Hall, under the mistaken idea that the piling were injured by the fault of his principal, Rennolds, and he accepted the same according to usual custom, then there was no implied warranty¹ that all the piling were accepted." (Italics supplied.)

[1] The plaintiff relies on *Syer & Co. v. Lester*, 116 Va. 541, 82 S. E. 122, to sustain instruction No. 3. It is there held that—

"Acceptance and appropriation of a part of a shipment of goods, with full knowledge of deficiency in their quality and quantity, implies an agreement for the acceptance of the whole."

[2] But this rule may need qualification where a single shipment or alleged delivery of goods is involved; and certainly it has no application where more than the partial acceptance is induced by such a reason that there is no inconsistency between such acceptance and the refusal to accept the residue of the goods on the ground that they do not conform to the contract requirements with respect to quality, etc. Such was the character of the reason for the partial acceptance which the defendant claimed in the instant case. The question of fact whether that was the true reason for such partial acceptance should have been left to the decision of the jury upon all the evidence in the case. The defendant had the right to have the jury consider the testimony of Hall on that subject. The refusal of instruction E and the giving of instruction No. 3 in the form in which it was given took that question of fact, and all consideration of Hall's testimony bearing upon it, entirely away from the jury. This

¹ The word "warranty" is supposed to be a typographical error; the word "agreement" being doubtless the word actually used in the instruction.

was error and harmful error, because of which we feel constrained to reverse the case.

As to the other assignments of error:

As the other assignments of error present no novel question, and as the case will be reversed on the ground above stated, we deem it sufficient to say as to such assignments of error that we find no merit in any of them.

The case will be reversed, and a new trial de novo awarded, to be had in conformity with the views above expressed.

Reversed.

(91 W. Va. 262)

STATE v. McCOY. (No. 4571.)

(Supreme Court of Appeals of West Virginia.
May 23, 1922.)

(Syllabus by the Court.)

1. Jury §7—Statute held to intend notice to accused before drawing jurors from another county.

Where a statute relating to the trial of criminal cases authorizes the court, or the judge thereof in vacation, if in the opinion of the court or judge qualified jurors not exempt from service can not be found in the county in which the trial is to be had, to cause jurors to be summoned from another county in the manner provided by the statute, but the statute provides for no notice to the accused of such proposed proceeding, the court or judge should adopt such practice or proceeding as will attain the ends of justice and avoid surprise, and give the defendant, if accused of a felony, an opportunity to be present to defend his rights. And in all such cases it will be assumed that notice to the accused was intended by the Legislature.

2. Jury §7—A judgment convicting of a felony on a verdict by a jury drawn from another county without notice to defendant will be reversed for new trial.

Where one charged with a felony has been tried and convicted by a jury drawn from another county upon an order entered in his absence and without notice to him, the judgment on the verdict will be reversed and the prisoner awarded a new trial.

3. Criminal law §1134(3)—Where conviction of a felony is reversed for failure to give defendant notice of the drawing of jury from another county, the constitutionality of statute authorizing it not considered.

Where one charged with a felony has been tried and convicted by a jury so drawn from another county, the court will reverse the judgment on this ground without consideration of the constitutionality of the statute, because not necessary to the relief sought.

Error to Circuit Court, Mingo County.

J. C. McCoy was convicted of murder in the first degree, sentenced to imprisonment

for life, and he brings error. Reversed, verdict set aside, and new trial awarded.

Harold W. Houston, of Charleston, Thomas West, of Williamson, and Charles J. Van Fleet, of Charleston, for plaintiff in error.

E. T. England, Atty. Gen., and R. A. Blessing and R. Dennis Steed, Asst. Attys. Gen., for the State.

MILLER, J. The grand jury of Mingo county, on August 27, 1921, returned an indictment against defendant and two others for the murder of one Staten.

On September 9th following, by an order entered in term, the circuit court, in the absence of defendant, upon the motion of the State, supported by the affidavits of the two jury commissioners and the sheriff of the county, filed, but not in the record, certified that it appeared to the court and that the court was of opinion that qualified jurors not exempt from service could not be conveniently found in the county of Mingo for the trial of the case, and it was thereupon ordered that fifty qualified jurors, not exempt from service, should be drawn and summoned from the county of Monroe, as required by law, to appear at the court house of said Mingo County on the 19th day of September, 1921, for the purpose of the trial of the case, and the clerk was directed to certify an attested copy of the order of the circuit court of said county to the circuit court of Monroe County, or the judge thereof in vacation.

On September 20, 1921, the defendants so jointly indicted, being set to the bar of the court, elected to be tried separately, and the State by the prosecuting attorney elected to try the defendant J. C. McCoy first, and announced that the State was ready for trial.

Whereupon defendant McCoy moved the court to set aside the order of September 9th, and also moved the court to quash the venire facias issued pursuant to said order and to discharge the jurors summoned thereunder and then in attendance upon the court, assigning the following grounds:

First, that the statute, section 21, chapter 116 of the Code, as amended by chapter 69, Acts 1921, contravenes section 14, article 3 of the Constitution of West Virginia, and the sixth amendment to the Constitution of the United States, and is unconstitutional and void;

Second, that said order was entered in his absence, and without notice to or knowledge by him, and at a time when the case was not on trial or called for trial;

Third, that at the time said order was made there were then and still were over three thousand persons in said Mingo County subject to and qualified for jury service, and residents of and domiciled in said Mingo County, and that before said order was en-

tered no examination of any kind had been made of said persons, on their voir dire or otherwise, to determine the necessity of calling jurors from Monroe County;

Fourth, that said order was not made and entered twenty days before the then present term, namely September 5, 1921, nor twenty days before the term began, and that the proceedings relating to the drawing of the said jurors from Monroe County was not certified as required by law.

This motion of the prisoner was overruled, the court reaffirming its opinion that a fair and impartial jury could not be obtained in Mingo County to try the case; and on motion of the prosecuting attorney, it was further ordered that all the prior proceedings and orders relating to the summoning of the jurors from Monroe County be spread upon the record, to which the defendant by counsel objected and excepted.

Defendant thereupon entered his plea of not guilty, on which issue was joined by the State; and the jury was then impaneled and sworn; and the trial was proceeded with, resulting in a verdict of murder in the first degree, and the judgment of the court thereon that defendant be imprisoned in the penitentiary for the remainder of his life.

[1] The evidence was not certified and is not before us for examination of any of the errors assigned relating thereto. Nor can the instructions to the jury, given and refused, though printed in the record, if properly before us, be considered.

The only questions we can consider are those presented by the motions of the defendant pertaining to the summoning of the jury to try the case.

The statute assailed as unconstitutional and void, and pursuant to which the jury was drawn to try the case, is as follows:

"And in any criminal case in any court, if, in the opinion of the court, or the judge thereof in vacation, qualified jurors, not exempt from serving, cannot be conveniently found in the county in which the trial is to be, the court, or the judge thereof in vacation, shall enter an order of record to such effect, and may cause so many of such jurors, as may be necessary, to be summoned from any other county. In said order the court, or the judge thereof in vacation, shall fix a day on which such jurors shall be required to attend, and in such order shall be indicated the county from which such jurors shall be drawn, and the number of such jurors to be drawn. An attested copy of such order shall be certified to the circuit court of the county designated, or to the judge thereof in vacation, and thereupon such circuit court or the judge thereof in vacation, shall, by order, direct that a jury be drawn, in the manner provided by law for the drawing of petit jurors in his county, and proceedings respecting the drawing of such jurors, including the names of the jurors so drawn, shall be certified by the clerk of the circuit court of the county designated to the clerk of the court wherein the

trial is to be had. Thereupon, writ of venire facias shall be issued by the clerk of the court wherein the trial is to be, directed to the sheriff of the county wherein such jurors have been drawn, commanding him to summon the jurors so drawn to attend for jury service in the county wherein the trial is to be upon the day named in the writ. Said jurors shall attend for the purpose of the trial, and the jury shall be selected in the manner provided by law."

Section 14, article 3 of the Constitution, relied on, is as follows:

"Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offence was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county."

If the defendant was entitled to notice and to be present and heard on the motion of the prosecuting attorney to summon a jury from another county, and before any action of the court thereon pursuant to said statute, a question presented by the second of his grounds assigned for setting aside the order and quashing the venire facias issued pursuant thereto, we need not consider any of the other grounds, for, if well founded, it will be sufficient to reverse the judgment; and the questions presented by the others may never arise, for the court may deny the motion of the prosecutor, and may sustain defendant's objection, in which event the constitutional questions relied on may never arise.

The statute does not in terms require notice to defendant; but in so important and vital a matter as the constitution of the jury or the place of trial, can it be assumed that the Legislature intended that the proceedings authorized should take place without notice to or in the absence of one accused of a felony? If it had been a motion by the prisoner for a change of venue, the State would have been entitled to a hearing and to oppose and even defeat the prisoner's motion unless good cause was shown therefor. In effect the summoning of a jury from another county amounts to a change of venue, and to give the statute a construction that would deprive one accused of crime of the right to be heard thereon, would at once condemn the law as invalid.

We are not wanting in precedents in this State on the question thus presented. In *Dixon v. Dixon*, 73 W. Va. 7, 9, 79 S. E. 1016, following prior decisions, it is said to be within the power of courts, when administering statutes, to adopt such practice or procedure as will attain the ends of justice, avoid surprise and give the parties opportunity to answer charges seeking to impose liability upon them, and furthermore, that where a statute allows a judicial proceeding to a man's prejudice, though it do not pro-

vide for notice, it is understood to intend it, as no judgment can be given under it without process, and process is necessary. So also in *B. & O. Railroad Co. v. F., W. & Ky. Railroad Co.*, 17 W. Va. 812, it was decided that wherever a statute authorizes a legal proceeding against anyone and does not expressly provide for notice to be given, it is implied that an opportunity shall be offered him to appear in defense of his rights unless the contrary appear. In *Cooper v. Bennett*, 70 W. Va. 110, 73 S. E. 260, Ann. Cas. 1913D, 851, we decided that the summons and proceedings at rules can not be dispensed with by notice of an intention to apply to a court of equity for a final decree.

[2] In this State the rule is firmly established that in felony cases nothing can be done lawfully in the absence of the prisoner affecting his rights, from the inception of the trial upon the indictment to the final judgment inclusive, and that the record must show his presence. *State v. Parsons*, 39 W. Va. 464, 19 S. E. 876; *State v. Grove*, 74 W. Va. 702, 82 S. E. 1019. In *State v. Sutter*, 71 W. Va. 371, 76 S. E. 811, 43 L. R. A. (N. S.) 399, the fact that the judge and the attorneys on both sides retired to an adjoining room and in the absence of the prisoner heard a motion to strike out the evidence of the State, was regarded such a denial of the prisoner's rights as to call for a new trial, although on discovery of his absence the judge offered to allow him to renew his motion, which he declined to do. In *State v. Stevenson*, 64 W. Va. 392, 399, 62 S. E. 688, 19 L. R. A. (N. S.) 713, it was held to be error invading the prisoner's rights and calling for reversal, for the court in his absence to call witnesses to be advised as to the character of the offense as to what judgment should be pronounced on the verdict returned by the jury on the trial before a special judge.

It would not be contended for a moment, in the face of our decisions, that the hearing of a motion by the accused for a change of venue could lawfully be conducted in his absence. Such a proceeding would be cause for reversal; and certainly where, as in this case, the motion to summon a jury from another county was by the State, the proceedings should not be allowed to go on in the absence of the prisoner, whereby he might be deprived of the right to trial by a jury of his own county. We can not conceive of a proceeding more vital to the constitutional right of one accused of crime. He has the undoubted right to be present in person and by counsel at every turn in the case, and nothing can be done lawfully in his absence. In the comparatively recent case of *State v. Hoke*, 76 W. Va. 36, 84 S. E. 1054, the rule just stated was invoked by the prisoner, who claimed that it had been violated by the order of the court made several days after con-

viction and final judgment, permitting the withdrawal of certain books of original entry which had been used in evidence, and it was properly decided that none of defendant's rights were thereby violated. But that case has no application bearing on the case at bar. The order of the court could have worked no prejudice to the rights of the accused.

[3] As the error in the proceedings by which the jury was drawn from Monroe County is sufficient to call for reversal of the judgment and the award of a new trial, as already stated it will be unnecessary to consider the other grounds of defendant's motion, involving as they do the constitutionality of the statute under which the jury was drawn. In such cases the right of a defendant generally depends upon whether or not there is error in the record aside from the constitutional questions. *Edgell v. Conaway*, 24 W. Va. 747, 749. As nothing presented here necessarily calls for a decision of the other questions presented, we adhere to the general rule here and everywhere observed, that courts will not pass upon such questions except in cases of necessity. *Edgell v. Conaway*, supra; *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. 635; *Rutter & Co. v. Sullivan*, 25 W. Va. 427; *Peyton v. Holley*, 72 W. Va. 540, 542, 78 S. E. 666.

Our conclusion is that the judgment should be reversed, the verdict set aside, and the prisoner be awarded a new trial.

(122 Va. 738)

MOORE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Intoxicating Liquors §236(5)—Evidence of finding liquor held to sustain conviction.

Unexplained and uncontradicted evidence that liquor was found on defendant's premises held to sustain conviction for a violation of the Prohibition Law, under section 28.

2. Intoxicating Liquors §236(5)—Finding of liquor on owner's premises prima facie evidence of violation of Prohibition Law, notwithstanding occupancy of premises by others.

Under Prohibition Law, § 28, the finding of intoxicating liquor on defendant's premises is prima facie evidence of the violation of the Prohibition Law, notwithstanding occupancy of premises by others.

Error to Corporation Court of Norfolk.

Edward Moore was convicted of violating the Prohibition Law, and he brings error. Affirmed.

Tomlin & Maupin, of Norfolk, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. [1] The accused has been found guilty of a violation of the Prohibition Law (Laws 1918, c. 388), and is here assigning a single error; that is, that the evidence is insufficient to justify the conviction.

It is not necessary to recite all of the testimony, though there is little conflict. It appears that two police officers of the city of Norfolk procured a search warrant, authorizing a search of the premises of the accused for intoxicating liquor. No such liquor was found in the dwelling, but in the back yard, within the curtilage, they found in the garage about one gallon of corn whisky, and in the tool box of the automobile belonging to the accused, then in the garage, a gallon jug about one-half full of corn whisky. As they were about to enter the garage with the accused and his wife, one of the officer's attention was attracted by the wife, who appeared to be making her way to the weeds growing near the side of the garage, and following her he found there a box containing thirteen half-pint bottles and one pint bottle, all filled with corn whisky. They also found two pints of corn whisky concealed in the privy in the yard, and in a chicken coop one gallon of corn whisky, and on the premises a bag partly full of corks and empty pint bottles. These facts were testified to by both of the officers. The accused testified in his own behalf and introduced no other evidence. He denied all knowledge of the whisky, but testified that the automobile was his exclusive property, and that no one else had any right to the possession of the garage or chicken coop; that, while he owned and occupied the premises with his wife and one child, his brother-in-law, a man about 40 years old, and his half-brother, about 26 years old, lived on the premises, renting rooms from him, both of whom were there on the night of the search.

By section 28 of the Prohibition Law (Acts 1918, p. 599), it is provided that—

"Whenever ardent spirits shall be seized in any room, building, boat, car or other place, searched under the provisions of this act, the finding of such ardent spirits * * * in any such place, shall be prima facie evidence of the unlawful manufacturing, selling, keeping and storing for sale, gift, or use, by the person or persons occupying such premises * * * and the proprietor or other person in charge of the premises where such ardent spirits are found" shall be indicted and tried therefor.

It is clear then, under this statute, that the unexplained and uncontradicted facts which we have recited fully justify the conviction.

[2] The mere suggestion that some of the

other occupants of the premises may have been also guilty may be true, but this does not warrant the acquittal of the accused. So to construe this statute would be to thwart its manifest design, to suppress the the illicit traffic in ardent spirits, would under the evidence in this case result in the acquittal of all of such occupants and thereby give aid and comfort to all others who contemptuously disregard the law.

Affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 741)

MOORE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Intoxicating liquors \S 236(20)—Evidence held insufficient to prove corpus delicti in prosecution for transporting liquor.

In prosecution for unlawfully transporting intoxicating liquor in excess of one quart, evidence held insufficient to sustain conviction in that it failed to prove the corpus delicti.

2. Criminal law \S 535(2)—Defendant's extrajudicial confession not alone sufficient to establish corpus delicti.

Even a confession by the accused, which is extrajudicial, that he committed the offense with which he is charged, is not, alone and uncorroborated, adequate proof to establish the corpus delicti.

Error to Circuit Court, Scott County.

Robert Moore was convicted of unlawfully transporting intoxicating liquor, and he brings error. Reversed.

The accused was separately indicted, charged with the offense of unlawfully transporting ardent spirits in excess of one quart, to wit, ten gallons, in, on, and by means of a certain automobile. He was tried and convicted of this offense. The verdict of the jury fixed as his punishment a certain fine and confinement in the county jail, and the judgment under review was entered accordingly.

The testimony for the commonwealth, so far as material, was to the following effect:

A county policeman, having received information that "a car was coming up the pike," deputized a number of men to assist him in holding it up and searching it for liquor, but had no warrant authorizing him to do so. They subsequently saw an automobile coming along the public road, with two men in it, the driver, named Wilson, and the accused. Whereupon the policeman hailed the occupants of the car, commanding them to "surrender," get out, and let him search the car. Wilson asked the policeman if he had

a warrant to search the car. The policeman replied that he did not, but said: "We have you surrounded; surrender and I will treat you nice." Wilson said, "No." The policeman said: "I will treat you nice. Get out and let me search the car." Wilson said: "That may be nice for you, but it will be hell for us." The policeman then stepped up to the car and saw that both men in the car had pistols. Wilson got his pistol from his side; and when he pulled it from under his coat the policeman caught hold of his wrist. Thereupon Wilson said: "I would rather have my brains shot out than my mother know this." The accused had a pistol in his hand. Wilson told the policeman not to enter the car. The policeman again asked to be allowed to search the car. Wilson then turned towards the accused and said: "What about it, old man?" And the accused said: "Hell, no." The officers held up the car for nearly an hour. The curtains were up. The policeman and two of his deputies testified that they saw "two kegs and what looked like another keg in the car." The policeman testified that when he stepped up to the car he "smelt liquor; it smelled like corn whisky." Two of the deputies testified that they "smelled liquor in the automobile," and one of these said that it "smelled like good liquor." The testimony does not show that the accused said anything except his reply above stated to the question of Wilson addressed to him above mentioned. After the parley and the refusal of Wilson and the accused to let the car be searched without a search warrant, the car was allowed to proceed on its way.

The accused, testifying in his own defense, stated that he was not the owner of the car; that Wilson was the owner of it; that he (the accused) was "only a passenger in it"; that there were no kegs in the car or liquor in it that he knew of; that he did not know any of the parties who held them up; that he thought there were nine of the men engaged in the hold up, with four shotguns and five pistols; that—

"They were strangers, and we did not know what they meant. We asked them if they had any authority, and they said they did not. They wanted to search the automobile, so they said, and Mr. Wilson told them that if they had a warrant they could; but if they did not have a warrant they could not. I had a little bit of money on me, and Mr. Wilson said he had a little too. There was considerable talking and some wrangling, but finally we were permitted to go on."

On cross-examination he further stated:

"* * * I did not know what they meant. I understood them to say they wanted to search the car, but they were strangers and armed, and I did not know their purpose. I was just a passenger in the car; got in at Castlewood.

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It was my business where I had been and what I was doing."

Several witnesses for the defense who had as good opportunities to see the kegs in the car as the accused had, so far as disclosed by the evidence, testified that they did not see any kegs in the car.

In the brief of the Attorney General and his two assistants this is said:

"* * * While we will not confess error, we frankly admit that there is doubt in our minds whether the evidence substantiates the charge of transporting whisky."

W. S. Cox, of Gate City, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazlie, Second Asst. Atty. Gen., for the Commonwealth.

SIMS, J. (after stating the facts as above). In our view of the case it will be necessary for us to consider only one of the questions raised by the assignments of error, and that is this:

[1] 1. Was there any evidence before the jury to prove the corpus delicti?

This question must be answered in the negative.

That ardent spirits, in quantity exceeding one quart, was being transported by some one at the time in question, was the allegation of the indictment, and hence was the corpus delicti in the case in judgment. There was absolutely no evidence of any probative value before the jury on this subject. Even if we could consider that the testimony as to the kegs and the smelling of whisky or liquor by the witnesses for the commonwealth warranted the jury in finding the fact that ardent spirits were in the automobile at the time, such evidence falls far short of the character of evidence essential to establish beyond a reasonable doubt that the quantity of the liquor exceeded a quart. And having given the utmost effect which can be properly given to the consideration that the jury may have believed that the accused swore falsely in his testimony in his own defense, still no inference which the jury might have been warranted in drawing for that reason could supply that character of proof of the corpus delicti which the law requires in all criminal cases.

[2] Even a confession by the accused, which is extrajudicial, that he committed the offense with which he is charged, is not, alone and uncorroborated, adequate proof to establish the corpus delicti.

The case must therefore be Reversed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 616)

CHRISTIAN v. COMMONWEALTH.(Supreme Court of Appeals of Virginia.
March 30, 1922.)**1. Indictment and information \S 75(1)—
Omission of commas not demurrable defect.**

Demurrer to indictment under Prohibition Act, \S 7, because a comma was omitted after accused's name, as well as after the word "indictment," was properly overruled.

**2. Intoxicating liquors \S 134 — Liquid need
not contain alcohol to be "ardent spirits"
within Prohibition Act.**

Under Prohibition Act, $\S\S$ 1, 49, 58, liquids, mixtures, and preparations which will produce intoxication, as defined in the act, are "ardent spirits" condemned by the act whether or not they contain alcohol.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ardent Spirits.]

Error to Circuit Court, Mathews County.

Julian T. Christian was convicted of violating the prohibition act, and brings error. Affirmed.

C. S. Smith, Jr., of Gloucester, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. The accused has been found guilty of unlawfully selling intoxicating liquors under the prohibition act (Acts 1918, p. 578), and is here assigning error.

[1] Among the errors assigned is that the court erred in overruling the demurrer to the indictment, which is in the form authorized by section 7 of the act, and the grounds assigned for the demurrer are that a comma is omitted after the defendant's name, as well as after the word "indictment."

"If reasons were as plenty as blackberries," it would be unnecessary to give one to sustain this ruling of the trial court, which is so obviously correct.

The accused was the proprietor of a store at Mathews C. H., and sold to his customers a beverage which the evidence of the commonwealth sufficiently shows produced intoxication in those who drank it, though there is also evidence that the effect resembled the effect produced by narcotics instead of by alcohol. The name chosen for the concoction, "highball," is certainly suggestive of alcohol.

[2] The other errors assigned are one in substance, and require a construction of certain sections of the act. Section 1 reads thus:

"The words ardent spirits, as used in this act, shall be construed to embrace alcohol, brandy, whisky, rum, gin, wine, porter, ale, beer, all malt liquors, all malt beverages, absinthe and all compounds or mixtures of any

of them; all compounds or mixtures of any of them with any vegetable or other substance; alcoholic bitters, bitters containing alcohol; also all liquids, mixtures or preparations, whether patented or otherwise, which will produce intoxication, fruits preserved in ardent spirits, and all beverages containing more than one-half of one per centum of alcohol by volume, except as herein provided."

The beverage was not analyzed, and the accused contends in support of his motion for a new trial upon the ground that the verdict was contrary to the law and the evidence, and of his assignments of error as to the instructions given and refused, that under the act it is essential for the commonwealth to prove that the beverage sold contained alcohol. That the words "ardent spirits" as usually construed designate a liquid containing alcohol cannot be doubted, so that the question presented by this record is whether or not the mixture which was sold by the accused is a beverage condemned by the act and is ardent spirits, the sale of which is thereby prohibited.

It is clear, however, from section 1 that the usual construction of the words "ardent spirits" cannot be adopted, because the act itself construes these words; and, among the beverages defined by the statute as ardent spirits, which definition is separated by a semicolon from the preceding words of the section, which refer altogether to those beverages which contain alcohol, are beverages thus defined, "also all liquids, mixtures or preparations, whether patented or otherwise, which will produce intoxication." So that if a beverage will produce intoxication, its sale is prohibited. Then the act also, in section 49 defines "intoxication" thus:

"Any person who has drunk enough ardent spirits to so affect his manner, disposition, speech, muscular movements, general appearance or behavior, as to be apparent to observation, shall be deemed for the purposes of this act, to be intoxicated. * * *"

For the purposes of the act then both ardent spirits and intoxication are defined. It seems to us that a mere recital of these provisions is sufficient to demonstrate that the General Assembly intended to enlarge the meaning of these words, as applied to prosecutions under the act. It therefore follows that liquids, mixtures, and preparations which will produce intoxication, as defined in the act, are clearly condemned whether they contain alcohol or not. We are confirmed in this view by section 58, which reads thus:

"This entire act shall be deemed an exercise of the police power of the state for the protection of the state, for the protection of the public health, peace and morals, and the prevention of the sale and use of ardent spirits,

and all of its provisions shall be liberally construed to effect these objects."

It is as clearly within the police power of the state to prohibit the sale of other beverages which produce intoxication and thus affect the public health, peace and morals as it is to prohibit the sale of alcoholic beverages which also produce disastrous results when used to excess. The decisive question here presented is whether or not the General Assembly has thus condemned beverages which produce intoxication, although they may not contain alcohol. Construing the words of these statutes according to their clear and generally accepted meaning, it seems to us perfectly apparent, under the evidence in this case, that the liquid mixture which the accused sold to his customers produced intoxication, and hence is within the condemnation of the act. It is not perfectly clear that it contained alcohol. It is thus described: The accused bought on an average of once a month five-gallon cans of a liquid marked "turpentine." This liquid was dispensed either with a soft drink known to the trade as "Green River," or with another known as "Pepsi-Cola." The other mixture labeled "turpentine" was poured into an ordinary glass to about the depth of an inch, and then the glass was filled with "Green River" or "Pepsi-Cola," and the resulting concoction was sold at 25 cents a glass. The medical testimony is that turpentine contains no alcohol, and that, if poured an inch deep in an ordinary glass and used as a beverage, it would probably poison or kill the person who drank it; and that no responsible drug house in the United States would sell narcotics in five-gallon cans. So that we conclude that the designation "turpentine" was chosen for purposes of deception, and the record leaves us ignorant as to just what it was. According to the witnesses, it produced intoxication as defined by the act, and we find no error in the procedure.

Affirmed.

(132 Va. 598)

BOWEN v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Jury \S 82(2)—Misdemeanant may waive irregularities in organization and constitution of jury.

Though the guaranty (Const. 1902, \S 8) of the right to a jury trial applies to misdemeanors as well as felonies, one tried for a misdemeanor may waive all irregularities in the organization and constitution of the jury.

2. Criminal law \S 895—Accused may waive anything except jurisdiction.

Accused may waive any matter not relating to the court's jurisdiction.

3. Jury \S 29(5)—Irregularity in trial of misdemeanor before jury of seven waived by failure to object; "Impaneled."

Under Code 1919, \S 4895, declaring that no irregularity in impaneling jurors shall be cause for setting aside a verdict unless objection was made before the jury was sworn, any irregularity in trying a misdemeanor case before a jury of seven, instead of five, as required by section 4927, was waived, where defendant made no objection and challenged none of the jurors; a jury being "impaneled" when ready to try the case (quoting Words and Phrases, First Series, Impanel).

Error to Corporation Court of Buena Vista.

W. R. Bowen was convicted of petit larceny, and he brings error. Affirmed.

John Dabney Smith, of Buena Vista, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

KELLY, P. The defendant, W. R. Bowen, was arrested and tried by the mayor of the city of Buena Vista upon a warrant charging him with the larceny of certain brass pipes, valves, and other brass articles, of the value of \$35, and was sentenced to serve a term of six months on the state convict road force. From that sentence he appealed to the corporation court, where he was tried by a jury, found guilty, and again sentenced to six months' imprisonment.

The sole ground on which we are asked to reverse the judgment is that the defendant was tried by a jury of seven, instead of five, the latter being the number provided for in such a case by section 4927 of the Code.

The record shows that the court impaneled a jury of seven men, "who, being elected, tried and sworn to well and truly say, and a true verdict render, between the commonwealth and the accused according to law and the evidence," returned the verdict above indicated, and that the defendant moved the court to set the same aside as contrary to the law and the evidence, which motion the court overruled. No grounds whatever for the motion were stated. No exceptions of any kind were noted at the trial. There was no challenge as to any individual juror or as to the jury as a whole. The evidence was not certified, and the foregoing recital contains the substance of the entire record before us.

Section 8 of the Virginia Constitution, so far as material here, provides as follows:

"That in all criminal prosecutions a man hath a right to * * * a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; provided, however, that * * * in a prosecution for an offense not punishable by death, or

confinement in the penitentiary, upon a plea of not guilty, with the consent of the accused, given in person, and of the attorney for the commonwealth, both entered of record, the court, in its discretion, may hear and determine the case, without the intervention of a jury; and, that the General Assembly may provide for the trial of offenses not punishable by death or confinement in the penitentiary, by a justice of the peace, without a jury, preserving in all such cases, the right of the accused to an appeal to and trial by jury in the circuit or corporation court; and may also provide for juries consisting of less than twelve, but not less than five, for the trial of offenses not punishable by death, or confinement in the penitentiary, and may classify such cases, and prescribe the number of jurors for each class."

Section 4927 of the Code of 1919 provides, among other things, that—

"Seven jurors shall constitute a panel in the trial of misdemeanors, but the jury therefor shall be composed of five."

Section 4895 of the Code provides that—

"No irregularity in any writ of venire facias, or in the drawing, summoning, returning, or impaneling of jurors * * * shall be cause * * * for setting aside a verdict or granting a new trial, unless objection thereto specifically pointed out, was made before the jury was sworn, and unless it appears that such irregularity, or error, * * * was intentional or such as to probably cause injustice to the Commonwealth or to the accused."

In *Brown v. Epps*, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676, this court, overruling *Miller v. Commonwealth*, 88 Va. 618, 14 S. E. 161, 342, 979, 15 L. R. A. 441, questioned whether the constitutional right to a jury trial was intended to apply to misdemeanors, but, leaving that question open, expressly decided that article 1, § 10, of the Virginia Constitution (Bill of Rights), adopted in 1869, declaring, like section 8 of the present Constitution, "that a man hath a right to a speedy trial by an impartial jury," means that the accused has a legal claim to a jury trial—that such is his privilege—but that the presence of a jury in a criminal trial is not thereby made essential to the jurisdiction of the court, and that the right or privilege thus conferred may be waived. Distinguishing the above-cited section of the Virginia Bill of Rights from article 3, § 2, clause 3 of the United States Constitution, and from the Sixth Amendment thereto, Judge Keith, in *Brown v. Epps*, supra, said:

"The language of our Bill of Rights differs from each and both of these provisions. It does not declare that 'the trial of all crimes shall be by jury'; it does not declare that 'the accused shall enjoy the right to a trial by an impartial jury,' but its language is 'that a man hath a right to a speedy trial by an impartial jury' that is, he has a legal claim to a trial by a jury. A trial by a jury is his privilege. The existence of the presence of a jury is not made a jurisdictional fact, without

which a court is not duly organized for the trial of criminals, as is the case in all courts of the United States."

Both in *Miller v. Commonwealth*, supra, and *Brown v. Epps*, supra, it was held that the General Assembly could validly provide for waiver of a jury trial by the accused in a misdemeanor case.

In *Schick v. United States*, 195 U. S. 65, 72, 24 Sup. Ct. 826, 828, 49 L. Ed. 99, 103 (1 Ann. Cas. 585) Mr. Justice Brewer, delivering the opinion of the court said:

"Where there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy. Authorities in the state courts are in harmony with this thought. In *Com. v. Dailey*, 12 Cush. 80, the defendant in a misdemeanor case waived his right to a full panel and consented to be tried by eleven jurors, and this action was sustained by the Supreme Court of Massachusetts. Chief Justice Shaw delivering the opinion of the court, said (page 83): 'He may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court.' The same doctrine was laid down in *Murphy v. Commonwealth*, 1 Met. (Ky.) 365; *Tyra v. Commonwealth*, 2 Met. (Ky.) 1; and in *State v. Kaufman*, 51 Iowa, 578, 33 Am. Rep. 148, 2 N. W. 275. In *Connelly v. State*, 60 Ala. 89, 31 Am. Rep. 34, a statute authorizing the waiver of a jury was sustained. The same rule was made in *State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27, which was a case of felony. See, also, *People v. Rathbun*, 21 Wend. 509, 542."

In the note found in 9 Ann. Cas. 263, citing numerous cases, it is said:

"In jurisdictions wherein it is held that a jury may be waived by the accused, * * * such waiver may be by a failure on the part of the accused to demand a jury."

We have referred to the foregoing authorities, not because we have regarded them, so far as they relate to the waiver of a jury trial, as being directly in point here, but to show how far the courts generally have gone in recognizing the power of a defendant to make, and the power of the trial court to enforce, the waiver of a right or privilege on the part of the accused, when the enjoyment of such right or privilege is not a fact essential to the court's jurisdiction.

[1] It is unquestionably true that under section 8 of the present Constitution in Virginia there can no longer be any doubt that the guaranty of the right to a jury trial applies to misdemeanors as well as to felonies; and it may plausibly be argued that the presence of a jury in any criminal trial in a court of record is now, by reason of the terms of that section, essential to the jurisdiction, unless waived in the precise manner therein prescribed. Whether such an argument be sound, especially where, as here, the case does not originate in a court of record, but

is first tried by a magistrate or police justice, we need not decide, because that question is not before us. But there is certainly nothing in the constitutional provision under consideration to warrant the view that a person on trial for a misdemeanor may not waive all irregularities as to the manner in which the jury is organized and constituted, especially where such waiver is provided for by statute.

[2] The reasoning of the above authorities, and the common-sense view of the question, would seem to lead inevitably to this conclusion. The proposition asserted by Chief Justice Shaw quoted by Mr. Justice Brewer in the Schick Case, *supra*, that the accused "may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court," is undoubtedly a sensible and sound proposition, supported by the great weight of authority.

[3] The waiver of precisely such an irregularity as the defendant here complains of is provided for by section 4895 of the Code, which expressly declares that—

"No irregularity in * * * impaneling of jurors * * * shall be cause * * * for setting aside a verdict or granting a new trial, unless objection thereto specifically pointed out, was made before the jury was sworn; and unless it appears that such irregularity * * * was intentional or such as to probably cause injustice to the commonwealth or to the accused."

A jury is "impaneled" in a legal sense—certainly in one of the senses in which that term is correctly used in American practice—when it is ready to try the case. Whart. Cr. Law, § 590; 1 Rapalje & Lawrence, Law Dict. 627; 4 Words & Phrases, First Series, p. 3417; State v. Ostrander, 18 Iowa, 446; State v. Hurst, 123 Mo. App. 39, 99 S. W. 820. The irregularity in impaneling the jury in this case was not objected to either specifically or in any way, and there is nothing to indicate the slightest injustice or prejudice to the prisoner. He was tried by a jury of

seven instead of five, but, so far as the record shows, the seven were all free from exception, and, in view of this fact, it would seem that, instead of having been prejudiced by a larger number of jurors than the law required, he was presumably given an advantage by the larger number. At common law the right to a jury trial meant the right to be tried by a jury of twelve, and, when the Virginia Constitution reduced the number from twelve to five, the provision was not an enlargement, but a restriction, of the common-law right. It is fair to say, therefore, that instead of getting less the defendant got more than he was entitled to when he was tried by a jury of seven qualified and impartial jurors.

In *McCue v. Commonwealth*, 103 Va. 870, 1006, 49 S. E. 623, Judge Keith, in an opinion refusing a writ of error to a sentence of death, quoted with approval the following from *McKinney v. People*, 2 Gilman (Ill.) 540, 43 Am. Dec. 65:

"A prisoner on trial, under our laws, has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error, on account of such irregularities. The law, by furnishing him with counsel to defend him, has placed him on the same platform with all other defendants, and if he neglect in proper time to insist on his rights, he waives them."

To award a new trial to this defendant, who brings to us a skeleton record showing no irregularity in his conviction save the fact that he was tried by seven jurors instead of five would be stretching the constitutional and statutory guaranties upon which he relies to an unreasonable extent, and would be little, if any, short of trifling with justice.

No error is shown in the record, and the judgment complained of is affirmed.

Affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 274)

MATHIAS v. HOLLAND et al.(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Waters and water courses \S 177(1)—Equity may enjoin interference with drainage ditches.

Equity has jurisdiction to entertain suits to enjoin interference with drainage ditches.

2. Injunction \S 37—If right clear or admitted, no judgment at law necessary.

On application for a permanent injunction, if plaintiff's right is admitted, or, if not admitted, yet on the evidence the court is of opinion that there is no substantial dispute, but that plaintiff's right is clear, the injunction will issue without a preceding judgment at law.

3. Injunction \S 37—Plaintiff must establish right at law before injunction will be granted if substantial dispute.

When, on an application for an injunction, there is a substantial dispute between the parties, and they have not submitted to have it decided by equity proceedings, the equity court will generally require plaintiff to establish his right at law before granting an injunction.

4. Injunction \S 37—Plaintiff held required to establish right at law before enjoining interference with drainage ditch.

Where, in a suit to restrain defendant from interfering with a drainage ditch by installing certain pipes and sewers alleged to be too small to carry off the water, and there was a dispute as to whether the long-continued use of the ditch before the drains were put in was adverse or permissive, whether or not a portion of the drain had been in its present condition for more than 15 years, so that plaintiff might be charged with acquiescence, and whether or not the proximate cause of the injuries was the recent diversion of a considerable quantity of water from other lands which did not formerly flow through the drain, there was such a substantial dispute between the parties as to require plaintiff to establish his right at law, before granting a permanent mandatory injunction.

5. Waters and water courses \S 179(1)—Remaindermen occupying as tenants held entitled to enjoin interference with drain.

Where remaindermen occupy land as tenants from year to year, they have, in either capacity, such a substantial interest in the property and the appurtenant easement of drainage as to entitle them to maintain a suit to enjoin interference with a drainage ditch.

6. Costs \S 48—Costs properly awarded defendant having no interest in suit.

Where in a suit to enjoin interference with a drainage ditch it appears that defendant before suit had sold the land upon which he was charged with obstructing the drainage, it was proper to dismiss the suit as to him and to award him his costs.

Appeal from Circuit Court, Accomac County.

Suit by William D. Holland and others against J. Stewart Mathias and another. Decree for complainants, and respondent named appeals. Reversed and remanded.

Mapp & Mapp, of Accomac, for appellant. Benj. T. Gunter and Warren Ames, both of Accomac, for appellees.

PRENTIS, J. The appellees (complainants), claiming by prescription the right to drain the surface waters from their land over and through the land of the appellant, Mathias, and one Charles Russell, filed their bill in equity, alleging that their easement had been unlawfully interfered with by certain pipes or sewers which had been placed in the drainage ditch, which were too small to carry off the water; that they had notified Mathias, the appellant, and Russell (defendants) either to remove these drain-pipes entirely or to substitute larger ones which would be sufficient to carry off such water.

The defendants demurred to the bill, and, their demurrer being overruled, they thereupon filed their separate answers thereto. Depositions were taken, and the trial court awarded a peremptory injunction requiring the defendant Mathias to remove the pipes on his land within 30 days, and the questions here presented arise on an appeal from that decree.

[1] There is no error in the decree overruling the demurrer, for the jurisdiction of equity to entertain and determine such cases appears to be perfectly well settled. *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *Williams v. Green*, 111 Va. 205, 68 S. E. 253; *Witt v. Creasey*, 117 Va. 872, 86 S. E. 128; *Muncy v. Updyke*, 119 Va. 636, 89 S. E. 884; *Clark v. Reynolds*, 125 Va. 626, 100 S. E. 468; *Landrum v. Tyler*, 126 Va. 600, 101 S. E. 788.

[2, 3] The evidence here, however, discloses some peculiar features which are absent from the cases just cited, and it is suggested that the complainants had no right to an injunction until both the existence of the legal right thus to drain the surface water through the land of the defendant and its disturbance had been established previously in an action at law. Without elaborating this question we adopt the summary found in 5 Pom. Eq. Jur. (2d Ed.) § 1963, relating to injunctions to protect easements:

"On application for a permanent injunction, if the plaintiff's right is admitted by the defendant, a judgment at law is not required, as it is obviously unnecessary in such case. So, too, though the defendant denies the plaintiff's right or the fact of a disturbance of it, yet, if, on the evidence before it, the court is of the opinion that there is no substantial dispute, but, indeed that the plaintiff's right is clear, the injunction will issue; the defendant's right to a trial at law at best extends

no further than to doubtful questions. And even when the questions in dispute are doubtful, the court of equity will pass on them, if both parties consent or submit to the jurisdiction. When, however, there is a substantial dispute between the parties, and they have not submitted to have it decided by the equity proceedings, the equity court will generally require the plaintiff to establish his right at law before granting an injunction. This rule is one of expediency and policy based on the reluctance of equity to decide purely legal questions, and there is a tendency to disregard it in modern cases, even in the restricted form above stated."

These authorities sustain the proposition that under the circumstances indicated the equity court will generally require a previous trial at law: *Rhea v. Forsyth*, 37 Pa. 503, 78 Am. Dec. 441; *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839; *Perkins v. Foye*, 60 N. H. 496; *Oppenheim v. Loftus* (N. J. Ch.) 50 Atl. 796; *Hart v. Leonard*, 42 N. J. Eq. 416, 7 Atl. 865; *Bailey v. Culver*, 84 Mo. 531; *Howell Co. v. Pope, etc., Co.*, 171 Ill. 350, 49 N. E. 497.

It is recognized by *Burks, J.*, in *Sanderlin v. Baxter*, *supra*, in this language:

"Ordinarily, where the existence of a nuisance (and in a general sense every violation of an easement may be considered a nuisance, *High on Injunctions*, c. 12, § 544) is controverted, the party seeking the interference of a court of equity will generally be required first to establish his right at law. But it is said that in cases (like the present) where the plaintiff has been long in the exercise of his right, or where delay would be disastrous, the court will not require the right to be first established at law. 2 *Story's Eq. Jur.* (11th Ed.) § 925f, and cases cited in note."

[4] Applying these principles to this case, we find certain conflicts in the testimony, and much obscurity. The obscurity grows out of the assumptions of the witnesses that the court is familiar with the locality, boundary lines, various other ditches, and with their courses and distances. The result is that the printed record leaves the mind in a state of doubt and indecision as to the facts of the controversy. There is certainly a substantial dispute, and the complainants' rights are not made clear by the testimony. Among the controverted questions are whether or not the long-continued use of the ditch before the drains were put in was adverse or permissive; whether or not a portion of the drain now complained of has been in its present place and condition for more than 15 years, and another part thereof since 1913, and hence that the plaintiffs may be charged with acquiescence therein; and whether or not the proximate cause of the injuries of which they complain is the recent diversion of a considerable quantity of water from other

lands to and upon the lands of the defendant, which did not formerly flow through this drain. It cannot be doubted then that there is a substantial dispute between the parties, the merits of which are not made clear, and the record shows that the appellant has neither waived any of his rights nor submitted them to be decided by the equity court. Under such circumstances, the general rule is that the equity court will require the complainants to establish their right at law before granting a permanent mandatory injunction.

Taking all of the peculiar circumstances of this case under consideration, we are of opinion that the court erred in granting the relief prayed for. The disputable issues of fact involved should first be submitted to a jury in a common-law action, and this suit in equity held to await the establishment or failure to establish the complainants' right. If the right is thus established, the mandatory injunction should be awarded; otherwise the bill should be dismissed.

[5] There are two incidental questions raised. One of these is whether or not these complainants can maintain the suit. It appears that the complainants *Julia J. Holland* and *John H. Gardner*, do not own the property in fee simple, as alleged in the bill, but as remaindermen, subject to the life estate of their grandmother, *Julia Gardner*, and also occupy it as tenants from year to year. This point is without merit. Both as tenants and as remaindermen they have a substantial interest in the land and the alleged easement of drainage appurtenant thereto, and their independent right to institute this suit for its protection cannot be doubted. 19 C. J. 998; 5 *Pom. Eq. Jur.* (2d Ed.) § 1974; *Balcum v. Johnson*, 177 N. C. 213, 98 S. E. 534.

[6] Another question is as to the costs of the suit. The defendant *Charles Russell* showed that before the suit had been instituted he had sold the land upon which he was charged with obstructing the drainage, and that from that time he had had no further interest therein. There being no dispute about this, the court dismissed the suit as to him and awarded him his costs, and, having decided the case against the other defendant, *Mathias*, awarded the complainants (appellees) their costs against him. We see no reason for criticism of this adjudication, but the question has become immaterial at this stage of the litigation, because the entire decree will be reversed, and the cause remanded for further proceedings, and the judgment for costs will follow the final decree.

Reversed and remanded.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 578)

HALE v. COMMONWEALTH.(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Indictment and Information \S 121(4)—Bill of particulars not defective for failing to specify kind of liquor sold and to whom sold.

In a prosecution under an omnibus indictment framed under Acts 1918, c. 388, § 7, for the unlawful sale of ardent spirits, the failure of a bill of particulars given on request by defendant, alleging that the state expected to prove that defendant sold ardent spirits, in view of the fact that "ardent spirits" are defined in section 1 of the act, and section 60, providing that it shall not be necessary to allege a gift or sale of ardent spirits, to state what kind of liquor was sold, did not render it defective.

2. Intoxicating Liquors \S 236(13)—Evidence held sufficient to sustain conviction for selling.

In prosecution for illegal sale of ardent spirits under Acts 1918, c. 388, § 7, evidence as to the nature of the beverage sold held sufficient to support a verdict of guilty.

Error to Circuit Court, Madison County.

John S. Hale was convicted of unlawfully selling ardent spirits, and he brings error. Affirmed.

Will A. Cook, of Madison, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

BURKS, J. [1] The plaintiff in error, hereinafter called the accused, was convicted of unlawfully selling ardent spirits, and was sentenced to pay a fine of \$50 and to be confined in jail for a term of 30 days. The indictment was framed under section 7 of the Prohibition Act (Acts 1918, c. 388, p. 578), and is what is called an "omnibus indictment." The defendant called for a bill of particulars, and it was given to him in the following language:

"That the commonwealth expected to prove that John S. Hale did, on the 19th of February, 1921, sell ardent spirits as alleged in the indictment."

The accused objected to the bill of particulars on the ground that it was insufficient and was no more definite than the indictment itself. In particular, it objected that the accused should have been informed "what sort of ardent spirits" the commonwealth accused him of selling. The objection is without merit. The prohibition Act itself defines the meaning of the term "ardent spirits" (Acts 1918, c. 388, § 1), and he is charged with knowledge of such meaning. It was not necessary to be any more specific. Nor was it necessary to

state to whom the ardent spirits were sold. Acts 1918, c. 388, § 60. Clopton v. Commonwealth, 109 Va. 813, 68 S. E. 1022, and cases cited.

[2] It is further objected that the verdict was contrary to the law and the evidence, in that "what was sold was not one of the enumerated beverages mentioned in the statute, nor shown to contain more than one half of one per cent. of alcohol by volume"; that the word "wine," as used in the statute, means one of the commercial brands of wine, and not one of the forms of beverage to which the word "wine" is loosely applied. State v. Dennison, 85 W. Va. 261, 101 S. E. 458. While it is true that the accused testified in his own behalf that what he sold was "parsnip wine," and that, "if you drank enough of it, it might make you feel it," the purchaser testified on behalf of the commonwealth:

That the accused "sold him two glasses of liquor; * * * that he did not know what sort of liquor it was; * * * that he believed it was either corn whiskey or apple brandy; that he felt it; that he did not know the smell of corn whiskey, or apple brandy; that he did not know anything about white grape wine, dandelion wine, or parsnip wine; he had never drank any; that he was never intoxicated; that the liquor he drank was intoxicating."

This was quite sufficient to sustain the verdict of the jury, without inquiring whether the various kinds of domestic concoctions which pass under the designation of "wine" are per se within the term of the statute. The judgment of the trial court will be affirmed.

Affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 251)

JAMES v. MCGUIRE.(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Lost Instruments \S 8(1)—Grantee claiming that there was a mutual mistake in the deed, and that it had been obtained by fraud, had burden of proof.

In grantee's action to require grantor to re-execute deed which the grantor had obtained possession of and had destroyed, the grantee, claiming that there was a mutual mistake in the deed, and that it had been obtained by deceit and fraud, had the burden of proof on such issues.

2. Lost Instruments \S 8(3)—Evidence held not to prove that there was a mutual mistake in deed, or that it was obtained by fraud.

Where the grantor conveyed land to grantee in consideration of the right to live in the house with grantee, but thereafter procured possession of the deed and destroyed it, evi-

dence in grantee's action to require grantor to re-execute deed *held* insufficient to sustain grantor's defense that there was a mutual mistake in the deed, and that it had been obtained by deceit and fraud.

3. Lost instruments ¶10—Is action to require re-execution of destroyed deed, equity may modify it to express intention.

In grantee's action to require grantor to re-execute deed after he had obtained possession thereof, and had destroyed it, defended on the ground that there was a mutual mistake in the deed, and that it had been obtained by deceit and fraud, equity in requiring grantor to re-execute the deed has the right to modify it so as to more clearly express the intention of the parties.

Appeal from Circuit Court of City of Lynchburg.

Action by Annie D. McGuire against William R. James. Decree for the plaintiff, and defendant appeals. Amended and affirmed.

Harrison & Long and S. H. Williams, all of Lynchburg, for plaintiff in error.

John D. Easley, of Lynchburg, and William Leigh, Jr., of Halifax, for defendant in error.

PRENTIS, J. The appellant, a man who was then 69 years old, by deed delivered October 2, 1917, under the circumstances to be hereafter stated, conveyed a certain house and lot to the appellee, a woman many years his junior, a divorcee. Thereafter, November 15, 1917, he asked her for the deed, which by agreement between them had not been recorded, so that he might read it over. He took it out of the house in which they were then living, down to his store, and four or five days after that he destroyed it by tearing his signature therefrom. She asked him several times to return the deed, and then in January, 1918, he told her that he had destroyed it. She thereupon promptly instituted this suit, the object of which was to set up the deed and require its re-execution. The trial court granted the prayer of the bill, and entered a decree requiring the appellant to execute and deliver to her, a deed identical with that which he had thus destroyed, and from that decree this appeal was taken.

The appellant seeks to justify his conduct by claiming that there was a mutual mistake in the deed, that it did not properly express the contract, that it had been obtained by deceit and fraud, and by the abuse of his trust and confidence in her, alleging that she occupied a fiduciary relation to him, and that the consideration had failed.

The principles of law governing courts of equity in such cases have been frequently stated, and all of the legal propositions maintained by the learned counsel for the appellant are fully supported by reason and authority; but we find ourselves unable to ap-

ply the doctrines for which he contends to the facts of this case. There is conflict upon some material points in the testimony of the parties to the transaction, and, if all of the evidence of the appellee were ignored, and all of that of the appellant were credited, then a fairly debatable question would be presented. When, however, the whole evidence is considered, and the testimony of the appellee given due weight, it seems to us apparent that there is no substantial error in the decree.

Stated briefly, the pertinent facts are that the appellant, who was a childless widower, was so attracted by the attentions of the appellee, first to his deceased wife, with whom she had been friendly for two years, and afterwards to him in his bereavement, decided that it would be most desirable to have her make a home for him. With this idea in mind he voluntarily suggested to her that he make his will in her favor, and he accordingly executed and showed her a copy of his will making her sole beneficiary, he being at the time the owner not only of the lot here referred to, but of other real and personal estate in the city of Lynchburg, as well as his stock of goods as a retail merchant. She was greatly pleased at this prospect of bettering her fortunes, and favorably entertained the suggestion. Shortly after that she went to visit her father and brothers in North Carolina, and when she returned she suggested that the will be put in a different form, and he readily re-executed it, making her the sole beneficiary, with the added provision that, in case she should die before he did, his entire estate should go to her only daughter. They were then living in separate houses, but the plan was that she was to own and move into his home, treat him as a father, and care for him there; that he would eat at her table, but that the expense of maintaining the family would be equitably shared. Thereafter she told him that she had been advised that, as he would have the right to revoke his will, she would be unwise to surrender her own rented home and go to his unless he would make her a deed for the property. When she suggested this to him he at first demurred, and she finally told him positively that she would not move into his house unless he would first convey the property to her. Pursuing their general understanding, she expended some of her own money in repairing and improving the property. Her testimony is to the effect that he told her to prepare the deed—that it was unnecessary to have a lawyer—and he handed her a previous deed which described the property. They discussed together the necessity of having his wife's will admitted to probate, that will being a link in the chain of title. He had this will probated September 20th, and thereafter, on September 25th, as she was moving into the house, she

had a notary there, and with a deed which had been prepared by a friend of her family who was a real estate agent. He postponed the execution of this deed, claiming that the time was not opportune, as they were busy moving. At a later date, October 2d, it was again presented to him; he read it over several times, specifically referred to the provision in the deed of which he is now complaining, received, as he says, her construction of it, and thereupon executed, acknowledged, and delivered it. On the same occasion he executed in duplicate an agreement with reference to a lane which was then used in common by the occupants of the property conveyed and the tenant of the adjoining property which also belonged to the appellant. The subject of this conveyance had been frequently discussed between them. There was no undue haste, and according to her testimony there was not the slightest concealment of any material fact, though he claims that she studiously concealed the fact that the deed was drawn by her friend the real estate agent instead of by an attorney in whom he had confidence, and who he thought had prepared the paper.

[1, 2] Now the clause in the deed of which he complains reads:

"* * * And it is further covenanted that the said William R. James is to have a room and to live as one of the family with the said Annie D. McGuire so long as it shall be mutually agreeable."

After such delivery, and when he began to complain that the deed did not express their agreement because it did not give him power enough, according to his testimony she agreed to destroy it, while according to her testimony she agreed to have him substitute therefor another deed which should fully express their joint purpose. Instead of accepting her proposition to substitute another deed which should properly express such purpose, and upon his express or implied promise to return it promptly, he borrowed the deed from her and destroyed it. He was a man in the full possession of all of his faculties, had been a retail merchant in the city of Lynchburg for many years, had apparently accumulated an estate sufficient for his needs, and, unless the courts are to extend their power to relieving parties of their contracts simply because they become dissatisfied, then this complainant is entitled to no relief. The question presented is a question of fact, and the burden is upon the appellant to establish the facts upon which he relies to defeat his contract. He has failed to do so, and, while his disappointment excites sympathy, it affords no ground for the cancellation of his contract.

[3] His claim that the consideration has failed is unsupported by the testimony fair-

ly considered. He continued to eat at her table until October, 1918, although this suit was instituted in January of that year, and then ceased to do so without giving her any reason therefor. He continues to occupy his room in the house. His own conduct has been such as to make it impossible for her to carry out in good faith their mutual agreement that she should make a home for him. The objectionable clause of the deed under which the appellant has justified his conduct is not before the court for construction. Equitable considerations, however, under the circumstances require that the clause of the deed objected to, and because of which the appellant has sought to justify his conduct, should be modified so as more clearly to express the intention of the parties. While it is probable that a court would construe this clause as meaning that the appellant retained an absolute right to occupy a room in the house, the room which he has retained, and now occupies, still that question should not be left open for future litigation. *Old Dominion Bank v. McVeigh*, 32 Grat. (73 Va.) 542; *Zirkle v. Allison*, 128 Va. 705, 101 S. E. 869, 15 A. L. R. 40. The two subjects of the clause can be easily separated, and, when the expressed motives of both of the parties and the contemporaneous facts are considered, it seems clear that the deed should contain an unequivocal expression of their intention, so that we will here modify the decree, and for the objectionable clause therein appearing will substitute this language:

"And it is further understood and mutually agreed that the said William R. James reserves a room in the dwelling upon the lot hereby conveyed, for and during the term of his natural life with the right to occupy the same and at all times to have ingress thereto and egress therefrom; and it is further understood that he is to live with the grantee, Annie V. McGuire, as one of her family, so long as it shall be mutually agreeable."

With this modification it seems manifest to us that the appellant will have little of which to complain, for, although his plan to secure a home is disappointed, it is not at all likely that he ever desired to remain a member of the family and to eat at her table any longer than it should prove to be mutually agreeable. Such a modification of the deed fairly meets the equities of the case. The appellant, having failed to sustain the burden which is imposed upon him by law, cannot now avoid the consequences of his contract, however great his disappointment in the result.

Amended and affirmed.

This case was argued before Judge WEST took his seat on the court.

(90 W. Va. 457)

TUNING v. TUNING. (No. 4329.)(Supreme Court of Appeals of West Virginia.
March 7, 1922.)*(Syllabus by the Court.)***1. Divorce ¶37(13)—Husband held not entitled to divorce on the ground of desertion.**

When the husband consents to and aids his wife in removing from the home then provided to another in another county, and agrees to follow her there soon afterwards, and he does go and for a short time lives and cohabits with her at the new place of residence, and where with his consent she has contracted to live and take care of an uncle during his life on condition that he will deed her his property including the house in which she resides, she is not guilty of deserting her husband at the time of such removal, entitling him to a divorce from the bonds of matrimony, or to any relief against her.

2. Divorce ¶37(14)—Defendant wife held entitled to divorce for husband's refusal to live with and support her.

On the other hand, if after such removal by the wife, the husband refuses to contribute to his own or the support of his wife and children at the new place of residence, and because she refuses to support him there without such assistance he then leaves her and refuses to live with her, and is guilty of other conduct evidencing such intent, he is guilty of deserting her, entitling her upon a cross-bill showing such facts, to a decree of divorce from bed and board, and for alimony against him.

3. Divorce ¶241—Facts held to show wife entitled to alimony in a gross sum, payable in installments, on her divorce from bed and board.

In such case, where it appears that the wife has been obliged to work out for many years to obtain money to suitably maintain and support herself and their children, and to assist and has thereby assisted materially in paying for the farm on which they have lived for many years and for other property, the court on decreeing her a divorce from bed and board may award her a reasonable sum in gross in lieu of alimony, payable in installments, and make the same a lien on the husband's real and personal estate.

Appeal from Circuit Court, Randolph County.

Bill by F. R. Tuning against Ida M. Tuning for divorce. From a decree therein, the plaintiff appeals. Affirmed.

W. B. & E. L. Maxwell, of Elkins, for appellant.

H. G. Kump, of Elkins, for appellee.

MILLER, J. On the bill of plaintiff and cross-bill answer of defendant, replied to specially, the court below by the decree complained of denied plaintiff a divorce a vinculo as prayed for, and granted defendant,

as prayed for by her, a divorce from bed and board against the plaintiff, and further adjudged that he pay her as alimony the sum of \$1,500.00, in three installments of five hundred dollars (\$500.00) each, the first within ninety days, the second on or before one year, and the third on or before two years, from the date of the decree, with interest on each installment at the rate of six per centum, and that the same constitute a lien on all his property, both real and personal, and that in default of payment she should have the right by execution, or by such other process as might be efficacious in the premises, to enforce the same, and that she also recover her costs incurred in this suit.

The ground of divorce alleged and relied on by the plaintiff in his bill is that the defendant wilfully and without reasonable cause deserted and abandoned him on the 1st day of October, 1915, and thereafter wholly refused to live and cohabit with him as his wife. The bill was sworn to by plaintiff; but it is conceded by his counsel that the proof wholly fails to sustain any desertion on October 1, 1915. Indeed plaintiff admits that he not only consented to, but aided the defendant in removing herself and their two children from their residence on the farm near Pickens, in Randolph County, to the village of Frenchton, in Upshur County, where defendant had contracted to move into the house then owned by one Hull, an uncle, and take care of him for the rest of his life, on his agreement to convey her his property, and with the understanding with plaintiff, that as soon as he could sell or lease the home farm in Randolph County, he should also come and reside with her and their children in Upshur County. The plaintiff, after this evidence and his admissions, did not amend his bill as to the time and place of defendant's alleged desertion, but on this hearing, and apparently in the circuit court, he relied wholly on her supposed desertion of him on November 11 and 12, 1917, at which time at his request she had gone to Pickens to execute with him a deed for a part of their land in Randolph County. Plaintiff makes no allegation, however, that on this occasion there had been any resumption of residence in Randolph County. True, they occupied the same room, as both admit, in a hotel where he was staying, but simply as guests of the hotel.

In her cross-bill answer defendant denies desertion as alleged in the bill, and as grounds of divorce from bed and board against plaintiff, she alleges non-support or inadequate support of herself and children for many years; that in order to provide such support and to get suitable clothing for herself and children, she was obliged to work out as a domestic servant in the homes of neighbors; and that in this way she also con-

tributed largely to the payment for the farm near Pickens purchased shortly after their marriage. She further alleges that she provided practically all the furniture for the house, and he practically nothing; that some time before they moved to Frenchton plaintiff whipped their son inhumanly with a pair of check lines, and that she told him about the time of going to Frenchton that she could no longer endure his treatment of herself and children, and if she was to be required to clothe herself and them, she would have to go to her own people, and that it was then that the agreement was made that they should remove to Frenchton, and that he should remain on the farm until the following July, 1916, when he might dispose of the stock and property thereon, and lease or rent the farm and himself come to Frenchton; that accordingly they did move to Frenchton, but that plaintiff failed to come in the spring as agreed, but remained at Pickens until the fall of 1916, when he disposed of the personal property on the farm and did go to Frenchton and resided and cohabited there with her for a short time, when she told him if he remained he would have to assist in providing the home and maintaining her and her daughter, that she could not support him, and that he would have to pay his board, which he refused to do; that she is now without any means of support except such as she derives from her own efforts in keeping a boarding house, and by her own labors and the assistance she receives from her uncle; that in the fall of 1917, plaintiff represented to her that he was in need of money and induced her to join in a deed for the farm, which she agreed to do on condition that he would pay her one-third of the purchase money, to which he agreed, but after obtaining her signature refused to do; that since then plaintiff has refused to live with her; and that she has never at any time received any of the purchase money or other money from him, but on the contrary he has appropriated all of said money, and has been selling off the personal property on the farm, and has sold timber, or is about to do so, on the remaining land at \$2,500.00, all of which defendant assisted him in acquiring, with the object of depriving her of her portion thereof.

[1] Has plaintiff made out a case for divorce? He does not pretend to have requested defendant in November, 1917, to return to Randolph County, or to have provided her a place of residence there. The most that appears in the record on this question is that some two years after they moved to Frenchton and the defendant had been at work there keeping a hotel and working out her contract with Hull, he may have requested her by letter to return to Randolph County, but he admits he consented to her going to Frenchton and entering into the

contract with her uncle, and that they should reside there; and she says, and she is corroborated by her son and daughter, that he only visited them occasionally at longer or shorter periods and never contributed anything to their support; and that all that he was requested to do when he came to them at Frenchton was to pay his board, which he declined to do, and was told she would not support him there, but that he must contribute to their support to that extent. His contention is that she drove him away and would not allow him to stay, "board or no board."

We think it clear that there was no desertion of plaintiff by defendant in Randolph County or elsewhere, and that the court was clearly right in denying him any relief. Their removal to Frenchton with plaintiff's consent, and where he lived and cohabited with her for a time at least, precludes him from obtaining a divorce from her on that ground. *McCoy v. McCoy*, 74 W. Va. 64, 81 S. E. 562, Ann. Cas. 1916C, 367. And that there was no subsequent desertion of him by her in Randolph County is quite manifest from the evidence already referred to. With his consent they had established a residence in Upshur County. She had the right to remain there, certainly until he provided her with another home and requested her to go there. There is no evidence that he did this. His pretenses that he wrote her to return, without providing a place, if true in fact, we think must be regarded as feigned and not sincere, for he knew she was under contract to say in Upshur County and would lose the property contracted for there unless she fulfilled the contract, entered into with his consent.

[2] The next question is, can the decree in her favor be sustained? We think the question is a close one. Desertion implies intent to desert. It is agreed by both parties that they lived and cohabited as man and wife in Upshur County, and that when they moved there in October, 1915, it was with the understanding that they should take up their residence in Frenchton. The plaintiff was there on a number of occasions, but did not go at the time originally contemplated, as she alleges, nor did he remain there for any considerable length of time; and barring a few farm provisions furnished shortly after going there, plaintiff never contributed anything to the support of his family. His going or remaining away under the circumstances, and his failure and refusal to contribute anything to the support of the family, though professing his ability to do so, even to the extent of paying his board, is a circumstance, we think, which may be considered on this question of desertion. The least that could have been expected of him was that he should pay his board. He could not have expected his wife, under the circumstances,

to work and support him, and that in comparative idleness, while living with her in the hotel or boarding house. He testified that he earned about seventy-five dollars a month by his labor when at work, not including his income from the farm and money invested. If he had provoked the wife to order him away unless he paid his board, he could have adopted no better way than to go home and refuse to aid her in any way in the maintenance of the family.

Besides this conduct and his remaining away for the greater part of the time, and the fact which we think augurs intent to desert, is the fact that he has been disposing of his real and personal property and converting it into money, manifestly for the purpose of putting it beyond her reach or depriving her of any of the benefits thereof. He pretends that he provided clothing and provisions for the family while residing on the farm, but his evidence is not specific as to any actual expenditures on that account. He acknowledged that his wife and children were supported by her a large part of this time by labor at the home of one Pickens, from whom they purchased the farm, and that in that way defendant contributed to the payment for the farm and the maintenance of the children.

On this evidence the court below has decreed defendant a divorce from bed and board. We can not say that the decree is not based on sufficient evidence of intent to actually abandon her. He has not returned to the home in Frenchton since he went away after being requested to contribute to the support of his family by paying board. He was obliged to pay for his keeping some place. His wife he would not pay for the same service when she was providing the home and means of living. Where the court below has found from the evidence the facts constituting good grounds for divorce, the evidence tending strongly to support such finding, the decree will not be reversed on the question of fact. *Deusenberry v. Deusenberry*, 82 W. Va. 135, 95 S. E. 685.

[3] The next question is, can the decree for a gross sum in lieu of alimony be sustained? Generally, it is conceded, alimony should be in periodical payments, of reasonable sums, out of the husband's income, and that gross sums or particular property should not be decreed. *Reynolds v. Reynolds*, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889; 2 Am. & Eng. Enc. Law (2d Ed.) 129; 1 R. C. L. 926, §§ 74, 75. But as noted in *Reynolds v. Reynolds*, supra, there are exceptions to this rule, as where the property was obtained with the wife's money or by the help of her exertions and labor. Is the case here presented one for the application of the exception to the general rule? Our statute, section 11, chapter 64 (sec. 3646) of the Code, is quite broad. It says that in

decreeing a divorce a vinculo or a mensa et thoro "the court may make such further decree as it shall deem expedient, concerning the estate and maintenance of the parties, or either of them," etc. As said in *Reynolds v. Reynolds* supra, reviewing the history of the statute, the power to provide alimony did not originate with the statute, but existed independently of the statute, and is based on the legal obligation of the husband, as incident to the marriage, to maintain and support his wife. Manifestly, the court was persuaded to decree a gross sum to the wife in this case on the ground that she contributed largely by her labors outside of the family home, in the acquisition of the land and personal estate which the evidence showed, or tended strongly to show, the plaintiff was disposing of and converting into money with some purpose, and not unlikely to put it beyond the reach of his wife. He refused, after obtaining her signature to the deed for a large part of the land, to fulfill his promise to pay her one-third of the purchase money. And without doubt he was endeavoring to sell his other property and convert it into money. What was to prevent him from going beyond the court's jurisdiction, or from squandering or disposing of the money, so as to deprive defendant of all interest therein? The record shows that he had personal estate consisting of notes and United States bonds and lands and coal interests, amounting in all to \$4,000 to \$5,000, and that of these he had convertible cash assets amounting to at least \$3,000, and that he was earning about \$75 per month.

Sums in gross for alimony have been allowed under such circumstances in other jurisdictions. It was done in Illinois, where the statute is substantially the same as ours. *Plaster v. Plaster*, 47 Ill. 290, where it was held that such decree would preclude the wife from thereafter having the decree so modified as to give her any sum additional for the support of herself or children. In California the statute (Civ. Code, § 139) said:

"Where a divorce is granted for an offense of the husband, the court may compel him [1] to provide for the maintenance of the children of the marriage, and [2] to make such suitable allowance to the wife for her support, [a] during her life or [b] for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects."

The Supreme Court of that state held that the court had the power under this section to require a gross sum to be paid the wife. *Robinson v. Robinson*, 79 Cal. 511, 21 Pac. 1095. In Iowa there is a similar holding under a statute no broader than ours, in which case specific property was set aside as alimony. *Twing v. O'Meara*, 59 Iowa, 826, 13 N. W. 821. So also in Wisconsin we find

that a decree for a gross sum in lieu of all-mony was sustained under a similar statute. *Hooper v. Hooper*, 102 Wis. 598, 78 N. W. 753, 44 L. R. A. 725. And in North Dakota, the statute, though not specifically authorizing it, was held broad enough to justify a decree for a gross sum for the support and maintenance of the wife. *De Roche v. De Roche*, 12 N. D. 17, 94 N. W. 767, 1 Ann. Cas. 221. See also the note to this case at page 224, citing many cases, both from states with statutes like New York authorizing such decree, and from other states, including those cited here, with statutes like or similar to our own, held broad enough to justify such decree.

Our conclusion, under all the facts and circumstances of this case, is that the decree below should be affirmed.

(90 W. Va. 209)

LAWRENCE v. KENNEDY et al.
(No. 4365.)

(Supreme Court of Appeals of West Virginia.
Feb. 7, 1922. Rehearing Denied April
4, 1922.)

(*Syllabus by the Court.*)

1. Equity §168—Plea in bar of separate claim properly allowed.

Ordinarily a plea in equity, to be good, must constitute a complete bar to the relief prayed for, but where the bill is based upon two or more claims for relief, separate and distinct in themselves, a plea which constitutes an absolute bar to one of such separate and distinct claims is properly allowed to be filed.

2. Judgment §585(1)—To constitute res judicata, matter in second suit must have been actually in issue in the first.

To render a decree res judicata in a subsequent suit about the same subject-matter involved in the suit in which such decree was entered not mere matter of defense thereto, the matter relied upon for relief in such second suit must have been actually in issue in the first.

3. Judgment §585(3)—Decree denying enforcement of contract held not a bar to subsequent suit against purchaser of interest pending suit.

A decree entered in a suit brought by several plaintiffs for the purpose of enforcing the specific execution of a contract for the sale of real estate, dismissing the bill and denying right to enforce such contract, is not a bar to a subsequent suit by the same plaintiffs against one who it is claimed was jointly interested with them in the subject-matter of the first suit, to have such party declared a trustee for the benefit of all the joint owners, upon the ground that he purchased the interest sought to be secured in the specific performance suit while it was pending, even though he was a defendant to the first suit and the bill therein alleged that he had made such purchase in the

name of some of the other defendants; no relief being asked in the former suit except the specific execution of the contract relied upon.

4. Judgment §590(4)—Decree held no bar to subsequent suit against one defendant on ground of estoppel.

A decree entered in a suit brought by several plaintiffs, for the purpose of enforcing specific execution of a contract for the sale of real estate, dismissing the bill and denying the right to enforce such a contract, is not a bar to a subsequent suit by the same plaintiffs against one who it is claimed purchased an interest in the subject-matter of such first suit from them, to have the purchase of such third party of an outstanding interest declared to be for their benefit, upon the ground that such purchaser is estopped to set up title adverse to that acquired from his vendors, even though he was a defendant in the first suit; no relief being sought therein except the specific execution of the contract relied upon.

5. Vendor and purchaser §190—Purchaser held estopped to assert outstanding title against vendor without restoration of possession.

One who purchases real estate, or an interest in real estate, and is placed in possession thereof, is estopped to assert against his vendor an outstanding title or interest acquired therein by him, unless he restores to such vendor the possession and all rights acquired by him under the contract and repudiates the same before making such purchase.

6. Tenancy in common §44—Purchaser of undivided interest held estopped to set up adverse interest against title of vendor.

The purchaser of an undivided interest in real estate who is placed in possession thereof by the vendor, who subsequently purchases another interest in the same property adverse to the claims of his vendor, is estopped to set the same up against the title of his first vendor, but such subsequent purchase will be for the benefit of his first vendor, provided he takes advantage thereof by paying the consideration paid therefor.

7. Tenancy in common §44—Vendor purchasing adverse interest entitled to benefit thereof on payment of entire consideration.

In such case, in order to have the benefit of such subsequent purchase, the vendor must pay the entire consideration paid therefor in good faith by the purchaser.

Appeal from Circuit Court, Kanawha County.

Bill by A. C. Lawrence against W. A. Kennedy, C. J. Van Fleet, and others. Decree for complainant, and defendant last named appeals. Reversed and remanded.

M. F. Stiles, J. F. Cork, and J. W. Kennedy, all of Charleston, for appellant.

Berkeley Minor, Jr., and Henry S. Cato, both of Charleston, for appellee.

RITZ, J. The plaintiff, Lawrence, filed his bill for the purpose of settling the interests of the various parties in the oil derived

from a tract of about one acre of land known as the Ramsey lease.

It appears that in the month of July, 1918, Samuel H. Meyers and H. F. Martin were the owners of a lease upon a tract of land, the oil from which is in controversy in this suit, by the terms of which they were authorized to develop the same for oil and gas. At that time considerable development had been begun in the neighborhood, and it was contemplated that this would prove to be a valuable oil-bearing lease. The defendants Kennedy and Van Fleet purchased the half interest of Martin in this lease, and at the same time entered into a contract with Meyers by which they were to secure his half interest upon certain terms and under certain conditions; one of such terms being that he was to have a certain interest in a corporation to be formed by them for the purpose of developing the property, and another that they should contribute a sufficient amount of money to drill one well upon the property. They organized a voluntary association for the purpose of carrying on operations on the lease and offered Meyers the proportion of stock therein which he was to get under his contract, which they claimed was a compliance with the terms of the contract upon their part. Meyers then, according to their contention, agreed to sell them his interest in the concern thus formed for the sum of \$2,250, but when this amount was offered to him in satisfaction of his accepted offer he declined it, and conveyed his interest to the defendant Stage, who in turn conveyed it to the defendant Burns. Kennedy and Van Fleet in the meantime had entered into a contract with the plaintiff, Lawrence, by which Lawrence agreed to drill a well upon the premises at his own expense for the consideration that he be given an $\frac{11}{32}$ interest therein, the cost of such well to be subsequently refunded to him by the whole enterprise, should it turn out to be a producing one. Lawrence went upon the premises in accordance with his contract and drilled a well, which turned out to be a substantial producer.

Upon the refusal of Meyers to convey his half interest in the lease to Kennedy and Van Fleet and their associates, in accordance with what they claim to be the terms of his contracts, they brought a suit against the defendants Meyers, Stage, and Burns for the purpose of compelling specific execution of those contracts. The plaintiff, Lawrence, was also made a party defendant to this bill, and it was alleged therein that, while he was jointly interested with Kennedy and Van Fleet in the enterprise, he was acting adversely to them, and that the purchase by Stage from Meyers and by Burns from Stage of the Meyers one-half interest was really a purchase by Lawrence, and that Burns and Stage were holding this interest

for his benefit. The bill alleged that Stage and Burns had full notice of the contracts and arrangements between Kennedy and Van Fleet on the one part, and Meyers on the other. The prayer of the bill was that the contracts between Kennedy and Van Fleet on the one part, and Meyers on the other, be specifically executed, and the defendants Stage and Burns be compelled to convey the title to this one-half Meyers interest to the plaintiffs, or that the same be conveyed to them by a special commissioner, should they refuse to do so. Lawrence answered this bill and denied that he had any interest in the Meyers half interest, or any connection with the purchase by Stage from Meyers and by Burns from Stage. Stage and Burns both answered, asserting that they purchased for themselves alone, admitting that they knew at the time of the contracts between Meyers and Kennedy and Van Fleet, but denied that they were valid contracts, or that the plaintiffs were entitled to have them enforced. Evidence was taken, and upon a hearing had in the court of common pleas a decree was entered adjudicating the right of Kennedy and Van Fleet to have specific execution of the contract, and compelling Meyers, Stage, and Burns to convey this half interest to Kennedy and Van Fleet and their associates upon the payment of the sum of \$2,250, provided for in the contract. From this decree an appeal was prosecuted to the circuit court of Kanawha county, and that court, upon a hearing, reversed the court of common pleas, and held that upon the showing made Kennedy and Van Fleet were not entitled to have specific execution of their contracts in regard to the Meyers half interest, and dismissed their bill. This decree was affirmed by this court. *Kennedy v. Burns*, 84 W. Va. 701, 101 S. E. 156.

Pending that litigation arrangements were entered into by the parties under which the property could be developed and the oil saved. It appears that operations were conducted on either side of this Ramsey lease, and in very close proximity thereto, which would have extracted all of the oil thereunder, unless it was drilled simultaneously with the operation on these other tracts. In order to secure such operation Kennedy and his associates, being the undisputed owners of the Martin half interest, and claiming the Meyers half interest, entered into a contract with the Ring Oil Company, which had been formed by Lawrence for the purpose of carrying on drilling operations, by which they agreed that the Ring Oil Company should further develop the property, and that the oil produced by such development should be sold by one John C. Malone and the proceeds thereof used to pay the expenses of drilling, so far as was necessary for that purpose, upon bills approved by a certain committee representing the different claim-

ants to the property. Stage and Burns entered into a like contract with the Ring Oil Company. Kennedy and Van Fleet and their associates also at the same time entered into a contract with Malone under which he agreed to market the oil, to pay the expenses of operations, upon bills approved as above indicated, and retain the residue for later distribution. Stage and Burns entered into a like contract with Malone. Under this arrangement the Ring Oil Company drilled two additional wells upon the property, making three in all, and from the oil produced from these wells there had been realized the sum of about \$100,000 at the time Malone filed his answer herein, at which time the said wells were still being pumped and were substantial producers. Of this sum of \$100,000 Malone had paid out about \$70,000 for the expenses of operation in accordance with the contracts above referred to. The representative of Kennedy and Van Fleet refused to approve the bills for the operation of the property according to the allegation of the bill in this case, and the Ring Oil Company notified the parties that unless it was paid its bills for pumping and operating the property it would shut down the operations. Lawrence thereupon filed this bill, alleging substantially the facts above recited, and further averring that if operations upon said lease were suspended he would be seriously injured and damaged, by reason of the fact that the oil which might be produced from this lease, by proper operation of the wells, would be discharged through the wells on adjoining leases which were then being operated, and asked that a receiver be appointed to carry on the operations pending the litigation, that the rights of the parties be established, and the money already on hand be divided among them in proportion to their respective interests. All of the parties assented to the appointment of a receiver under the circumstances, and operations have since been conducted by a receiver appointed by the court.

Various pleadings have been filed in the case, but for the purpose of the question we have here it is necessary to notice only some of them. To Lawrence's bill setting up his interest, Kennedy and Van Fleet and their associates filed an answer and cross-bill. In this answer and cross-bill the interest of the parties in the Martin one-half of the land is denied to be as contended for by Lawrence, and certain contracts and deeds in relation thereto are asked to be set aside, and others to be construed differently from the interpretation given to them by Lawrence in the bill. With this Martin one-half interest, however, we are not now concerned. As to the Meyers half interest, the defendants allege in their cross-bill that they are entitled to practically the whole thereof. They aver that the purchase thereof by Stage and Burns was in the

interest of Lawrence; that Lawrence was the real purchaser, and that the purchase of this interest, which conflicted with the interest asserted by them in the former suit, under their contract with Meyers, inured to the benefit of all of the joint adventurers; that they are entitled to have the interest so acquired by Stage and Burns in behalf of Lawrence adjudged to be for the joint benefit of all of those jointly interested in the Martin interest, inasmuch as the purchase was made by Lawrence through Stage and Burns during the time the controversy was pending over this Meyers interest; and, further, that Lawrence, as a purchaser from them, is estopped to claim an interest adverse to that which they sold him, while he is still relying upon and holding under his contract with them. They filed an amended cross-bill in which the allegations in regard to the Meyers half interest were somewhat elaborated. Subsequently it appeared from answers filed by Stage and Burns that Lawrence had acquired all of the interests held by Meyers, Stage, and Burns in the Meyers half interest, and was the owner of all thereof, and Kennedy and Van Fleet contended that the conveyance to Lawrence of these interests by Stage and Burns and Meyers was simply turning over to him what he had actually purchased during the time the litigation in regard thereto was pending. Lawrence filed a special plea, termed a plea of *res judicata*. In this plea he set up the former litigation and its termination, as above indicated. He averred in this plea that he was in no wise interested in the transactions between Meyers and Stage and Burns in regard to the Meyers half interest at the time the same were made, or until long after the termination of the litigation settling the claims of Kennedy and Van Fleet and their associates thereto; that recently he had purchased from Meyers, Stage, and Burns their interests in the Meyers half interest, and that he now held the same; but insisted that the determination of the former litigation was a bar to Kennedy and Van Fleet and their associates asserting any interest therein against him, because of the fact that he was a party defendant to the former suit, in which allegations were made against him that he was the real purchaser of the interests conveyed to Stage and Burns. Objection was made to the filing of this plea, which being overruled, Kennedy and Van Fleet tendered what they called a special replication and amended cross-bill, but the court, upon objection, refused to allow the same to be filed, and entered a decree holding that Kennedy, Van Fleet, and their associates were barred by the decree in the former suit from asserting any claim to the Meyers half interest against Lawrence, and it is from this decree that this appeal is prosecuted.

[1] The first question naturally is, Is the plea good as a plea in equity? Ordinarily the rule is that a plea in equity, to be good, must bar the right to recover in the suit, but it seems that, where separate and distinct matters upon which the right of recovery is based are set up, a plea which is effective to bar one of these separate and distinct rights and claims will be held to be a good plea. Story's Equity Pleadings, § 647.

[2-4] It only remains, therefore, for us to determine whether the matter set up in the plea furnishes a complete bar to the claims asserted by Kennedy and Van Fleet to the Meyers half interest. It will be borne in mind that this plea relies upon the adjudication in the former suit to defeat Kennedy and Van Fleet from recovering any interest in the Meyers part of the lease from Lawrence, but, in addition to setting up the proceeding in that suit, it further avers that Lawrence never acquired any interest in the Meyers claim until long after the determination of the suit of Kennedy against Burns. One of the theories upon which Kennedy and Van Fleet claim to be interested in the Meyers half of the lease is that Lawrence, while he was jointly interested with them in the venture, purchased this outstanding claim. They insist in their pleading that, while they were in good faith claiming for themselves and Lawrence this Meyers interest, Lawrence, through his agents, Stage and Burns, went out and purchased the same, and now attempts to hold it adversely to them. Their contention is that, because this purchase was made while they were asserting their claim to the whole lease in behalf of themselves and Lawrence, it was for their common benefit, and that they are entitled to have Lawrence decreed to be a trustee holding it for the benefit of all engaged in the common enterprise. They further contend that, because of the relationship of vendor and purchaser existing between them and Lawrence, he is estopped to claim an interest in the property purchased by him from them adverse to such interest while he is still holding the same under his contract of purchase. The court below held that these contentions were barred by the former adjudication. With this conclusion we do not agree. An examination of the record in the suit of Kennedy against Burns discloses that the only relief sought was the enforcement of the contracts set up between Kennedy and Van Fleet on the one hand, and Meyers on the other, and the only adjudication in that case was that these contracts were not enforceable, and that Kennedy and Van Fleet were not entitled to have this half interest conveyed to them by Meyers or his grantees. While it is true that bill makes Lawrence a party defendant thereto, no relief is asked against him. It may be that the plaintiffs in that suit could have asserted that Lawrence was the real purchaser, and that his

purchase inured to their benefit, and that the same was held by him simply as a trustee for the benefit of all the joint adventurers, and relied upon this as a ground for relief. This they did not do.

The rule of *res judicata*, when applied to the plaintiff in a suit, is somewhat different in its effect than when applied to a defendant. Ordinarily a defendant, when he is sued, must set up every matter which exists that would defeat the claim asserted against him, and the adjudication in the suit ordinarily determines, not only every matter of defense which is actually set up, but also such matters as might pertinently be used as a defense. This is not the rule, however, in regard to a plaintiff. The adjudication in that case only settles the claims and grounds for relief actually set up and relied upon by the plaintiff. He may have another ground upon which to base a claim for relief in the particular case not set up, and not relied upon, in which event the adjudication will not bar him from subsequently relying thereon in another suit. *State v. McEl-downey*, 54 W. Va. 695, 47 S. E. 650; *Perdue v. Ward*, 88 W. Va. 371, 106 S. E. 874, 14 A. L. R. 539. We are therefore clearly of the opinion that the adjudication in the former suit (*Kennedy v. Burns*, 84 W. Va. 701, 101 S. E. 156), did not bar Kennedy and Van Fleet from setting up as a ground for relief against Lawrence, so far as the Meyers half interest is concerned, the facts now relied upon.

But this does not necessarily conclude the question. Lawrence's plea goes further than simply setting up the former adjudication and relying thereon. It traverses the allegation in the cross-bill that the purchase by Stage and Burns was for his benefit, and that they acted in his interest, and asserts that he never acquired any interest whatever in this Meyers half interest until after it was determined that Kennedy and Van Fleet and their associates had no claim of any kind thereto. Does this make any difference? It may be true that if Lawrence did not stand in the relation of purchaser to Kennedy and Van Fleet he would be in a position to acquire for his own benefit the Meyers half interest from Stage and Burns at the time he says he did. We must not, however, lose sight of the fact that not only is Lawrence, by reason of his purchase, jointly interested with Kennedy and Van Fleet, but he is a purchaser from them of an undivided interest in the whole property. He claims in the bill filed in this case this interest under that contract of purchase, and insists that he is entitled to it. It clearly appears that he was put in possession of the property and began and continued operations thereon under that contract of purchase, and that the Ring Oil Company, organized by him for the purpose of carrying on these operations, retained possession and control

of the property until, upon his motion, it was taken possession of by a receiver of the court, and the possession of this receiver is, of course, but the possession of the owners.

[5-7] It is very well established that a purchaser of real estate, or an interest in real estate, who is put in possession thereof by his vendor, cannot acquire an adverse interest so long as he holds the same, and if he does acquire such interest it will inure to the benefit of his vendor, if he desires to have the advantage thereof, upon payment of the purchase price thereof. 27 R. C. L. title "Vendor and Purchaser," § 283; *Warvelle on Vendors*, § 703; *Buffalo Coal & Coke Co. v. Vance*, 71 W. Va. 148, 76 S. E. 177; *Smith v. Boyer*, 72 W. Va. 632, 78 S. E. 787, 46 L. R. A. (N. S.) 209; *Roller v. Effinger*, 88 Va. 641, 14 S. E. 337; *Galloway v. Finley*, 12 Pet. 264, 9 L. Ed. 1079; *Bush v. Marshall*, 6 How. 284, 12 L. Ed. 440; *Mizamore v. Berglin*, 197 Ala. 111, 72 South. 347, L. R. A. 1916F, 1024; *Page v. Bradford-Kennedy Co.*, 19 Idaho, 685, 115 Pac. 694, Ann. Cas. 1912C, 402; *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239; *Petroski v. Minzgoehr*, 144 Mich. 356, 108 N. W. 77, 115 Am. St. Rep. 450; *Lake v. Hancock*, 38 Fla. 53, 20 South. 811, 56 Am. St. Rep. 159; *Greeno v. Munson*, 9 Vt. 37, 31 Am. Dec. 605; *Harle v. McCoy*, 7 J. J. Marsh. (Ky.) 318, 23 Am. Dec. 407; *Meadows v. Hopkins*, Meigs (Tenn.) 181, 33 Am. Dec. 140. The fact that Lawrence's purchase from Kennedy and Van Fleet was not of the whole property cannot change his relationship to them. He purchased an undivided interest in the whole. He was put in possession under that purchase, and he is, in this suit, setting up the same and insisting thereon. He is in the position of claiming an undivided interest in the whole property under Kennedy and Van Fleet and another undivided interest in the whole property adverse to Kennedy and Van Fleet. This he cannot do. His acquisition of the Meyers half interest while he was holding under Kennedy and Van Fleet inures to their benefit. He is estopped to set it up adversely to them. Of course, however, in order to have the advantage of it, they will have to pay him the cost of securing the same, instead of only a part of the cost, as is argued by counsel. Their obligation to Lawrence was to sell him an undivided $\frac{11}{32}$ of the whole property. They purported to own the whole property, and he dealt with them on the basis of their ownership of the whole, and it is their duty to make good the title to the whole property. Lawrence is under no obligation to make good such title by the acquisition of an outstanding interest. He has fully paid for his $\frac{11}{32}$, and if he would have to pay $\frac{11}{32}$ of the cost of purchasing the outstanding interest he would be paying twice for part of the interest acquired by him.

We are of opinion that the plea filed by

Lawrence sets up no defense to the cross-bill, and that the court should have sustained the objection to the filing of the same. We will therefore reverse the decree, sustain the objection to the plea, and remand the cause for further proceedings.

(90 W. Va. 477)

STATE ex rel. WRIGHT v. BENNETT.
(No. 4017.)

(Supreme Court of Appeals of West Virginia.
March 7, 1922.)

(Syllabus by the Court.)

1. Bastards \S 17 $\frac{1}{2}$, New, vol. 12 Key-No. Series—Nonsupport statute furnishes cumulative remedy in determining paternity and compelling support.

Notwithstanding the provision made in chapter 80 of the Code (§§ 3927-3932), for determination of paternity of illegitimate children and provision for their support, a cumulative remedy therefor is provided in sections 16c(1) to 16c(8) of chapter 144 of the Barnes' Code 1918 (Code Supp. 1918, §§ 5179a-5179h), commonly known as the nonsupport statute.

2. Bastards \S 17 $\frac{1}{2}$, New, vol. 12 Key-No. Series—Order requiring defendant to support child cannot be made solely upon complaint, warrant, and proof of nonsupport.

In a proceeding under the provisions of chapter 144, §§ 16c(1)-16c(8), Barnes' Code 1918 (Code Supp. 1918, secs. 5179a-5179h), against the putative father of a bastard child, primarily to punish him for willful neglect of the child and refusal to support it, and incidentally to compel him to provide for its support, the court cannot properly make an order requiring him to support it pending the proceeding, solely upon the complaint and warrant supported by proof of nonsupport. To obtain such an order, the complainant must file a petition therefor, in the proceeding, and give the defendant notice thereof, and afford him an opportunity to resist the application by appropriate pleadings and proof, as in a civil action.

3. Bastards \S 17 $\frac{1}{2}$, New, vol. 12 Key-No. Series—In proceeding for nonsupport defendant entitled to jury trial unless waived, and court cannot award support pendente lite in absence of such remedy.

If upon such petition an issue is made as to the paternity of the child, the defendant is entitled to a trial thereof by a jury, unless waived, and the court cannot properly award support pendente lite in the absence of such waiver, unless nor until such issue has been determined against the defendant by the verdict of a jury.

4. Bastards \S 17 $\frac{1}{2}$, New, vol. 12 Key-No. Series—In proceeding for nonsupport of illegitimate child where relationship is expressly admitted, or not denied, the court may order temporary support.

If, however, in any case arising under said statute, the relation between the defendant and

the person or persons who are alleged in the petition to be entitled to their support from him is expressly admitted or not put in issue by a denial thereof, the court, upon its own finding and judgment as to what sum should be paid by him for temporary support, may award it against him and enforce payment thereof.

Error to Circuit Court, Mercer County.

Proceeding by the state on the relation of Amella Wright, against Oscar L. Bennett for the nonsupport of an illegitimate child, and being denied a jury trial, the defendant brings error. Judgment reversed, and cause remanded.

James S. Kahle, of Bluefield, for plaintiff in error.

E. T. England, Atty. Gen., and R. Dennis Steed, Asst. Atty. Gen., for defendant in error.

POFFENBARGER, P. On a complaint filed and warrant issued under the provisions of sections 16c (1) to 16c (8), inclusive of chapter 144 of Barnes' Code of 1918 (Code Supp. 1918, §§ 5179a-5179b), commonly known as the nonsupport statute, the plaintiff in error was arrested, prosecuted, and convicted of the paternity of an illegitimate child. On his arraignment in the circuit court of Mercer county, he demurred to the complaint and warrant, and moved to quash them, and later, the motion having been overruled, he entered a plea of not guilty on which issue was joined. Thereafter, a continuance having been refused, he demanded a trial by jury, which was denied him. To all of these adverse rulings he excepted.

On the inquiry conducted by the court, he was found and held to be the father of the child, required to pay \$4 per week to its mother, pending an inquest by the grand jury at the next term of the court, and compelled to enter into a recognizance in the penalty of \$500, and with condition to appear on the first day of such term to answer such indictment as should be found against him. The basic issue in the inquiry conducted by the court was that of the paternity of the child, then about two and a half years old. The accused had never been charged with such paternity in any proceeding under the bastardy statute. Chapter 80 of the Code (§§ 3927-3932).

[1] Although the statute under which the proceedings here narrated and complained of authorizes prosecution of any parent who shall, without lawful excuse, desert, or willfully neglect or refuse to provide for the support and maintenance of his or her legitimate or illegitimate child or children under the age of 16 years, in destitute or necessitous circumstances, it makes no express provision for determination of the question of paternity, in any instance in which the accused is

a man and the child illegitimate, and the former denies the relation of parent. Apparently assuming the existence of the status of parent, it makes nonsupport of the child a criminal offense, and incidentally provides means of coercing support of the child by the parent. In the cases of legitimate children, the parentage is so notorious and so readily susceptible of establishment that it is not often denied. In the cases of illegitimate children, the paternity, unless judicially established in a proceeding under the provisions of chapter 80 of the Code, is nearly always denied. A vital and basic inquiry in this case is whether the nonsupport statute contemplates a proceeding against a man for failure to support an illegitimate child whose paternity he denies, and of which he has never been convicted under the bastardy statute and in the manner provided by it.

But for the rule of evidence prescribed in section 16c(6) of the act, it would be difficult, if not impossible, consistently with the rules of interpretation and construction, to bring cases of this kind within its provisions. Serious consequences ensue upon the fixing of paternity of an illegitimate child upon a citizen. It affects his liberty, his estate, and his earnings. That subject has been governed for many years by a statute conferring the right of jury trial and carefully safeguarding the rights of the accused as well as those of the prosecutor. Code, c. 80. In the act now under consideration there is no express repeal of that statute.

However, in the enactment of chapter 80 of the Code, the Legislature did not exhaust its powers over the subject, and its authority to provide additional remedies for the same wrong, making the new ones cumulative, is incontrovertible. Intent to do so in this instance is clearly indicated by the terms and provisions of the act, when read and considered together. The first section includes parents of children, whether legitimate or illegitimate. Section 6 plainly contemplates trial of the issue of paternity of illegitimate children. It prescribes a rule of evidence to govern in proving that the defendant is the father or mother of "such child or children." These terms necessarily include both classes of children, legitimate and illegitimate, though the issue of relationship is more frequently raised in cases of paternity of illegitimate children than in those involving maternity and the marital relation, it is easy to perceive that it may be just as vital and important in the other classes of cases. There may be efforts to charge men with the support of women, as their wives, who are not their husbands, and women, as mothers of children, who are not their mothers. Imposters and pretenders may break into proceedings of the kind provided for by this statute as well as others. Hence, if any exception is to be made from its operation, it

must be based upon the relative frequency or infrequency of the occurrence of issues as to the relationship charged, and the fact that there is an additional and pre-existing statutory remedy for one class of the cases it includes not applicable to any of the others. This would be a flimsy and insufficient ground upon which to base it. Express terms in a statute do not often yield to implications, and never do unless they are so strong that the contrary thereof cannot reasonably be supposed. *First National Bank v. De Berriz*, 87 W. Va. 477, 105 S. E. 900. Implied exceptions must be based upon very substantial presumptions. This statute does not innovate upon any right conferred by chapter 80 of the Code. It violates no established and recognized principle of public policy. It is susceptible of a construction that will avoid conflict with any of the constitutional limitations of legislative power. No ground is perceived, therefore, upon which the import of its terms, respecting the classes of cases to which it applies, can be cut down or restricted in meaning.

[2] But it must be interpreted and applied in conformity with legislative intent and purpose. It does not, in terms nor by necessary implication, authorize dispensation with the procedure ordained by the Constitution and statutes for the government and regulation of trials, findings, and judgment in actions and proceedings instituted in the courts for imposition of civil and criminal liability. It assumes that the courts, in administering it, will take notice of the modes of trial of such issues and adopt them. In so far as conviction of a criminal offense is sought, there must be an indictment and trial by jury, if the latter is not waived, as it may be in some cases. If establishment of civil liability is sought and properly denied, there is likewise right of trial by jury. In giving a civil remedy or creating a criminal offense, the Legislature is not bound to repeat in the act the constitutional guaranties and statutory provisions for trial. It is the duty of the courts to look beyond such acts for the procedure found in other parts of the law, except in so far as it is provided in the act. *Fisher v. Somerville*, 83 W. Va. 160, 98 S. E. 67; *State v. Harris*, 88 W. Va. 97, 106 S. E. 254.

[3] The statute contemplates a preliminary hearing on the warrant, if not waived, indictment, and trial by jury. The prosecution is one for a criminal offense, with incidental power in the court to give civil relief in certain forms, both before trial and after conviction. Primarily, the proceeding is a criminal one. The civil liability is collateral and incidental in character. After conviction, punishment may be avoided by performance of the omitted duty, but that does not alter the nature of the proceeding. Before conviction and pending the proceedings by in-

dictment and trial, the court may make such order "as may seem just" for support. This, too, is collateral and incidental. The plea of not guilty entered to the indictment, when found, puts in issue the act made criminal by the statute, wilful desertion and failure or refusal to support the dependent party. That issue, of course, includes the narrower, though basic, one, of relation, which may or may not be raised in the evidence on the trial. Ordinarily it is not, except in cases of alleged paternity of illegitimate children, but it is involved and may become actual in all of the other classes of cases. If that is the vital issue in any case, as it is here, the accused is entitled to have it determined by a jury, whether it is involved in the civil side of the case or the criminal side. Intention on the part of the Legislature to make any citizen, male or female, civilly liable for perhaps hundreds of dollars in the form of support pendente lite, otherwise than by the verdict of a jury, when the relation is properly denied, can no more be assumed nor indulged than intention to impose criminal liability without such trial.

[4] For the purposes of award of support pendente lite, that issue does not arise solely upon the complaint and warrant. There must be a petition, with notice to the defendant of the filing thereof, to which he has right to make defense. In many cases the relation charged in the petition is not and cannot be denied. If it is not, the court may award the temporary support, if, under all the circumstances, justice requires it, and in such an amount as is just. Failure to deny the relation or an express admission of it amounts to a confession of the cause of action alleged in the petition. It also confesses a relation which in law imposes the duty to render support. But, if it is denied, the situation is altogether different. The inquiry then arises, in the construction of the statute, whether support pendente lite can be awarded at all.

Postponement of all pecuniary relief, until after indictment, trial, conviction, and final judgment, would often work great hardship. There may be necessary continuances, mistrials, and appellate proceedings, carrying the controversy over a long period of time, and, in that way, the plainly manifest purpose of the Legislature to compel the rendition of support may be almost entirely defeated. While, in a legal sense, the main proceeding is criminal, its practical purpose is to coerce husbands and parents into the rendition of necessary support of wives and children, both before and after conviction of the accused. Section 3 of the act gives the prosecutor the right to come into court for pendente lite support, and empowers the court to award it. Its inability to try the issue of relationship, if made on the petition, without a jury, does not necessarily preclude

such relief. The section of the act providing the remedy is silent as to the mode of trial. Not a word in it can be construed as necessarily inhibiting power in the court to impanel a jury for trial of such an issue, and let it render a verdict in such collateral proceeding, upon which the award or denial of the relief sought shall depend. And the prescription of a rule of evidence, by section 6, limited to the issue of relationship, is strongly suggestive of legislative contemplation of two issues, one governed by the rules of evidence applicable in civil cases, and the other by the rules applicable in criminal trials. Such power in the trial court is necessary to full realization of the legislative purpose, as disclosed by the general scope of the act and also by section 3 thereof. Generally it contemplates support of a more or less permanent character. As to temporary support, section 3 confers jurisdiction and power upon the court to award it, and right upon the complainant to come in and ask for it by petition. Notice to the defendant is required in order to give him an opportunity to defend. Parties to an informal civil proceeding are thus provided with power in the court to hear and determine the controversy and award relief, upon the basis of justice as disclosed by the circumstances. In this there is no exception of any case brought within the scope of the act, nor any limitation upon the court's powers. Temporary support is as clearly within the intent of the Legislature as permanent support. Power to award the latter is conferred in terms very similar in import to those in which authority is given to allow the former. Grant of power to make the allowance in term or in vacation does not preclude the construction here given the statute. A jury trial in vacation could hardly have been intended, but, in the great majority of the cases, there is no occasion for such a trial, for the relation is not denied. The meaning of the phrase, "the court or a judge thereof in vacation," is that the order may be made in term or in vacation, according to situation of the parties, the issues developed, and the circumstances disclosed. If an issue

as to the relation is made by allegation and denial, the question should be determined in term, by a jury unless waived, and the order then made, or in vacation, according to the convenience of the court and parties. Otherwise, it may all be disposed of either in term or in vacation. The jury trial here suggested and held to be within the contemplation of the act will not in any way affect such a trial on the criminal charge preferred by the indictment. It determines the relationship only provisionally and for the purposes of award of temporary support. Moreover, the parties are different in the two trials. Our conclusion is that, in this case and others of its class, a temporary order awarding support pendente lite cannot properly be entered until after determination of the issue as to the relation of the parties, by a jury trial, if not waived, nor otherwise than upon a petition filed by the complainant praying for such relief, and notice to the defendant of the filing thereof.

In this proceeding all of the steps prescribed by the statute for determination of the right to temporary support were omitted. No petition was filed. The defendant had no notice of an application for award of such support. He was not accorded the right of trial by jury of the issue as to paternity of the child. The trial he had on the complaint and warrant was not such a one as the statute contemplates, except in so far as it may answer the purposes of a preliminary examination. His demurrer to the warrant and complaint and motion to quash them were properly overruled. Both papers follow the forms prescribed by the statute. As the entire proceeding, in so far as it relates to the award of temporary support, was irregular and erroneous, it is unnecessary to enter upon any inquiry as to the propriety of the rulings on the motion for a continuance and the demand for a trial by jury.

The judgment complained of will be reversed, except in so far as it required the defendant to enter into a recognizance to answer such indictment as should be found against him, and the case remanded.

(90 W. Va. 428)

APPALACHIAN POWER CO. v. TATE.
(No. 4419.)(Supreme Court of Appeals of West Virginia.
March 7, 1922.)*(Syllabus by the Court.)*

1. Evidence \S 441(9)—Where appliance is sold by particular description in written contract, buyer may not prove a verbal warranty of fitness for a particular purpose.

Where a machine or appliance is sold by a particular description or designation by a contract in writing, the buyer may not prove an express verbal warranty of fitness of such machine or appliance for a particular purpose.

2. Sales \S 273(5)—There is no warranty that article bought by particular description is fit for any particular purpose, although seller knows the buyer intends it for such purpose.

Ordinarily there is no implied warranty that a machine or appliance sold by a particular description is fit for any particular purpose, even though the seller knows at the time of the sale that the buyer intends it for such specific purpose.

3. Sales \S 272—Machine sold by particular description is impliedly warranted to be a merchantable article of the kind sold.

Where a sale of a machine or appliance is made by a particular description or designation, there is an implied warranty that it will be a merchantable article of the kind sold.

4. Sales \S 273(5)—Buyer is justified in rejecting a machine sold by particular description, where it will not perform the usual service of the ordinary appliance described.

One who buys a machine or appliance by a particular description or designation is justified in rejecting the article tendered in satisfaction of the contract of sale, where it appears that it will not perform the service usually performed by the average or ordinary machine or appliance described in the contract of sale.

Appeal from Circuit Court, Mercer County.

Action by the Appalachian Power Company against James D. Tate to recover a balance claimed upon an account for goods sold and delivered. Judgment for the defendant, plaintiff's bill dismissed, and the plaintiff appeals. Affirmed.

McClagherty & Richardson, of Bluefield, for appellant.

Reynolds & Reynolds, of Princeton, for appellee.

RITZ, J. The plaintiff instituted this suit to recover the balance claimed upon an account for goods sold and delivered by it to the defendant, the jurisdiction in equity being sustained by an attachment sued out upon the ground that the defendant is a non-resident of the state of West Virginia. The right to recover was denied, and upon a hearing the court below found in favor of the defendant, and dismissed the plaintiff's bill,

and it is to reverse this decree that this appeal is prosecuted.

The only substantial controversy arises over the right of the plaintiff to recover the purchase price of one "Isko refrigerating unit No. 20," amounting to \$332.50. It appears that on the 9th day of May, 1919, the defendant gave a written order to the plaintiff for the refrigerating machine above mentioned at the price above indicated, to be shipped by express as soon as possible, and to be paid for in 30 days from date of delivery. This written order was accepted in writing by the plaintiff. It will be noted that there is no express warranty that the machine to be furnished would be fit for any particular use, or would accomplish any specific purpose. It is shown, however, that at the time this order was given and accepted the plaintiff's agent warranted that the machine would furnish refrigeration for the defendant's refrigerator, and would make small cubes of ice for domestic table use. Upon this order the plaintiff had the manufacturer ship a machine to the defendant, but the shipment was not made for nearly three months after the order was given. This delay in shipment is, however, not involved in the controversy. When the machine arrived it was received from the transportation company by an agent of the plaintiff, and taken to defendant's residence, where it was placed in a servant's room, without removing the original crating and packing, until the same could be installed. It seems that a part of this machine was intended to rest on the top of the refrigerator and another part, consisting of coils and perhaps some other devices, was intended to be placed inside the chamber of the refrigerator intended to contain the ice when the refrigerator was used in the ordinary way, and to connect the parts so placed it was necessary to bore holes through the top of the refrigerator, through which pipes extended joining the part on the outside with the part on the inside of the refrigerator. The mechanical device was operated by electricity, and to secure the current for this purpose it was necessary for the apparatus to be connected with the electric wires used by defendant for lighting his residence. Upon the delivery of the machine at his residence the defendant inquired of plaintiff's agent who made the delivery, who was the same agent who sold the machine to him, whom he could get to make these connections and install the machine, and this agent advised him that a certain plumber and a certain electrician could properly do the work. Accompanying the machine were diagrams and directions for the proper installation. On the day after the machine was delivered at his residence, defendant procured the plumber and the electrician recommended by plaintiff's agent to come to his residence for

the purpose of installing the machine. Upon opening the door of the room in which the machine had been stored overnight, a very strong odor of gas was detected, which had evidently escaped from the machine. The crating and packing were removed and the machine installed in exact accordance with the directions, but it failed to produce any substantial refrigeration or to make any ice as it was contemplated that it would. Defendant thereupon notified the plaintiff's agent of the failure of the device to function, and this agent made an examination of it. He made no criticism of the manner in which the work of installation had been done, but discovered some valves which he thought were not properly adjusted. After adjusting these valves another attempt was made to operate the machine, but without success. The plaintiff's agent then concluded that the failure upon the part of the device to operate was occasioned by an insufficient supply of gas, and he undertook to secure an additional supply. He was unable to get the gas upon his order, and proposed that he would substitute a machine which he was using for demonstration purposes. The defendant acceded to this suggestion, and the substitution was made, but with no better results than had been obtained with the first machine. After repeated attempts to get the results contemplated, the defendant refused to accept the device, and so notified plaintiff's agent. Some time afterward a representative of the manufacturer appeared upon the scene, and examined the machine at defendant's residence, where it still remained. According to his contention it was badly out of repair, and required considerable replacements and repairs to make it a working machine. He proposed to remedy the difficulties, but the plaintiff refused to employ him for the purpose and incur the attendant liability, as did also the defendant, and the machine remained at the defendant's residence without any further attempt to use it at the time this suit was brought.

The defendant challenged the right of the plaintiff to recover upon this state of facts, and in addition filed an answer in the nature of a cross-bill, in which he claimed damages in the sum of \$1,000 for injury to his refrigerator, for loss of food products on account of lack of refrigeration, and for inconvenience experienced by him in his home because of the experiments conducted with the machine.

[1] The plaintiff's right to recover depends upon the application of a few familiar principles of the law of sales. There is contained in the written order and the acceptance thereof no express warranty that the machine purchased would be fit for any particular use or would accomplish any particular purpose. There was a verbal warranty made by the plaintiff prior to or contemporaneous

with the writing that the device would furnish refrigeration and would produce small cubes of ice for domestic table use. The plaintiff's agent admits this. Can we add this warranty to the written contract? If we can, the defendant's right to prevail in this suit is clear, for it is admitted that the machine does not and never did meet the terms of this warranty. There is some conflict among the authorities on this question. There are some holdings to the effect that a warranty is collateral to the principal contract, and may be proven by parol evidence, even though the contract of sale is in writing. The better reason, supported by the weight of authority, seems to be that a verbal express warranty cannot be added to a written contract of sale. Williston on Sales, § 215; 23 R. C. L., title "Sales," § 224. This is the doctrine adhered to by this court. Erie City Iron Works v. Miller Supply Co., 68 W. Va. 519, 70 S. E. 125; American Canning Co. v. Flat Top Grocery Co., 68 W. Va. 698, 70 S. E. 756.

[2] Being thus barred from considering the express verbal warranty, we must determine the rights of the parties upon the terms of the written contract. It is quite well established that where one buys an article of personal property by a particular description or of a designated kind, there is generally no implied warranty of fitness of such article for any particular purpose, even though the seller knows at the time of the sale that the buyer intends it for a specific use, but there is an implied warranty that the article furnished is a merchantable article of the kind purchased; that is, that it will fill the description of the article purchased. Gorby v. Bridgeman, 83 W. Va. 727, 99 S. E. 88. Applying this principle to the case here, if the machine furnished by the plaintiff meets the description of the machine contained in the written contract, then it has fully complied therewith, and is entitled to recover. If, on the other hand, the machine furnished was not a merchantable machine of the kind ordered, the defendant was justified in rejecting the same.

[3] That the machine furnished answered the description contained in the written contract so far as the name is concerned there is no doubt. Was it, however, an ordinary machine of that class? Did it possess the attributes ordinarily belonging to a machine of that kind? If it did not, then it did not meet the requirements of the contract. There is some evidence tending to show that the Iako refrigerating machine will not perform the functions of refrigeration or of making ice. If this is true, then the fact that the device furnished the defendant did not make ice is not evidence that it did not correspond with the description contained in the written contract. The plaintiff, however, has introduced much evidence to establish as a fact that the Iako

machine when in proper order will produce adequate refrigeration and will make ice cubes, and, as before stated, a representative of the manufacturer condemned the machine furnished the defendant because it was out of order. Of course the plaintiff, in fulfillment of its contract, could not furnish a machine answering the general description, but so out of order or so lacking in workmanship as not to perform any of the functions usually performed by machines of the general class to which it belongs. Such a machine would not be a merchantable one of that class. There is evidence in support of both contentions, but it seems to us that the preponderance of the evidence is to the effect that an ordinary Isko machine will furnish refrigeration and make ice, and, it being conceded that the one furnished the defendant will not, it follows that it does not answer the description contained in the written order, and the court properly denied the plaintiff relief.

[4] The plaintiff insists that the defendant's conduct has been inconsistent with his contention that he rejected the machine, that it offered to take the machine back and relieve him of any liability for its purchase price, which offer he refused. It is true one of plaintiff's agents testifies that he proposed to the defendant that he would take the machine back for the plaintiff and cancel the claim for the purchase price, but the defendant says that this was to be also a settlement of any claims he might have for damages against the plaintiff, and that he did refuse to accept such settlement, but that he never refused to permit the plaintiff to reclaim the machine, but has been perfectly willing at all times and still is willing for it to take it and make any disposition it desires of it. The evidence of plaintiff's witness upon this question is not inconsistent with defendant's contention. He shows that he was trying to settle the controversies between the parties, and that defendant was then claiming damages, and it would seem from all of the evidence that his proposition contemplated just what the defendant says it did. Of course the defendant could not be compelled to waive any claims for damages that he might have, under penalty of being charged with conduct inconsistent with his rejection of the machine.

The plaintiff contends that it is entitled to recover in any event the sum of \$9.50, being the price of an electric grill furnished the defendant. The defendant admits that he received this grill, but says that he is under the impression that he returned it, and enforces this contention with the declaration that it did not appear on the statement of account sent him by the plaintiff, all of the items of which he paid, except the one covering the price of the Isko machine. It is true when testifying he stated that he would ascertain definitely when he went home whether this grill had been returned, but there is no further showing in the record in regard to it. The plaintiff did not undertake to show that it had not been returned. It occurs to us that the defendant's statement, coupled with the fact that the item was not included in the statement of account sent him, justifies the finding of the circuit court upon this question.

The defendant cross-assigns as error the action of the court in denying his claim for damages. He claims that his refrigerator was rendered practically worthless in attempting to install the machine in it, and that it was worth from \$200 to \$250; that he lost a considerable quantity of vegetables, milk, and meat for want of refrigeration; and that he was much inconvenienced by the failure of the machine to produce refrigeration. That the refrigerator was slightly injured, sufficiently appears, but it is also shown that the damage to it can be repaired for a very inconsiderable sum; the amount not being shown. Under the evidence he was not entitled to recover as damages the full value of the refrigerator, but, if entitled to recover at all on this account, only the difference in the value of the same before and after the injury to it. What this is does not sufficiently appear to form a basis for a recovery in his favor. The claims for loss of food products are uncertain and indefinite. There is no showing of any actual loss on this account and the amount thereof. The inconvenience suffered is entirely too speculative and uncertain to form the basis of any recovery. The defendant's evidence introduced in support of his claim for damages entirely fails to establish any reasonably certain or definite basis for such recovery.

We find no error in the decree complained of, and the same is affirmed.

(90 W. Va. 465)

DEXTER & CARPENTER, Inc., v. CO-OPERATIVE FUEL CO. (No. 4422.)(Supreme Court of Appeals of West Virginia.
March 7, 1922.)*(Syllabus by the Court.)*

1. Appeal and error ⇨1003—Verdict contrary to weight and preponderance of evidence should be set aside.

Where the verdict of a jury is contrary to the decided weight and preponderance of the evidence, it should be set aside, notwithstanding the evidence may have justified the giving of instructions based thereon.

2. Sales ⇨428, 429—Where goods are sold without opportunity for inspection, buyer may recoup the difference between the contracted value and the value with the defects shown; return not condition precedent to recoupment.

When goods are sold to be of a particular kind or quality, and there has been no inspection or opportunity of inspection, and the buyer relies on the seller to deliver the goods contracted for, the purchaser may, when sued by the seller for the price thereof, recoup in damages the difference between the value which the goods sold would have had at the time of delivery if of the kind and quality corresponding to the warranty, and the actual value thereof at the same time with the defects shown; and it is not a condition precedent to such right that the purchaser should have notified the seller and offered to return the goods.

Error to Circuit Court, Mercer County.

Action by Dexter & Carpenter, Inc., against the Co-operative Fuel Company. Verdict and judgment for plaintiff, and the defendant brings error. Reversed, verdict set aside, and defendant awarded a new trial.

Arthur F. Kingdon, of Bluefield, for plaintiff in error.

Lee & Tanner, of Bluefield, for defendant in error.

MILLER, J. On notice of a motion therefore for the plaintiff obtained a verdict and judgment for the sum of \$922.21, the full amount sued for, and we awarded defendant the present writ of error to review the judgment pronounced on the 11th day of June, 1921.

What plaintiff sued for was the price of two car loads of coal sold and delivered to defendant, the first on November 5, 1920, containing 41.40 net tons at \$9.00 per ton, amounting to \$372.60; the second on November 10, 1920, containing 58.70 net tons at \$9.00 per ton, amounting to \$528.30, which with interest to the date of the notice totaled \$918.90, and at the date of the verdict, \$922.21, the amount of the verdict and judgment.

Besides the general issue of non assumption, the defendant filed a plea of tender before suit and on the trial, of \$282.48, also a

notice of recoupment of damages for breach of the contract by plaintiff in furnishing coal of an inferior quality to that of Standard Pocahontas ROM coal contracted for, and for which defendant was only able to realize the sum of \$385.91, and was obliged to pay demurrage and switching charges amounting to \$53.38, and on which coal it was entitled to a profit of fifty cents per ton, or \$50.05, leaving a net balance of \$282.48, the amount tendered, entitling defendant to recoup in damages the difference between \$900.90, the principal sum sued for, and the sum of \$282.48, or the sum of \$617.42, which it would undertake to offset against plaintiff's demand.

It is agreed that the memorandum orders accepted by plaintiff show that the coal contracted for was what was known in the market as Standard Pocahontas ROM (run of mine) coal. And according to these memoranda the coal was to be shipped to defendant at Portsmouth Scales, Ohio.

The main controversy before the court and jury was whether the two cars of coal sued for were in fact Standard Pocahontas ROM coal; and much testimony of witnesses was introduced on this question. It was fully proven that these two cars of coal came from what it known as the J. B. B. mines, in McDowell County, and were billed and shipped to Portsmouth, Ohio, not in the name of the defendant, but in the name of the plaintiff, where there was a joint agent or shipping clerk, who received them and rebilled and shipped them to defendant's customer, the Ford Motor Company, at Detroit, Michigan, where they were received a few days later, and were after analysis rejected, apparently on the ground that the coal was too high in ash qualities; and plaintiff was so notified through its agent at Bluefield, W. Va., where the contract was made, by the agent of the defendant company, also located there.

It is proven that the coal from the J. B. B. mines, owned and operated by plaintiff, was generally good coal, and was, when properly mined and delivered in the cars, accepted in the market as Standard Pocahontas ROM coal. The witnesses for plaintiff and defendant, however, differ as to the proper manner for preparing the coal for shipment at the mines. One or two of defendant's witnesses say that, at some mines at least, the coal is first run over screens, and the lump, egg, nut and slack thereby separated and delivered on to different tables, where it is picked and the impurities removed, and when so treated, Standard Pocahontas ROM coal is produced by reassembling the different lots in about the proportion it comes from the mine, namely, 40% to 50% lump, egg and nut, and 50% to 60% slack, and then delivered in to the cars for shipment. It is proven and agreed that the J. B. B. mines have no equip-

ment for purifying and preparing the coal for market in this way; but witnesses for plaintiff say that Standard Pocahontas ROM coal does not call for such treatment; that run of mine means the coal just as it is mined and hauled out of the mine and dumped into the cars. Notwithstanding this claim, plaintiff's manager at Bluefield says on cross-examination that Standard Pocahontas run of mine for the United States Navy is fixed as to quality by chemical analysis, but that when sold elsewhere the designation Standard Pocahontas ROM has no meaning other than run of mine. Accepting this as the true basis for marketing the coal, however, the evidence satisfies us that run of the mine coal from the mines of plaintiff would produce lump, egg, nut and slack in about the proportion named, that is, 40% to 50% lump, egg and nut, and 50% to 60% slack, and that the chemical analysis should not show over 4% to 6% ash, and that a showing of a greater percent. of ash would mean dirty coal, not properly classified as Standard Pocahontas ROM coal.

But whatever may be the true method of producing and classifying Standard Pocahontas ROM coal, it is conceded by plaintiff that coal so classified and sold in the market, whether at the seaboard or inland, has good heat producing and other qualities, and is free from impurities rendering it practically worthless for steam and domestic purposes. So that for the purposes of this case it becomes of little importance whether the one or another method of producing such coal be the proper one; to answer the reasonable requirements of such coal for steam or domestic uses it should come up to the quality of coal sold as Standard Pocahontas ROM coal. Otherwise the seller could not know what he was selling, nor the buyer what he has contracted for. After this case arose the plaintiff took samples by pick from the face of one of its mines and had them analyzed, and proved by this analysis that they showed a low percentage of ash, not over 4%; and plaintiff proved by the same witnesses that the average per centum of ash in the Standard Pocahontas ROM coal runs not to exceed 7% of ash. The customer of defendant, the Ford Motor Company, in rejecting the particular coal in question, replied that the coal in the two cars rejected showed an ash test of over 12%. Objection was made to this evidence because hearsay, the chemist of the Ford Motor Company who made the test not being found or examined; but this was the ground of objection by the Ford Motor Company, and it is conceded that a coal showing this high a percentage of ash would be a dirty coal, and much higher showing than the coal from the Pocahontas field should develop. However, defendant does not rely wholly on the test supposed to have been made by the Ford Motor Company. After

the coal was rejected a representative of the defendant was sent to Detroit, and was told that he might have it analyzed at the Ford company's expense, and if it showed the proper test, the Ford company would take it and pay for it. The coal was identified by the numbers of the cars in which it was shipped. Defendant's representative concluded that it was useless to have the test made, and he set out to make the best disposition of the coal that he could. He succeeded in selling both loads to J. W. Dykstra & Company, a coal dealer at Detroit, at the price shown in defendant's recoupment, who in turn disposed of car I. C. 118519 to the Peoples Coal & Coke Company, dealers at Detroit, and the other car N. & W. 47350 to R. A. Holland at Walkerville, Ontario. Each purchaser swears that the coal in the car purchased was not Standard Pocahontas coal. The purchaser of I. C. car No. 118519 said it looked like nut, pea and slack; and the witness Michalak, of the Peoples Coal & Coke Company, swears that the car bought by his company was mostly fine slack and was mixed with sand; that one purchaser to whom he sold a part of it complained, and when he went to investigate he found his furnace choked; that he advised buying some lump coal to mix with the other, which was done, and still it would not work in the furnace, and he had to remove the coal from the cellar of his customer; that other complaints were made by other customers; that they still had a greater part of the coal on hand; and that his company had complained to J. W. Dykstra about the coal, and had not paid for it. The Ontario customer testified to the bad qualities of his coal; said that on account of its quality the Canadian government had made him a rebate of the difference between fifty-three cents, the regular customs duty per ton on the class of coal purchased, and fourteen cents a ton, the rate on inferior coal such as he got in the car purchased. There is some evidence tending to show that exposure of the coal to weather may have accounted for the disintegration shown, but this would not account for the dirty condition and bad quality of the coal as shown by the positive evidence of the witnesses. It is conceded that these cars of coal had no substantial inspection at the mines before shipment. Plaintiff had only one inspector to inspect as many as fifty cars a day, produced at five different and widely separated mines; and he says he could not be at the mines when the coal was being run and dumped into the cars. This coal had no inspection until it reached Detroit. The purchaser at Walkerville, Ontario, says he used the coal himself and would not have purchased it at all if he had seen it beforehand. Plaintiff offered no evidence of the character of these two loads of coal except the general statement of its superintendent that it was

run of the mine coal. These cars were two of the six sold to the Ford Motor Company. The four other cars were accepted without objection. Why not these two, if Standard Pocahontas ROM coal? There could be no reason for the Ford company rejecting these and not the four cars accepted, except that the coal was bad and inferior and not of the quality of the four other cars. There is some evidence that about the time this coal was loaded the plaintiff had been engaged in robbing its coal of egg and nut to fill orders for those grades of coal. But while significant, we do not think this fact material.

[1] Upon the whole evidence we think the plaintiff failed to make even a prima facie case of compliance with its contract, and that the verdict of the jury was contrary to the plain preponderance of the evidence. Where the verdict of the jury is contrary to the decided weight and preponderance of the evidence, notwithstanding the evidence may have justified the giving of instructions based on it, it will be set aside. *Fuccy v. Coal & Coke Ry. Co.*, 75 W. Va. 134, 141, 83 S. E. 301.

[2] But as is said it was the duty of the defendant, if the coal was not of the quality called for by the contract, to reject it and notify the plaintiff, and give it opportunity to resell or give orders for its disposition; that having accepted and sold it, defendant was bound for the full price regardless of the quality or character of the coal; and such seems to have been the theory of the trial court as evidenced by instructions given to the jury and refused. The coal was shipped, not to the defendant at Portsmouth Scales as stipulated in the order, but to the plaintiff itself, and there turned over to defendant through a joint agent. There was no opportunity there to properly inspect the coal in the cars; and it must have been known to the plaintiff that the only one there to look after the coal was the billing or shipping clerk, employed to rebill and forward the coal to defendant's customers. The coal was sold f. o. b. cars at the mines, and certainly there was no opportunity there for the defendant to inspect it. Viewing the coal from the top of the car would not ordinarily furnish adequate opportunity for inspection. In the case of *Wilson v. Wiggin*, 73 W. Va. 560, 81 S. E. 842, we held that under such circumstances the purchaser, if the goods are not of the kind and the quality contracted for, though he has not returned or offered to return them, or notified the seller of the defect, may plead the breach in recoupment of the purchase price, when the seller sues therefor. And subsequently, when this case was again before us on writ of error, we decided that the true measure of damages in such cases is the difference between the value which the goods sold would have had at the time of delivery if of the kind and quality corresponding to

the warranty, and the actual value thereof at the same time with the defects shown.

And in Virginia, the Supreme Court of Appeals held that a purchaser is not estopped from claiming damages for such breach because he has given no notice to the seller of his claim. *Eastern Ice Co. v. King*, 86 Va. 97, 102, 9 S. E. 506.

In the case here the evidence satisfies us that the defendant sold the coal at the very best price obtainable in the market, on the basis f. o. b. cars at the mines, and thereby mitigated the damages which it was entitled to recoup against plaintiff.

In so far as the instructions given and refused are not in accord with the foregoing principles, they should, on the new trial about to be awarded, be refused or modified.

The judgment will be reversed, the verdict set aside, and the defendant awarded a new trial.

(90 W. Va. 417)

DAVIS v. FISHER. (No. 4320.)

(Supreme Court of Appeals of West Virginia.
March 7, 1922.)

(Syllabus by the Court.)

1. Principal and agent §189(4)—In action on a contract, where defendant pleaded nil debet, evidence he made the contract merely as agent for disclosed principal was admissible under the general issue.

Plaintiff, on motion under the statute, sought to recover judgment for money alleged to be owing him, under a verbal contract made with defendant. Defendant pleaded nil debet, and upon the trial offered evidence tending to show that, when the alleged contract was made, he was acting as the agent of a disclosed principal and not for himself, and that plaintiff then knew he was so acting. Such evidence was admissible under the general issue, and it was error to exclude it.

2. Pleading §428(3)—In action on contract, where defendant pleaded nil debet, plaintiff not moving to require defendant to file particulars of defense cannot object to testimony admissible under such plea.

In an action for recovery of money due on contract, where defendant has filed the plea of nil debet, the plaintiff has the right under section 48, chapter 130 (sec. 4903), Code, to move the court to require the defendant to file a statement showing the particulars of his ground of defense, and, upon his failure or neglect to make such motion, he cannot, on the ground of surprise, object to evidence properly admissible under such plea.

3. Principal and agent §136(2)—Principal and not agent held bound by agent's commission contract made within actual or apparent scope of authority.

Where an agent, within the scope of his actual or apparent authority, and acting for and on behalf of his disclosed principal, makes

a contract to pay plaintiff commissions for his services in bringing about a meeting between the agent and the owner of certain timber which the principal desires to purchase, and, in consequence of which meeting, the agent procures such timber for his principal, such contract is deemed to be that of the principal, and the agent is not bound by it, unless his conduct or his express promise evinces an intention that he shall be bound personally.

4. Principal and agent — 194(4)—Refusal of instruction that defendant agent was not liable for commissions under contract if made for disclosed principal held error.

Under such circumstances it is error to refuse an instruction on behalf of the defendant agent in an action for such commissions, which told the jury that, if they believed from the evidence that the plaintiff and defendant made the contract as claimed by the plaintiff, and that at the time it was made the defendant was acting for his principal in making the contract, and that plaintiff then knew the defendant was so acting, the jury should find for the defendant, there being no claim by the plaintiff that defendant promised to pay the debt of his principal.

Error to Circuit Court, Randolph County.

Action by George E. Davis against W. H. Fisher. Verdict and judgment for plaintiff, and, from an order denying a motion to set aside a verdict and for a new trial, the defendant brings error. Judgment reversed, verdict set aside, and cause remanded for new trial.

W. B. & E. L. Maxwell, of Elkins, for plaintiff in error.

R. S. Irons and A. M. Cunningham, both of Elkins, for defendant in error.

MEREDITH, J. Plaintiff caused to be served upon defendant a notice, with affidavit attached, that on February 19, 1919, he would move the circuit court of Randolph county for judgment against him for \$540, with interest from September 1, 1918, for commissions alleged to be due him from defendant upon a verbal contract made between them, whereby defendant agreed to pay plaintiff \$1 per cord for each and every cord of locust timber taken from the lands of O. S. Armentrout in Dry Fork district in said county, for plaintiff's services and attention in securing a meeting between defendant and said Armentrout by and through which the defendant purchased said locust timber from Armentrout to the amount of 540 cords. Defendant filed his counter affidavit and plea of nil debet, and, upon a trial before a jury, a verdict was returned for the amount sued for; defendant's motion to set aside the verdict and award him a new trial was overruled; judgment was entered for plaintiff, and from that order defendant obtained a writ of error to this court. Two errors are complained of: First,

that the court erred in excluding certain evidence offered by defendant; and, second, in refusing defendant's instruction No. 6, which is as follows:

"The court instructs the jury that, if they believe from the evidence that the plaintiff and defendant did make the contract as claimed by the plaintiff, and that at the time said contract was made the defendant was acting for the Buena Vista Hardwood Company in making said contract, and that the plaintiff knew at that time that the defendant was so acting, then the jury should find for the defendant."

As these involve the same question, they may be considered together. The plaintiff offered evidence tending to show that defendant bought the Armentrout timber, and that plaintiff was instrumental in bringing Armentrout and defendant together, and for which he was to be paid \$1 per cord for all the timber purchased by defendant from Armentrout, and which amounted to 540 cords. Defendant denied any such agreement with plaintiff, and offered evidence tending to show that, when he bought the timber, he bought it for the Buena Vista Hardwood Company and not for himself, and that he was acting solely as the agent of that company, and that such was known to the plaintiff at that time; that plaintiff then had other contracts with that company by which he was furnishing it locust timber, and made his settlements for such timber with defendant as agent of the company, and received a stipulated price of \$18 per cord for all locust timber delivered by plaintiff to defendant as agent of the company, and which was the only compensation to which plaintiff was entitled by reason of his contracts made with that company.

It appears that defendant manufactured some of the Armentrout timber into locust pins for shipbuilding purposes under a contract with the Keystone Manufacturing Company, which company had bought the timber from the hardwood company. This evidence, as well as the evidence offered by defendant that he bought the timber, not for himself, but for and as agent of the hardwood company, the court excluded. It appears from the briefs filed in the case that this evidence was excluded on the theory that it could not be admitted under the general issue for two reasons: (1) That, in order to have it admitted, defendant should have filed a plea in abatement at rules, alleging the nonjoinder of the hardwood company as a cocontractor, and that this could not be done because the hardwood company was a nonresident of the state; and (2) that, before such evidence could be admitted, defendant should have filed a special plea alleging his agency so as to give the plaintiff notice of his defense.

[1, 2] As to the first objection, there was no occasion for the filing of such plea in abatement; of course, it could not be filed at rules, because the case was never at rules. Defendant did not seek to show by his evidence that the hardwood company was a cocontractor, that is, a contractor jointly liable with him in the purchase of the timber, but, on the contrary, his evidence offered and excluded tended to show that the hardwood company was the sole contractor, and defendant was not a contractor at all in any sense, either joint or several; that he was acting merely as its agent when the timber was bought, and that his agency was known to the plaintiff. The second ground of objection is equally untenable. If the plaintiff desired to know the ground of defense that would be relied on by defendant in the trial, all he needed to do was to move the court to require the defendant to file a statement showing the particular matters relied upon by him. We have no doubt the court would have readily granted it, under section 46, chapter 130 (sec. 4903) of the Code, which provides:

"In any action or motion, the court may order a statement to be filed of the particulars of the claim, or of the ground of defense; and if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the notice, declaration, or other pleading of such party so plainly as to give the adverse party notice of its character."

It will be observed that this statute applies alike to plaintiff and defendant; no such motion was made, and the plaintiff, therefore, could not properly object to the admission of defendant's evidence, because of surprise or because of lack of notice to him that it would be offered.

This evidence is clearly admissible under the general issue in this case. All the authorities so hold. As stated in 4 Minor's Inst. 770:

"Hence, under the plea of nil debet, the defendant may prove at the trial, coverture when the promise was made, lunacy, duress, infancy, release, arbitrament, accord and satisfaction, payment, a want of consideration for the promise, failure or fraud in the consideration, a former judgment for the same cause of action, illegality in the contract, as gaming, usury etc.; * * * and, in short, anything which shows that there is no existing debt."

See, also, Kittle, *Modern Law of Assumpsit*, § 364; *Insurance Co. v. Buck*, 88 Va. 517, 18 S. E. 973; *Keckley v. Union Bank*, 79 Va. 462; *Richmond Union Pas. Ry. Co. v. New York Seabeach Ry. Co.*, 95 Va. 338, 28 S. E. 573; *Bank v. Foster*, 35 W. Va. 357, 13 S. E. 996; *Sutherland v. Guthrie*, 82 W. Va. 419, 96 S. E. 61.

The evidence offered by the defendant should have been permitted to go to the jury, and its rejection was error.

But was defendant's instruction No. 6 above quoted proper in view of the evidence? Plaintiff testified:

"Mr. Fisher told me if I would get that locust—get Mr. Armentrout to sell that locust—he would give me a dollar on the cord for the locust wood, all that came off of their land, whether he brought it to Hendricks or manufactured it on the ground."

He further stated that if he (plaintiff) moved the timber to Hendricks, he was to have in addition to the dollar a cord his expenses for moving it. It appears that at that time the hardwood company had a mill at Hendricks for manufacturing the timber, but after it sold the timber to the Keystone Manufacturing Company, that company employed the defendant to manufacture the timber on the ground, so plaintiff did not move any of it.

[3, 4] If defendant as agent of the hardwood company contracted with plaintiff to pay him for his services, and plaintiff knew at that time that he was contracting with him as agent, then plaintiff's contract was made with the hardwood company.

"If an agent is acting within the scope of his actual or apparent authority, and purports to enter into a contract on behalf of the principal it is fundamental that the contract is that of the principal and all rights and obligations under it belong to him. The agent can neither enforce it, nor is he bound by it. In informal contracts it is sometimes a difficult question of fact to determine whether the agent did contract on his own behalf or on behalf of his principal. In any case the question is one of fact. The inquiry must be made, to whom was the third person justified in giving credit? If the name of the principal is disclosed, the presumption is strong of an intention to contract on behalf of the principal, and not of the agent." Williston, *Contracts*, § 281.

"Where an agent contracts on behalf of a disclosed principal, in reference to the matters within the scope of the agency, and within the scope of his authority conferred upon him, there is always a legal presumption that he intended to bind his principal and not himself personally, and that credit is extended to the principal and not to the agent; and unless credit has been given to the agent expressly or exclusively, and it was clearly his intention to assume a personal responsibility, and this is shown by clear and explicit evidence, the agent will not be personally liable on the contract." *Clark & Skyles, Agency*, § 563; *Hall v. Lauderdale*, 46 N. Y. 70.

"A person having contracted with an agent, knowing him to be such, for the rent of a piano to be used in the principal's business, cannot, by charging the account to the agent, elect to hold him for the rent, instead of the principal, and he is not precluded, by so charging, from asserting the claim against the principal." *Guest v. Burlington Opera House Co.*, 74 Iowa, 457, 38 N. W. 158; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

"Where in a chancery suit to require money to be paid on a contract it appears that one of the parties, who signed the contract, had

no interest in the subject but was acting as agent merely, and the other contracting party knew that he was acting as agent for others, no personal decree can be had against such person for the repayment of moneys paid on such contract." *Smith v. Bond et al.*, 25 W. Va. 387. See, also, *Hoon v. Hyman*, 87 W. Va. 659, 105 S. E. 925.

The instruction told the jury that, if they believed from the evidence that the parties made the contract as claimed by the plaintiff, and that at the time the contract was made the defendant was acting for the hardwood company in making the contract, that is, acting for it and in its behalf, and thus made the promise of \$1 per cord to be paid by it, and that plaintiff then knew that defendant was so contracting on behalf of the hardwood company, the jury should find for the defendant. This instruction should have been given; it was error to refuse it. We therefore reverse the judgment, set aside the verdict, and remand the case for a new trial.

(90 W. Va. 471.)

LEWIS v. WELCH WHOLESALE FLOUR & FEED CO. et al. (No. 4465.)

(Supreme Court of Appeals of West Virginia. March 7, 1922.)

(*Syllabus by the Court.*)

1. Landlord and tenant §123—Lease recognizing occupancy of part of premises by tenant and providing for subsequent surrender held not to exclude such part from lease.

A stipulation in a lease in terms demising certain buildings, which, recognizing the occupancy of part of one of them by a tenant of the lessor without indication of the character of the tenancy of the occupant, assumes subsequent vacation and surrender of possession by him, says no definite time is fixed for such vacation and surrender, and provides for an agreed abatement of the rent reserved on the entire property, until such vacation and surrender shall occur, does not except the occupied part of the property from the operation of the lease, in favor of the occupant, nor reserve it to the lessor, except for a period of time, reasonable in view of the situation and purposes of the parties to the lease and the circumstances surrounding them at the date of execution thereof.

2. Landlord and tenant §22(2)—Stipulation in lease, reserving part of building then occupied by tenant for reasonable time, demises whole premises.

Such stipulation does not make the instrument, as to the occupied part of the building, a mere contract for a lease. The entire property is demised, subject to a burden or incumbrance in favor of the occupant, consisting of right to retain possession of the occupied part thereof, for such reasonable period of time.

3. Landlord and tenant §117, (20(1))—Lease creating burden in favor of occupant by sufferance held to terminate occupant's right after expiration of reasonable time for surrendering premises.

The occupant in whose favor such burden is created is prima facie a tenant at will or by sufferance of the lessor, in the absence of disclosure of right of a higher nature in him, and such tenancy is terminated by the execution of the lease, notice thereof to him, and expiration of such reasonable period of time.

4. Landlord and tenant §291(4)—Lessee may maintain action against occupant of premises after reasonable time for surrender and notice.

After expiration of such period and demand for possession, the lessee may invoke and maintain, against such occupant, the statutory remedy known as unlawful detainer, for recovery of the possession of the part of the property so withheld.

Error to Circuit Court, McDowell County.

Action by Walter H. Lewis against the Welch Wholesale Flour & Feed Company, and others. Directed verdict for the defendants, and the plaintiff brings error. Reversed, and verdict set aside, and case remanded for new trial.

Strother, Sale, Curd & Tucker, of Welch, for plaintiff in error.

Litz & Harman and G. W. Howard, all of Welch, for defendants in error.

POFFENBARGER, P. The judgment under review on this writ of error was rendered upon a directed verdict in favor of the defendant, in an action of unlawful detainer in which the issues involved are right to possession of one floor of a certain building and damages for detention thereof.

The defendant, a corporation, was in possession of that floor at the date of the lease made to the plaintiff, as tenant of the lessor, under some sort of an agreement the nature of which is not disclosed by the evidence, and the lease recognized such possession and contained a stipulation respecting it. Failure of the lessor to put that tenant out and admit the plaintiff to possession is the occasion of this action.

O. D. Brewster, having two brick buildings on two adjoining lots, one a two-story building in course of construction and not completed, and the other a completed one-story building, one floor of the latter being then occupied by the Welch Wholesale Flour & Feed Company, a corporation in which he was a stockholder, entered into a lease with the plaintiff, February 25, 1920, by which he demised and let both buildings to him, for a term of 10 years, commencing April 1, 1920, with the privilege of renewal for a further and like term, upon certain conditions. An

annual rental of \$7,500, payable in monthly installments, was provided for in the lease, with a proportionate right of abatement of rent for uncompleted portions of the two-story building.

As to the occupied floor of the one-story building, the parties agreed as follows, by a clause inserted in the lease:

"The lessors agree with the lessee that the lessee shall be entitled to a reduction of one hundred (\$100.00) dollars per month from the said monthly rental until such a time as the said lessors or their tenants shall vacate from the first floor of the said one-story brick building, and deliver possession of the said one-story brick building to the lessee, it being understood and agreed that the lessors or their tenants are now in possession of the first floor of the said brick building, and no definite time is fixed for the lessors to vacate and surrender possession of said one-story brick building, but it being further understood and agreed that the basement under said one-story brick building is now and will be available to said lessee for use and occupancy."

Under the lease, the plaintiff took possession of all of the premises except the floor in question, and, after having verbally demanded possession of that floor, served a written notice upon the defendant, February 10, 1921, requiring vacation of it and relinquishment of the possession thereof, on or before March 31, 1921. Compliance with that requirement having been refused, the summons in this action was issued June 16, 1921, and executed June 30, 1921.

On the trial, the lease and written notice were put in evidence and supplemented by the oral testimony of the plaintiff, proving verbal demands for possession, both before and after service of the written notice, and also the amount of his damages. Thereupon the defendant tendered a statement of agreed facts, showing the interest of the lessor, directly and indirectly, in the defendant corporation, at the date of execution of the lease, and disposal thereof before institution of this action; and also offered the testimony of a witness, tending to prove verbal negotiations between the parties to the lease, resulting in the stipulation above quoted. Both the statement and the evidence of that witness were rejected by the court.

[1,2] The court's direction of a verdict for the defendant, by the giving of a peremptory instruction to find for it, seems to have been based upon the theory of nonexpiration of its term or tenancy, or lack of right of possession in the plaintiff, and not upon a defect as to parties or informality of any kind in the procedure. That the plaintiff's lease includes the entire building is incontrovertible, unless the stipulation referred to partially nullifies the express demise thereof made in the granting clause of the instrument. The two clauses read together are perfectly consistent, however, and the

latter did not except any property included in the former. It impliedly said the occupied floor should be vacated and possession thereof delivered to the lessee, and provided for an abatement of rent, until the vacation and surrender should occur. If the granting clause did not expressly demise the entire building, there would be strength in the contention that, as to the floor in question, the lease amounted to no more than a contract for a demise thereof; but it was expressly demised, and was not afterward excepted by the stipulation relied upon. On the contrary, as has been observed, the stipulation carries an implication, or rather an express assumption, that the occupied part of the building would be vacated in favor of the lessee. Hence, it is manifest, that the lease granted the plaintiff a term of 10 years in the entire building, commencing April 1, 1920, subject to an incumbrance or burden thereon, occasioned by the occupancy of a part of it, for an apparently indefinite time, by the lessors or their tenant, with a reciprocal right of abatement from the rent, provided no inconsistent term or right was reserved to the lessors or excepted in favor of their tenant.

As to that, nothing was agreed, except that the lessors or their tenants were then in possession, and that no definite time had been fixed for vacation and surrender. This agreement fails to disclose such reservation or exception, and also continues and repeats the assumption of future vacation and surrender of possession. It merely recognized the existing occupancy and stipulated that no definite time for termination thereof was fixed by it. As to the right of the occupant, if a tenant of the lessors, it is either silent or admits that the tenant had no definite term. As the tenant, if any, was not a party to the lease, nor bound by its provisions, no doubt the stipulation ought to be construed as reserving no definite right of possession in the lessors and as representing that their tenant had none. However this may be, it is obvious that no term for months or years is reserved to the lessors or excepted in favor of a third party, by any provision of the lease.

The evident purpose of the stipulation relied upon was an allowance of a reasonable period of time, after April 1, 1920, for convenient transfer of the business of the defendant from the building to some other location, during which the rent should be abated in an agreed amount. It must be allowed some effect and operation, if it may operate consistently with the other terms and provisions of the instrument. Having found one function for it, agreeable to its own terms and consistent with the expressed objects and purposes of the parties, nothing in the rules of interpretation requires allowance to it of any further scope or effect.

White v. Bailey, 65 W. Va. 573, 64 S. E. 1019, 23 L. R. A. (N. S.) 232. Functions, neither expressed nor necessarily implied, should not be added.

As the defendant set up no title in itself and relied solely upon this stipulation of the lease, which, except as aforesaid, reserved none to its landlord and admitted none in it, and more than a year after April 1, 1920, had elapsed at the date of the institution of this action a manifestly reasonable period, the court should have given the peremptory instruction requested by the plaintiff, and refused the one it gave at the instance of the defendant, if the plaintiff had right of action against the occupying tenant, to recover the possession.

[3] Lack of disclosure of any right on the part of the defendant, except a possession rightful in its inception, made it *prima facie* a tenant at will or by sufferance of the lessors, at the date of the execution of the lease to the plaintiff. The lessors held the legal title to the property and the defendant was in possession under them. Nothing further appeared then or has since been disclosed. Holding a lease of the property from the owner, effective after the lapse of a reasonable time from April 1, 1920, the plaintiff had such right respecting possession, as his lessors had at the date of execution thereof. If the occupant was then a mere tenant at will or by sufferance, as it must be deemed to have been, in the absence of disclosure of any better right, the execution of the lease terminated it as of the date on which it became effective. At and from that time, the plaintiff had, and has had, right of possession superior to that of the defendant, if the execution of the lease terminated the indefinite tenancy of the latter. It did. *Hildreth*

v. Conant, 10 Metc. (Mass.) 300; *Mizner v. Munroe*, 10 Gray (Mass.) 290; *Pratt v. Farrar*, 10 Allen (Mass.) 519; *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462; *Grundy v. Martin*, 148 Mass. 279, 9 N. E. 647; *Cofran v. Shepard*, 148 Mass. 582, 20 N. E. 181; *Underhill, Land. & Ten.* § 153; *Tiffany, Land. & Ten.* p. 1424.

[4] After notice to the tenant at will, of the execution of the lease, expiration of the reasonable time allowed by it, and demand for vacation, the plaintiff was entitled also to invoke the remedy he adopted. Our statute giving it is very liberal. Any person against whom possession of land is unlawfully detained, no matter what his right or title may be, can invoke it. Code, c. 89, § 1 (sec. 4065). It lies between lessees of the same land, in favor of him who has superior right of possession thereof. *Guffy v. Hukill*, 84 W. Va. 49, 61, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901.

Exclusion of evidence, offered by the defendant is not complained of. However no error in it is perceived. The rights of the parties depend upon the written contract which cannot be varied by parol evidence, in the absence of disclosure of a tenancy in the defendant superior in right to that of the plaintiff, and the evidence rejected was not such in character as to give any aid in the interpretation thereof, in so far as it may be deemed to be uncertain or indefinite in its terms. The declarations of the parties, as to what they intended by the language they used, are inadmissible. *Snider v. Robinett*, 78 W. Va. 88, 88 S. E. 599; *Uhl v. Ohio River R. Co.*, 51 W. Va. 106, 41 S. E. 340.

Being clearly erroneous, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(123 N. C. 248)

**HOLLY SPRINGS LAND & IMPROVEMENT
CO. v. BREWER. (No. 250.)**(Supreme Court of North Carolina. April 5,
1922.)

Appeal and error ⇨927(3)—On review of grant of motion for nonsuit, evidence construed in plaintiff's favor.

On review of grant of motion for nonsuit the evidence should be considered in the light most favorable to the plaintiff.

Appeal from Superior Court, Wake County; Connor, Judge.

Action by the Holly Springs Land & Improvement Company against W. L. Brewer. Judgment of nonsuit, and plaintiff excepts and appeals. Reversed.

P. J. Olive, of Apex, and Little & Barnes and J. W. Bailey, all of Raleigh, for appellant.

H. E. Norris and Armistead Jones & Son, all of Raleigh, for appellee.

ADAMS, J. It is alleged in the complaint that on February 17, 1916, I. D. Royal and his wife executed and delivered to the plaintiff a deed conveying certain timber situated on the land therein described, and that after the registration of the deed these grantors conveyed a part of said land to the defendant. It is also alleged that for the purpose of acquiring title to a portion of the plaintiff's timber the defendant has endeavored to hinder and delay the plaintiff in removing it, and to this end has threatened and intimidated the plaintiff's employees, and with evil intent has had one of them arrested and prosecuted for an alleged breach of the criminal law, and otherwise has wrongfully obstructed the plaintiff's right of removal. The defendant denies the material allegations of the complaint, and alleges that the plaintiff has wrongfully cut and removed a large quantity of timber of dimensions smaller than the plaintiff's deed specifies, and has otherwise damaged the land.

It is unnecessary to analyze the testimony of the plaintiff's witnesses, which covers about 24 pages of the record; but a careful perusal of the evidence, considered in the light most favorable to the plaintiff, leads us to the conclusion that the jury should have been permitted to determine the controversy between the parties. *Daniels v. Railroad*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Ann. Cas. 719; *Freeman v. Brown*, 151 N. C. 111, 65 S. E. 743; *Morton v. Lumber Co.*, 152 N. C. 54, 67 S. E. 67; *Christman v. Hilliard*, 167 N. C. 4, 82 S. E. 949; *Collins v. Cas. Co.*, 172 N. C. 543, 90 S. E. 585; *Rush v. McPherson*, 176 N. C. 563, 97 S. E. 613; *Newby v. Realty Co.*, 182 N. C. 34, 108 S. E. 323.

The judgment of nonsuit is reversed, and this will be certified for further proceedings. Reversed.

(123 N. C. 762)

STATE v. FRESHWATER. (No. 325.)(Supreme Court of North Carolina. April 5,
1922.)

1. Municipal corporations ⇨592(1)—Ordinance held void as conflicting with statutes.

Under C. S. § 2618, limiting speed of automobiles to 18 miles per hour in the residence section of a city, and to 10 miles per hour in the business section, and section 2599, making the violation of those statutes punishable by a fine not exceeding \$50 and imprisonment not more than 30 days, and section 2801, inhibiting passage of ordinance by a city contrary to the provisions of the chapter in which those statutes are found, a city ordinance limiting the speed of automobiles to 15 miles per hour in the residence section, and to 8 miles per hour in the business section, and punishing the first violation by a fine of \$5, the second by a fine of \$10, and the third by canceling the permit to operate motor vehicles, is void.

2. Municipal corporations ⇨592(1)—In case of conflict, ordinances must yield to state law.

In case of conflict between municipal ordinances and the state law, the former must yield.

Appeal from Superior Court, Alamance County; Kerr, Judge.

Bob Freshwater was convicted of violation of a city ordinance, and he appeals. Reversed.

The ordinance is as follows:

"That the speed limit on all automobiles, motor cars, electric and steam vehicles of any and all kinds shall not exceed eight miles an hour over the streets in what is known as the fire limits; and through and over any other streets of the city of Burlington the speed limit shall not exceed fifteen miles an hour; that in turning from one street to another the signal must be given, and that the mufflers on all automobiles shall not be open within the fire limits.

"Any person violating any of the provisions of this ordinance shall upon conviction before the mayor be punished by a fine of \$5.00; for the second offense or any subsequent offense he shall be punished by a fine of \$10.00; and upon conviction of the third offense the permit to operate automobiles or other motor vehicles shall be canceled."

Sections 57b, 57h.

At the close of the state's evidence the defendant moved to dismiss as in case of nonsuit. C. S. § 4643. The motion was overruled, and the defendant excepted. Verdict of guilty. Judgment, and appeal by defendant.

William I. Ward, of Graham, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

ADAMS, J. [1, 2] The ordinance is plainly in conflict with sections 2599 and 2618 of the Consolidated Statutes. Section 2601 inhibits the governing body of a municipal corporation from passing any ordinance contrary to the provisions of the chapter in which these sections are found. But, without regard to this statutory inhibition, the conflict would be fatal. Municipal ordinances are ordained for local purposes in the exercise of a delegated legislative function, and must harmonize with the general laws of the state. In case of conflict the ordinance must yield to the state law. The motion to dismiss the action should therefore have been allowed. *Washington v. Hammond*, 76 N. C. 33; *State v. Langston*, 88 N. C. 693; *State v. Brittain*, 89 N. C. 574; *State v. Keith*, 94 N. C. 933; *State v. Austin*, 114 N. C. 835, 19 S. E. 919, 25 L. R. A. 283, 41 Am. St. Rep. 817; *State v. McCoy*, 116 N. C. 1059, 21 S. E. 690; *State v. Black*, 150 N. C. 886, 64 S. E. 778. On the defendant's motion the judgment is reversed, and this will be certified.

Reversed.

(183 N. C. 249)

BOWMAN v. FIDELITY TRUST & DEVELOPMENT CO. et al. (No. 282.)

(Supreme Court of North Carolina. April 5, 1922.)

1. Trial \S 25(7)—Under court rule no error in giving defendant having burden of proof opening and closing argument.

Under Rules of Practice in the Superior Court, rule 6 (81 S. E. xvii), where at trial plaintiff tendered no issue and defendant admitted the execution of a contract, but alleged mutual cancellation, the burden being on defendant, there was no error in giving him the opening and conclusion of the argument.

2. Trial \S 260(1)—Where general charge covered issues, denial of special charge not error.

Where the law bearing on issues and evidence had been clearly and sufficiently stated in the general charge, denial of a special charge relating thereto was not error.

3. Trial \S 256(1)—Party desiring specific instruction should request it.

Where the instructions given covered the case, if plaintiff desires more specific instructions on any issue, he should request them.

Appeal from Superior Court, New Hanover County; Kerr, Judge.

Action by G. A. P. Bowman against the Fidelity Trust & Development Company and

another. From judgment for defendants, plaintiff appeals. No error.

This was an action to recover \$3,675 for alleged breach of contract. The execution of the contract was admitted by the defendant, but alleging that it had been mutually canceled and released about June 1, 1912, in consideration of a cancellation and discharge of an indebtedness of about \$800 which was then due by the plaintiff to the defendant. The plaintiff denied there was any mutual cancellation of the contract, and contended that he was wrongfully discharged by the defendant. The case was in this court on a former appeal. 170 N. C. 302, 87 S. E. 46. The jury in response to the issues found that the contract described in the complaint had been made, but that the parties to said contract thereafter mutually canceled and annulled the same, and that the plaintiff had sustained no damages. Appeal by plaintiff.

Wright & Stevens, of Wilmington, for appellant.

Jno. D. Bellamy & Sons and C. D. Weeks, all of Wilmington, for appellees.

CLARK, C. J. [1] The plaintiff tendered no issue and made no exceptions to those submitted by the court, which besides were those properly arising upon the pleadings. The plaintiff contended, however, that the court erred in giving to the defendant the opening and conclusion of the argument, but, the defendant having admitted the first issue as to the execution of the contract described in the pleading, the burden of the second, namely, the allegation of the cancellation of the contract, rested with the defendant, and the court allowed the defendant to open and conclude. This was a matter entirely in the discretion of the judge. Rule 6 of the Rules of Practice in the Superior Court (174 N. C. 848, 81 S. E. xvii) prescribed by this court, provides:

"In any case where a question shall arise as to whether the counsel for the plaintiff or the defendant shall have the reply and the conclusion of the argument the court shall decide who is so entitled and except in the cases mentioned in rule 3 (i. e. when no evidence is introduced by the defendant) its decision shall be final and not reviewable."

Besides the court properly charged that the burden was upon the defendant to establish by the evidence that there had been a mutual cancellation of the contract and also to show that the plaintiff did or could by reasonable effort and diligence have reduced the amount of his loss. The third issue as to the measure of damages was immaterial, if no error was committed as relates to the second issue. The rulings of the court as to the admission and rejection of evidence was proper.

[2, 3] The plaintiff abandoned all exceptions for refusal of the judge to charge as prayed except one:

"If the defendant had breached the contract on or before June 14, 1912, you will answer the second issue, 'No.'"

The court properly refused this prayer, except so far as he instructed the jury in the general charge, an examination of which shows that the law bearing on the evidence and issues was clearly and sufficiently stated.

It is not incumbent upon the court to present every contention of the various parties, nor to charge as to the law in every possible phase of the evidence. If counsel for the plaintiff had desired more specific instructions on any point involved, he should have so requested. The trial was principally, if not entirely, upon the evidence, and the result depended almost entirely upon the second issue as to the cancellation of the contract, in regard to which the court charged the jury that, the defendant having admitted the execution of the contract and pleaded the mutual cancellation of it, then the burden was upon it to show by the greater weight of the evidence that the contract was actually canceled and annulled, and further charged that as to the third issue:

"As to how much the contract price has been diminished and how little the plaintiff has been damaged, the burden is upon the defendant company."

Upon full consideration of all the matters presented for our consideration, we find no error.

STACY, J., took no part in the consideration and decision of this case.

(183 N. C. 267)

WILLIS et al. v. MUTUAL LOAN & TRUST CO. (No. 299.)

(Supreme Court of North Carolina. April 5, 1922.)

1. Deeds ¶97—Habendum was void at common law if repugnant to estate previously created.

The habendum clause in a deed was void at common law if it was repugnant to the estate vested by preceding parts of the deed.

2. Deeds ¶128—Rule in Shelley's Case not applicable to conveyance to grantee and bodily heirs.

Where the conveyance was to a named grantee and her bodily heirs, the rule in Shelley's Case is not applicable to make the conveyance an unconditional fee, since there is no limitation by way of remainder to the bodily heirs.

3. Deeds ¶93—Now construed to give effect to intention of parties.

The rigid technicalities of the common law for the construction of deeds have yielded to demand for a more rational construction, and now the purpose is to discover the intention of the parties, which must be gathered from the whole instrument in conformity with established principles, and the division of the deed into formal parts is not permitted to prevail against such intention.

4. Deeds ¶95—Every clause must be given effect if possible.

If possible, effect must be given to every part of a deed, and no clause shall be construed as meaningless if reasonable intentment can be found.

5. Deeds ¶127(2)—Conveyance to grantee and bodily heirs gives fee-simple estate.

A conveyance to a grantee and her bodily heirs in the premises and the habendum, followed in the warranty by the words "to the grantee and the heirs of her body," creates what was originally a conditional fee at the common law, but became a fee tail under the statute de donis conditionalibus, and was converted into an estate in fee simple by O. S. § 1734.

6. Deeds ¶120—Fee may be limited after a fee.

The former common-law rule that a fee could not be limited after a fee was changed after the enactment of the statute of uses, now O. S. § 1740, by the doctrine of springing and shifting uses, under the latter of which a fee may be limited after a fee by deed or will.

7. Deeds ¶134—Conveyance held to create fee simple, determinable by grantees dying without issue.

Where the premise and habendum of a deed created what would have been a fee-tail estate, which became a fee simple under O. S. § 1734, a last clause of a deed providing that if there were no heirs of grantee, the land should go back to grantor's estate, which under O. S. § 1737, is held to be a limitation to take effect when the grantee dies without issue living at the time of her death, the grantee received a fee-simple estate determinable in the event of her dying without issue, so that she could not convey a valid fee-simple title to the land, especially when she was 70 years of age and unmarried.

Appeal from Superior Court, Robeson County; Connor, Judge.

Controversy submitted without action by Joe Willis and another against the Mutual Loan & Trust Company. Judgment for plaintiffs and defendant appeals. Reversed.

J. S. J. Regan, unmarried and seized in fee, executed to his grantee a deed, the material parts of which are as follows:

"This deed, made this 31st day of January, 1882, by Joseph Samuel Jenkins Regan, of Robeson county, state of North Carolina, to his daughter, Mary Regan, and her bodily

heirs, of Robeson county and state of North Carolina.

"Witnesseth, that said Joseph S. J. Regan for and in consideration of the sum of \$1,000.00 doth bargain, sell and convey to said Mary Regan and her bodily heirs a tract or parcel of land in Robeson county,

"To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging, to the said Mary Regan and her bodily heirs, and to their only use and behoof forever.

"And the said J. S. J. Regan covenants that he is seized of said premises in fee and hath right to convey the same in fee simple, that the same are free from all incumbrances and that he will warrant and defend the said title to the same against the claims of all persons whatsoever, to his daughter, Mary Regan, and the heirs of her body, and if no heirs said lands shall go back to my estate."

On October 1, 1914, Mary Regan conveyed said land to Joe Willis, reserving a life estate; and on December 3, 1921, these two entered into a written agreement to convey to the defendant 50 acres of the land at the price of \$3,400. Accordingly they tendered to the defendant a deed in fee duly executed, and demanded payment of the purchase price, and the defendant refused to make payment or to accept the deed on the ground that they cannot convey a title in fee simple. Mary Regan is now more than 70 years of age, and has never been married. His honor rendered judgment for the plaintiffs. The defendant excepted and appealed. The only question is whether Joe Willis and Mary Regan can convey a title in fee.

Johnson & Johnson, of Lumberton, for appellant.

McNeill & Hackett, of Lumberton, for appellees.

ADAMS, J. [1] The plaintiffs contend that the deed should be considered with regard to its formal division into parts; that the last clause, because repugnant to the estate conveyed in the premises, is void, and in consequence that the grantor conveyed to Mary Regan an estate in fee. They rely in part upon the common-law principle that a fee acquired in the premises cannot be divested by the habendum. Blackstone says:

"The office of the habendum is properly to determine what estate or interest is granted by the deed, though this may be performed, and sometimes is performed, in the premises. In which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, the estate granted in the premises, as if a grant be 'to A. and the heirs of his body,' in the premises habendum 'to him and his heirs forever,' or vice versa; here A. has an estate tail, and a fee simple expectant thereon. But, had it been in the premises 'to him and his heirs,' habendum 'to him for life,' the habendum would be utterly void; for an estate of inheritance is vested in him before the

habendum comes, and shall not afterwards be taken away or divested by it." 2 Bl. Com. 298.

And Coke:

"The habendum hath also two parts, viz. first, to name againe the feoffee; and secondly, to limit the certaintie of the estate." 1 Coke, c. 1, § 1, 6a.

Originally used to determine the interest granted, or to lessen, enlarge, explain, or qualify the premises, the habendum was held to be void if repugnant to the estate vested by preceding parts of the deed. *Hafner v. Irwin*, 20 N. C. 570, 34 Am. Dec. 390; *Trip-lett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514. Whether this principle applied to a limitation in the warranty we need not now consider; for neither in the warranty nor in the habendum of this deed is there a fatal repugnancy, and the question presented must be resolved by other recognized rules of interpretation.

[2] The plaintiffs can derive no aid from *Shelley's Case*. There being no limitation by way of remainder to the heirs or "bodily heirs" of Mary Regan as nomen collectivum, the deed in question cannot be construed as an unconditional fee. The distinction between a determinable fee and an estate created under the rule in *Shelley's Case* is clearly drawn in numerous decisions. *Ward v. Jones*, 40 N. C. 404; *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295; *May v. Lewis*, 132 N. C. 115, 43 S. E. 550; *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172; *Puckett v. Morgan*, 158 N. C. 344, 74 S. E. 15; *Jones v. Whichard*, 163 N. C. 241, 79 S. E. 503; *Reid v. Neal*, 182 N. C. 192, 108 S. E. 769.

[3] The rigid technicalities of the common law have gradually yielded to the demand for a more rational mode of expounding deeds. Hence to discover the intention of the parties is now regarded as the chief essential in the construction of conveyances. The intention must be gathered from the whole instrument in conformity with established principles, and the division of the deed into formal parts is not permitted to prevail against such intention; for substance, not form, is the object sought.

[4] If possible, effect must be given to every part of a deed, and no clause, if reasonable intentment can be found, shall be construed as meaningless. *Springs v. Hopkins*, 171 N. C. 486, 88 S. E. 774; *Jones v. Sandlin*, 160 N. C. 155, 75 S. E. 1075; *Eason v. Eason*, 159 N. C. 540, 75 S. E. 797; *Acker v. Pridgen*, 158 N. C. 337, 74 S. E. 335; *Real Estate Co. v. Bland*, 152 N. C. 231, 67 S. E. 483; *Featherstone v. Merrimon*, 148 N. C. 199, 61 S. E. 675; *Gudger v. White*, 141 N. C. 513, 54 S. E. 386.

[5] The phrase "to Mary Regan and her bodily heirs," twice used in the premises

and once in the habendum, is followed in the warranty by the words to "Mary Regan and the heirs of her body." What was the intention of the grantor? Obviously to limit over the grantee's estate in case she should die without issue or bodily heirs. To give to the deed such construction is not inconsistent with familiar principles of law.

"A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others, * * * as the heirs of a man's body. * * * Now, with regard to the condition annexed to these fees by the common law, our ancestors held that such a gift (to a man and the heirs of his body) was a gift upon condition that it should revert to the donor if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee simple, on condition that he had issue." 2 Bl. Com., 110. "Which condition was implied in the words as well as in the intent; for in that the gift is to one and to his heirs of his body, and no further, therein it is implied that, if he have no heirs of his body, the donor shall have the land again." Willion v. Berkley, Plowd. 235.

But upon the birth of issue the donee had power to alien the fee, and thereby to bar, not only the succession of his issue, but the reversion of the donor in case his issue subsequently failed. Willion v. Berkley, supra; 2 Bl. Com. 110. To suppress the exercise of this power the nobility procured the enactment of the statute de donis conditionalibus (13 Ed. 1), which so operated that the estate was no longer alienable by the donee upon the birth of issue, but remained to the heirs of his body, and on the failure of such heirs reverted to the donor. The estate was divided into two parts, leaving in the donee a fee tail, and investing in the donor the ultimate fee simple, expectant on the failure of issue. Estates in fee simple conditional were thus converted into estates in fee tail; "and hence it is that Littleton tells us that tenant in fee tail is by virtue of the statute of Westminster the second." 2 Bl. Com., supra. But since the act of 1784 every person seized of an estate in tail shall be deemed to be seized of the same in fee simple. C. S. § 1734; Marsh v. Griffin, 136 N. C. 333, 48 S. E. 735. Eliminating the last clause, the deed therefore conveys to Mary Regan an estate in fee. What, then, is the legal effect of the words "if no heirs said lands shall go back to my estate"?

[6] At common law, because a freehold could not pass without livery of seisin, a fee

could not be limited after a fee; but after the statute of uses was enacted (27 Henry VIII, C. 10; C. S., § 1740), the judges, departing from the rigor of the common law, ingeniously devised the doctrine of springing and shifting uses, under the latter of which a fee may be limited after a fee by deed or will. If by deed, it is a conditional limitation; if by will, it is an executory devise. 2 Bl. Com. 234; Smith v. Brisson, 90 N. C. 284.

[7] The scope of the contingent limitation set forth in the last clause of the deed is defined by statute. Every contingent limitation in a deed or will made to depend upon the dying of any person without heirs, or heirs of the body, or issue, shall be held to be a limitation to take effect when such person dies not having such heir, or issue, or child living at the time of his death. C. S. § 1737; Act of 1827, 1856.

Applying these principles, we conclude that the deed should be construed as if it read, "to Mary Regan and the heirs of her body (a fee simple, C. S. § 1734) and if she should die not having such heirs or issue living at the time of her death then to the heirs of the grantor." C. S. § 1737; Patterson v. McCormick, 177 N. C. 448, 99 S. E. 401; Williams v. Blizzard, 176 N. C. 146, 98 S. E. 957; Reid v. Neal, 182 N. C. 199, 108 S. E. 769. A similar construction may be found in Smith v. Brisson, 90 N. C. 284; Buchanan v. Buchanan, 99 N. C. 308, 5 S. E. 430; Dawson v. Emmett, 151 N. C. 544, 86 S. E. 566; Smith v. Lumber Co., 155 N. C. 890, 71 S. E. 445; Rees v. Williams, 165 N. C. 201, 81 S. E. 286; Jarman v. Day, 179 N. C. 318, 102 S. E. 402. There are cases apparently to the contrary, but they were decided before the act of 1827 (C. S. § 1737). Davidson v. Davidson, 8 N. C. 163; Sanders v. Hyatt, 8 N. C. 247; Hollowell v. Kornegay, 29 N. C. 261; Weatherly v. Armfield, 30 N. C. 26; Folk v. Whitley, 30 N. C. 133. McBee's Case, 63 N. C. 332, may be considered an exception, but there the act of 1827 was evidently disregarded or overlooked. Smith v. Brisson, supra.

From these principles it follows that Mary Regan acquired under the deed of her grantor a fee simple determinable upon her dying without having heirs of her body or issue living at the time of her death, and that she and her coplaintiff cannot convey to the defendant an indefeasible estate in fee. The judgment is therefore reversed.

Reversed.

(183 N. C. 213)

M. V. MOORE & CO. v. SOUTHERN RY. CO.
(No. 541.)

(Supreme Court of North Carolina. March 22, 1922.)

1. Carriers ⇐187—Proof that box in which goods were shipped was empty when delivered made question for jury against delivering carrier.

Proof that the box in which goods were shipped was empty when delivered to the consignee by the terminal carrier made a question for the jury and required the carrier to elect between introducing testimony in exoneration and risking an adverse verdict on plaintiffs' evidence.

2. Carriers ⇐132—Presumption that liability is common-law liability and burden on party claiming different liability.

As a general rule, the liability of a common carrier is presumed to be its common-law liability, and any party attempting to prove otherwise carries the burden of showing facts and circumstances which change or affect such liability.

3. Carriers ⇐108—Liable at common law for loss or damage not due to act of God, etc.

At common law a carrier was liable for loss or damage to property in its possession not due to the act of God, the fault of the shipper, or the inherent nature or quality of goods.

4. Carriers ⇐177(1)—A carrier is liable only for its own negligence in absence of contract or statute changing rule.

In the absence of any contract or partnership agreement or constitutional or statutory provision, a common carrier is not required to transport goods beyond its line, and its obligation extends only to carriage to the end of its route and delivery to the consignee or next succeeding carrier, and the carrier, whether initial, intermediate, or terminal, is liable only for such loss or damage as results from its own negligence.

5. Commerce ⇐8(13)—Carmack Amendment in saving rights under "existing law" means existing federal law.

Under the Carmack Amendment to the Hepburn Act (U. S. Comp. St. §§ 8604a, 8604aa), providing that nothing therein shall deprive any holder of the receipt or bill of lading therein mentioned of any remedy or right of action which he has under "existing law," the "existing law" referred to is the existing federal law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Existing Law.]

6. Carriers ⇐177(3)—Under federal law receiving carrier is liable for loss or injury on connecting lines.

Under the Carmack Amendment to the Hepburn Act (U. S. Comp. St. §§ 8604a, 8604aa), requiring interstate carriers to issue a receipt or bill of lading and making the carrier liable to the lawful holder for loss, damage, or injury, the receiving carrier is conclu-

sively treated as having made a through contract and will be liable for loss or injury on any connecting line on the principle that each connecting carrier is made the agent of the initial carrier.

7. Carriers ⇐177(4)—Connecting lines not liable for initial carrier's negligence under federal law.

The Carmack Amendment to the Hepburn Act (U. S. Comp. St. §§ 8604a, 8604aa) does not expressly or impliedly make intermediate and terminal carriers the agents of the receiving carrier so as to make them liable in damages for the negligence of the initial carrier.

8. Carriers ⇐184—No recovery against delivering carrier on partnership or special contract when not alleged though proved.

Where the complaint did not allege a partnership between connecting carriers or special contract for joint transportation, but merely alleged delivery to the receiving carrier for transportation by it and connecting carriers under a bill of lading, proof of a partnership or special contract was incompetent and would not support a recovery, and liability depended on the legal import of the bill of lading itself.

9. Carriers ⇐177(4)—Under bill of lading initial carrier not connecting carrier's agent so as to impose liability for its negligence.

Under a bill of lading for transportation of goods from New York to Asheville, N. C., providing that no carrier should be liable for loss, damage, or injury not occurring on its own road, except as liability might be imposed by law, the initial carrier was not the agent of the connecting lines so as to make the terminal carrier liable for the initial carrier's negligence.

10. Carriers ⇐180(1)—Bill of lading excluding liability for loss or injury on connecting lines does not limit common-law liability.

A provision in an interstate bill of lading that no carrier should be liable for loss, damage, or injury not occurring on its own road, etc., except as liability might be imposed by law, was not a limitation of the carrier's common-law liability, as there was no common-law liability on a carrier for loss or damage not occurring on its own line and not caused by its own negligence.

Clark, C. J., dissenting.

Appeal from Superior Court, Buncombe County; Harding, Judge.

Action by M. V. Moore & Co. against the Southern Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Civil action to recover damages for the loss of merchandise tried before Harding, Judge, and a jury, at the June term, 1921, of Buncombe. Judgment for defendant. Appeal by plaintiffs.

On October 5, 1917, the plaintiffs ordered from Friedman & Co., of New York, a box of clothing which was turned over to the Pennsylvania Railroad Company for trans-

portation and delivery to the purchasers in Asheville. The Pennsylvania Railroad then issued a straight nonnegotiable bill of lading containing this provision:

"No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed." Section 2.

The defendant was the terminal carrier. The agent of the defendant in Asheville collected the freight charges and delivered the box to the plaintiffs; and the box when opened was found to contain paper and packing, but no part of the original shipment. The plaintiffs filed with the defendant a claim for the invoice price of the goods, together with the charges for freight, and brought suit against the defendant after it had refused to make payment. The Pennsylvania Railroad is not a party to the action.

The issues were answered as follows:

1. Did the initial carrier, Pennsylvania Railroad Company, receive from J. Friedman & Co., to be transported to the plaintiff at Asheville, N. C., the box containing the clothing mentioned and described in the complaint? Answer: Yes.

2. If so, was said clothing lost by reason of the negligence of the Pennsylvania Railroad Company, as alleged in the complaint? Answer: Yes.

3. If said clothing was delivered to said Pennsylvania Railroad Company, was the same lost by the negligence of the Southern Railway Company? Answer: No.

4. What damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: \$292.14, with interest from October 5, 1917.

The plaintiffs made a motion for judgment upon the verdict on the ground that the bill of lading constituted a contract or partnership by which the receiving carrier and the connecting lines became jointly and severally liable for the loss. The court's denial of the motion is assigned for error.

Lee & Ford, of Asheville, for appellants.
Martin, Rollins & Wright, of Asheville, for appellee.

ADAMS, J. [1] The case was appropriately submitted to the jury on the question of the defendant's negligence. Proof that the box was empty when delivered to the plaintiffs required of the defendant an election between introducing testimony in exoneration and risking an adverse verdict on the evidence of the plaintiffs. *Meredith v. R. R.*, 137 N. C. 478, 50 S. E. 1; *White v. Hines*, 182 N. C. 275, 109 S. E. 31. But the verdict shows that the loss was due, not to the negligence of the defendant, but to the

negligence of the initial carrier. The answer to the third issue exonerated the defendant from the charge of negligence. The question for decision, then, is this: Upon the pleadings and the proof in this cause, can the terminal carrier who collected the freight charges when the shipment was delivered be held liable in damages to the consignee for the negligence of the receiving carrier, upon bare proof of carriage on a uniform nonnegotiable bill of lading which contains the provisions hereinbefore stated? There is no contention that the defendant incurred liability by reason of the joint or concurrent negligence of separate lines independently operated.

[2-4] As a general rule, the liability of a common carrier is presumed to be its common-law liability, and any party attempting to prove otherwise carries the burden of showing facts and circumstances which change or affect such liability. *N. J. Steam Nav. Co. v. Bank*, 6 How. 344, 12 L. Ed. 465; *R. R. v. Stock Co.*, 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348; *R. R. v. Barrett*, 36 Ohio St. 448; *Jackson v. R. R.*, 23 Cal. 268; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285; 10 C. J. 110. At common law a carrier was liable for loss or damage to property in its possession, not due to the act of God, the fault of the shipper, or the inherent nature or quality of the goods; but such carrier was bound to carry the shipment only over its own line and to deliver it without damage to the next succeeding carrier. The English doctrine announced in 1841 in *Muschamp v. R. R.*, 8 Mees. & W. 421, has been repudiated by the Supreme Court of the United States and by the greater number of the American courts, and the generally accepted doctrine has been stated as follows: In the absence of any contract, or partnership agreement, or constitutional or statutory provision, a common carrier is not required to transport goods to a point beyond its line, for its obligation extends only to carriage to the end of its route and delivery to the consignee or to the next succeeding carrier; and in these circumstances the carrier, whether initial, intermediate, or terminal, is liable only for such loss or damage as results from its own negligence. In *R. R. v. Myrick* (decided in 1883) 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325, Mr. Justice Field said:

"The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: That each road, confining itself to its common law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement

will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence." *R. R. v. Ex. Co.*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; *R. R. v. R. R.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; *R. R. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *R. R. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; *McConnell v. R. R.*, 163 N. C. 504, 79 S. E. 974; *Phillips v. R. R.*, 78 N. C. 294; *Lindley v. R. R.*, 88 N. C. 550; *Rocky Mount Mills v. R. R.*, 119 N. C. 694, 25 S. E. 854, 56 Am. St. Rep. 682.

The plaintiffs insist, however, that this principle is not applicable here for the reason that it has been modified both by the Carmack Amendment to the Hepburn Law (U. S. Comp. St. §§ 8604a, 8604aa), and by the contract of the connecting carriers. It becomes material therefore to inquire, first, into the practical operation of the Carmack Amendment in its relation to intermediate and terminal carriers. This act provides:

"That any common carrier, railroad, or transportation company * * * receiving property for transportation from a point in one state * * * to a point in another state * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, * * * and no contract, receipt, rule [or] regulation * * * shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed. Provided, * * * that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law. * * *

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof." 219 U. S. 195, 31 Sup. Ct. 166, 55 L. Ed. 178, 31 L. R. A. (N. S.) 20; Act Cong. June 29, 1906, 34 Stat. 595 (U. S. Comp. St. §§ 8604a, 8604aa).

[5] The "existing law" referred to is, of course, the federal law. *Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257.

[6] Under this act, when the receiving carrier accepts an interstate shipment it is conclusively treated as having made a through contract and will be liable for loss or injury occurring on any connecting line over which the shipment may pass as well as for loss or injury occurring on its own line. *Express Co. v. Croninger*, supra; *R. R. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683. This on the principle that each

connecting carrier is made the agent of the initial carrier. In *R. R. v. Riverside Mills*, 219 U. S. 204, 31 Sup. Ct. 169, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, Mr. Justice Lurton said:

"Reduced to its final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one state to be transported to a point in another involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to his own negligence." *R. R. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516; *Commis. Co. v. R. R.*, 262 Ill. 400, 104 N. E. 666, Ann. Cas. 1915B, 89; *R. R. v. Ward* (Tex. Civ. App.) 169 S. W. 1035.

[7] By virtue of this act the intermediate and terminal carriers are made the agents of the receiving carrier; but the act does not purport in terms express or implied to make any connecting line liable in damages for the negligence of the initial carrier.

The next question raised by the plaintiffs is whether in the present case, without regard to the Carmack Amendment, there was a special contract between the several carriers by which the defendant became liable for the negligence of the carrier first receiving the shipment.

In approaching the question we do not controvert the established principle that a special contract or partnership relation among connecting lines may make the intermediate or terminal carrier liable for loss or injury, whether occurring on its own line or on the line of another connecting carrier. *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Phillips v. R. R.*, supra; *Lindley v. R. R.*, supra; *R. R. v. Myrick*, supra.

[8-10] But in the complaint there is no allegation upon which to base the application of this principle. The plaintiff does not allege either a partnership or a special contract for joint transportation. The substance of the only relevant and material allegations in the complaint is this: The goods were packed by the shippers and delivered to the receiving carrier to be transported by it and its connecting carriers to the plaintiffs in Asheville, and the bill of lading was thereupon issued. Considered in the light of section 2 in the bill of lading, the absence of an allegation of a partnership or special contract for joint transportation is all the more marked. Without allegation, proof of such partnership or special contract is incompetent and unavailing; for in our procedure is firmly embedded the principle that proof without allegation is no less fatal than allegation without proof. *McKee v. Lineberger*, 69 N. C. 217; *McLaurin v. Cronly*, 90 N. C. 50. In these circumstances the ultimate inquiry is confined to the legal im-

port of the bill of lading. Taken in connection with the allegations referred to, does the receipt or bill, itself, constitute a partnership among the connecting carriers? If, as we have seen, the Carmack Amendment does not create such partnership, we must search for an answer in the relation that would have existed between the connecting lines, by virtue of the bill of lading, if this amendment had not been enacted. Under such conditions—if the Carmack Amendment were not in force—the receiving carrier, when the shipment was tendered, would have had the right to contract either to carry the goods to their destination or to carry them safely over its own line only and then to deliver them to the next carrier. In case of the latter election, the next connecting carrier would have been the agent of the shipper; and, in case of the former, the intermediate or terminal carrier would have been the agent of the receiving carrier. In neither event would the initial carrier have been the agent of either of the connecting lines. *R. R. v. Riverside Mills*, supra; 10 C. J. 518. This conclusion is fortified by the provisions of section 2 in the bill of lading. This section is not a limitation by contract of the defendant's common-law liability; for no common-law obligation devolves upon any carrier to transport goods over lines other than its own, and hence there is no common-law liability for loss or damage not occurring on its own line and not caused by its own negligence. The plaintiffs, not having alleged a partnership or special contract, did not tender an issue relating to either question. The case turned upon the issues as to negligence, and the verdict was adverse to the plaintiffs. At the trial there was neither an allegation nor an issue of a partnership or special contract, and we hold that there was no error in the judgment of the court. The plaintiffs cited *Paper Box Co. v. R. R.*, 177 N. C. 351, 99 S. E. 23, in support of their contention; but that case and this are entirely distinct. Indeed, the question arising in the instant case has not heretofore been presented to this court for decision.

No error.

CLARK, C. J. (dissenting). On October 5, 1917, the plaintiffs purchased a bill of goods, \$290, from *Friedman & Co.*, in New York City, who delivered the same to the Pennsylvania Railroad Company, who agreed to transport them over its own and connecting lines to Asheville, N. C., and gave the plaintiffs a bill of lading to that effect. On November 3, 1917, the defendant, Southern Railway Company, delivered the box supposed to contain the shipment of goods to the plaintiffs and accepted payment in full of the freight from New York City. On opening the box it was found to contain nothing but

waste paper and trash. The plaintiffs filed with the defendant, the Southern Railway Company, their claim for the value of the goods lost and freight paid. This being refused, this action was brought.

The liability of the defendant should be settled upon the right and reason of the thing as heretofore decided, in several cases in this court. The Pennsylvania Railroad Company agreed for itself and its connecting lines to deliver the shipment in Asheville, and the defendant company ratified that contract by accepting the shipment and delivering the box to the plaintiffs and accepting payment for itself and associates of the entire freight from New York to Asheville.

It is true that the Pennsylvania Railroad Company put in the bill of lading a denial of any responsibility for default except as to carriage along its own line, but under the Carmack Amendment the Pennsylvania Railroad Company is expressly made responsible and liable for the whole transit. The initial carrier could not restrict its liability against the responsibility placed upon it by virtue of the Carmack Amendment, and, as on behalf of itself and connecting lines it assumed a joint contract to take the shipment at New York and deliver it at Asheville, it could not restrict that liability of a common carrier against the liability of any one of the lines.

In the execution of the contract to take this box of goods in New York and deliver it in Asheville, no valid restriction could exempt the defendant from liability for the goods whose shipment it accepted at the beginning of its line and the payment of the entire freight on which it accepted at its terminal point.

A partnership cannot stipulate that it will not be liable for the misconduct or negligence of any one of its partners in the transaction of the partnership business, and still more is it against public policy that one railroad company shall undertake to receive a package in New York and transport it over its own and connecting lines to Asheville, the defendant company ratifying this contract by accepting the box for shipment, transporting it along its route, and then, at its end as agent for all the lines from New York to Asheville collect freight, and then deny all liability.

This proposition was discussed and fully settled in *Mills v. R. R.*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682, and the cases in our reports which have followed that authority. Indeed, it has been held that in spite of any agreement to the contrary, or even where there is no bill of lading, there is a presumption that a terminal carrier who delivers the freight short or in bad order is liable. *R. R. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, and notes.

The defendant relies upon the headnote in *Ins. Co. v. R. R.*, 104 U. S. 146, 26 L. Ed. 679, decided in 1881, long before the Carmack Amendment rendered statutory the liability of the initial carrier, "that in the absence of a special contract, express or implied, for the safe transportation of goods to their known destination, the carrier is only bound to carry safely and deliver to the next carrier in the route"; but the decision in that case states that the facts found were that there was no through bill of lading and the bill of lading also specified that the receiving company should not be liable for any damage or deficiency beyond its terminus. Since then the Carmack Amendment has recognized that such contract as this is in fact a partnership agreement, and hence that the receiving carrier is responsible. This statute does not negative in any respect the decision in *Mills v. R. R.*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682, and numerous citations thereto in 2 *Anno*, Ed., and the Carmack Amendment is wholly illogical unless it is based upon the same principle that this court has always recognized as the basis of the decision in *Mills v. R. R.*, *supra*.

Upon the evidence the reasonable inference arose as a matter of law that the initial carrier was the duly authorized agent of the other carriers through to the point of destination, not only because of the Carmack Amendment, but upon the foundation on which that statute rested, that it was a joint contract upon the bill of lading making each the joint lines extending from New York to Asheville, a member of the partnership existing *pro hac vice* for the transportation of the shipment, and liable, more especially the initial carrier and the terminal carrier.

The liability of the carrier for nondelivery or damage to freight does not require proof of negligence to be made (as was required in this case) by the consignee, for the carrier is an insurer except against the acts of God or the public enemy. The court below erred in putting this burden on the plaintiff.

It would be a very great hardship in the transportation of freight for long distances, over several lines of road, if when the consignee brings suit against the last carrier in the joint contract and fails to locate the loss on that line, that then it must sue the next carrier and the next, and so on up through to the initial carrier, who was certainly made liable not only itself but as agent for all the others. It is easy for the joint lines, making for this occasion the continuous transportation of this shipment from New York to Asheville, to ascertain by wire or correspondence promptly, accurately, and inexpensively where the default lies. It is almost impracticable for the consignee to ascertain this fact without suing in succession each member of the line and traveling from carrier to carrier and from state to state and

employing successive lawyers to prosecute the action.

This will amount practically to a denial to the shipping public of all remedy unless the consignee should go to the expense at once of suing the initial carrier at the most distant point on the line. To require a consignee of a small shipment like this to sue in succession a half dozen carriers in order to trace and locate the loss of this \$290, or any other shipment, is a denial of justice which should not be imposed on the shipping public.

The true doctrine as laid down in *Mills v. R. R.*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682, *Gallop v. R. R.*, 173 N. C. 21, 91 S. E. 375, *Paper Box Co. v. R. R.*, 177 N. C. 351, 99 S. E. 23, and other similar cases, is thus summed up in *Paper Box Co. v. R. R.*, 177 N. C. 351, 99 S. E. 23:

"The various companies which compose, *pro hac vice*, the 'through line' over which any shipment passes, make a joint contract for their own convenience, or it may be a quasi partnership for the occasion, by which the bill of lading is given at the point of origin by the receiving company on behalf of itself and as agent for all the others down to the place of destination and on this joint contract any company on such line of through traffic can be sued."

Public policy and elemental principles of justice require that the consignee for whom this transportation was received and to whom the bill of lading is given by the initial carrier on behalf of all the carriers constituting the line of transportation for the goods should be held liable, leaving them to apportion among themselves or ascertain on which line the loss occurred. No mere technicality nor reference to decisions made at a time when the law in regard to liability for shipments over more than one line was in an unsettled state should govern. The only reasonable and logical ruling, especially since the Carmack Amendment has fastened liability upon the initial carrier because it is held as acting and assuming responsibility for all the carriers, is that all the carriers on the line over which it is stipulated that a given shipment shall pass are equally liable, more especially the terminal carrier who delivered the rifled package, or failed to deliver it at all, while receiving the freight. The law must conform to the modern customs and methods of transportation and to the reason of things, for, as Coke says, "Reason is the life of the law."

This line of carriers having agreed through its initial carrier, who is certainly responsible for them all under the Carmack Amendment, that these goods should be safely transported from New York to Asheville, should be jointly and severally held liable for the failure to deliver or for the delivery in a damaged condition of the goods which the

Initial carrier agreed should be delivered in Asheville. Any other ruling will fall short of the reason applicable to such shipments as laid down in the cases above cited.

(123 N. C. 195)

OLIVE v. KEARSLEY. (No. 92.)

(Supreme Court of North Carolina. March 22, 1922.)

1. Brokers \Leftrightarrow 44—Agency may be revoked before sale perfected.

Though a broker in whose hands land is placed for sale has begun negotiations, the principal has a right to revoke the agency at any time before the sale is perfected.

2. Brokers \Leftrightarrow 88(1)—Question whether agency revoked and sale made through another agent should be submitted to jury when there is evidence thereof.

Where there was ample evidence, if believed, that defendant revoked a broker's agency before a sale was made, and that it was actually made by another agent whom he paid for the service, he was entitled to have this question of fact submitted to the jury.

Appeal from Superior Court, Lee County; Cranmer, Judge.

Action by W. J. Olive against G. T. Kearsley. Judgment for plaintiff, and defendant appeals. New trial granted.

This is an action by a broker on an alleged indebtedness of \$250 for making sale of land. The defendant listed the land for sale with the plaintiff and a number of other brokers, and the same was sold to one Price. The defendant was introduced to Price by one Carter (to whom the defendant paid \$25 for making the sale). The plaintiff was allowed to testify over the defendant's objection that the attendance of Price was procured by the "influence of plaintiff" acting through one McGhee, who was dead at the time of the trial. The defendant testified that he sold the land himself to Price, that plaintiff was not there, and said nothing to him about selling the land until after it was sold. The contest was over the right of the defendant to revoke the agency of brokerage. Verdict and judgment for plaintiff. Appeal by defendant.

Hoyle & Hoyle, of Greensboro, for appellant.

A. A. F. Seawell, of Sanford, for appellee.

CLARK, C. J. The court instructed the jury:

"Now it is the law in North Carolina that, when land is placed in the hands of a broker for sale and that broker had begun negotiations, the owner cannot take the matter into his own hands and complete the sale and refuse to pay

commission. Now if you find from the evidence in this case—it is not refuted that the land was placed in the hands of Olive for sale—if you find from the greater weight of the evidence in this case that he had begun negotiations and brought the buyer down, then I instruct you that the defendant could not take the matter out of his hands and avoid paying his commission."

[1] The instruction that if the broker "had begun negotiations that the owner cannot take the matter into his own hands and complete the sale and refuse to pay commission" was error. There was evidence from the defendant which denies that Olive effected the sale. He testified:

"I placed my land with Olive for sale. I listed this land with 15 or 20 concerns that sell. I told a number of others that I would pay them to send me a purchaser, among them was Abe Carter who had come from Rockingham county, and who was the first man who brought Price [the purchaser] to me. Olive said nothing to me about selling the land until after it was sold and the trade closed. Then he claimed a commission."

Abe Carter testified that the purchaser Price lived on an adjoining farm to his in Rockingham county; that he told him about the Kearsley place and he agreed to go with him to look it over and he bought the place from Kearsley.

The law applicable in this case is thus stated in *Abbott v. Hunt*, 129 N. C. in which on page 404 it is said (40 S. E. on page 119):

"An agency can be revoked at any time before a valid and binding contract, within the scope of the agency, has been made with a third party. The only exception is an agency coupled with an interest, and that must be an interest in the subject of the agency, and not merely something collateral, as commissions or compensation for making sale. *Hartley's Appeal*, 53 Pa. St. 212, 91 Am. Dec. 207, which holds that a power of attorney by which the attorney is to receive as compensation 'one-half of the net proceeds' is not a power coupled with an interest, and is revocable. This case cites a very clear enunciation of the same principle by Marshall, C. J., in *Hunt v. Rousmanier*, 8 Wheat. 174, which is also cited by this court (as to agencies to solicit insurance) in *Insurance Co. v. Williams*, 91 N. C. 69. In *Brookshire v. Vancannon*, 28 N. C. 231, it is held that a power of attorney is revocable 'at any moment before the actual execution of it.' To same purport *Wilcox v. Ewing*, 141 U. S. 627; *Mansfield v. Mansfield*, 6 Conn. 559, 16 Am. Dec. 76; *Mechem on Agency*, §§ 204-210; *Hall v. Gambrill*, 88 Fed. 709. In *Sibbald v. Iron Co.*, 83 N. Y. 378, 22 Am. Rep. 441, it is said: 'Where no time is fixed for the continuance of a contract between broker and principal, either party can terminate it at will, subject only to the ordinary requirements of good faith.' A case on 'all fours' is *Coffin v. Landis*, 46 Pa. St. 426, which holds (page 434):

'Where one as agent for another contracts to sell the land of the latter in consideration of one-half of the net proceeds of the sale, and there is no stipulation in the contract as to the duration of the employment, the principal has a right to terminate it at any time, and to discharge the agent from his service without notice, and the plaintiff (agent) cannot recover for any services rendered, or for his loss of employment after his discharge.' And almost as directly in point are the recent cases *Young v. Trainor*, 158 Ill. 428 (1895) which holds that 'a real estate broker who produces a customer after his principal has withdrawn his offer to sell, is not entitled to a commission,' and *Bailey v. Smith*, 103 Ala. 641 (1894) which is to the same effect, and *Mallonee v. Young*, 119 N. C. 549. * * *

"In *Atkinson v. Pack*, 114 N. C. 597, and *Martin v. Holley*, 104 N. C. 38, the broker had procured a purchaser at the stipulated price before the revocation of the power, and, of course, being an executed contract, the agent was entitled to his commission, and the same might be true where the revocation was in bad faith, just as the contract was about being consummated, the revocation being for the purpose of depriving the agent of his commissions. But such is not the case here."

This has been often quoted and always followed by this court. In *Thomas v. Gwyn*, 131 N. C. 461, 42 S. E. 904, *Abbott v. Hunt* was reaffirmed, the court saying that, "Where no term is fixed for the continuance of a contract, either party may terminate it at will," and this was reaffirmed in *Wilmington v. Bryan*, 141 N. C. 871, 873, 54 S. E. 543, which held that a contract of this kind, containing no limits as to time, is in law a contract terminable at the will of either party.

In *Trust Co. v. Adams*, 145 N. C. 161, 58 S. E. 1008, *Walker, J.*, states that—

"When there is no definite time fixed for the employment to sell land upon a commission, either party has a right to terminate the agreement at will, subject to the requirement of good faith under the agreement and a sale made in pursuance of its terms."

When such broker fails to complete the purchase upon the specified terms before the principal elects to terminate the agreement, the principal has the right to terminate the contract if done in good faith.

In *Wright v. Shepard*, 178 N. C. 656, 100 S. E. 587, where the defendant, as in this case, claimed that he had revoked the agency and sold the land himself, it was held that this was a question of fact which was properly submitted to the jury by the judge, and the verdict against the plaintiff was sustained. Mr. Justice Stacy was the trial judge in that case, and the able and instructive brief filed therein for the defendant cites and relies upon *Abbott v. Hunt*, supra, and *Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441, supra, and *Trust Co. v. Adams*, supra, and thus sums up the doctrine which was stated in those cases by the trial judge and affirmed by this court:

"The broker may devote his time and labor and expend his money with ever so much devotion to the interests of his employee and yet if he fails without effecting an agreement or accomplishing a bargain, or abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commission. He loses the labor and effort which was staked upon success, and in such event it matters not that after his failure and the termination of his agency what he had done proves of use and benefit to the principal."

In *Real Estate Co. v. Sasser*, 179 N. C. 497, 103 S. E. 73, it was held, *Brown, J.*, that the interest of an agent in a contract which would prevent the revocation of the agency must be in the subject-matter of the power, and not merely relate to the agent's compensation for its execution and where the principal contracts for the sale of his land by the agent, the latter to receive whatever he could get for the land over a certain price, and there is no covenant not to revoke, the former may at any time invoke the power before the completion of the deal leaving the broker to an action for damages for the expenses incurred by him and reasonable compensation for the worth of his services rendered before the revocation.

In *Hagood v. Holland*, 181 N. C. 64, 106 S. E. 154, it was held by *Stacy, J.*, that—

"A contract of agency for the sale of land for an indefinite and unstated time may be revoked at will by the owner, in the absence of agreement or covenant to the contrary" (citing *Abbott v. Hunt*, and *Real Estate Co. v. Sasser*, supra).

In *House v. Abell*, 182 N. C. 628, 109 S. E. 877, the court held that where the broker "within the terms of authority given, succeeds in bringing about a contract of sale with a responsible purchaser, he is entitled to stipulated commission, or to the reasonable worth of his services if no definite amount is specified, and his claim therefor is not affected because the principal has seen proper to voluntarily surrender his rights under the contract;" and, further "a broker who has agreed for compensation 'to procure a purchaser' for lands, has earned his commission when he effects a valid written contract for sale of the lands upon terms and with the purchaser acceptable to the owner and the voluntary failure of the vendor to compel him to do so will not defeat the broker's claim for commission." It will be seen at once that there is no conflict in these rulings to the case at bar. In the later case the contract was performed and the sale perfected, but the vendor refused to make the conveyance. But in cases like the present, where the sale was not completed, the principal has the right to revoke the agency at any time before the sale was perfected, or, if there is a controversy whether the sale was completed by the party who first "began negotia-

tions," then it was error not to submit that question of fact to the jury.

[2] In the present case there was ample evidence, if believed, not only that the defendant had revoked the agency before the sale was made, but that it was actually made by another agent whom the defendant paid for the service, and he was entitled to have this phase of the evidence presented to the jury.

For this error there must be a new trial.

(183 N. C. 747)

STATE v. MONTGOMERY. (No. 275.)

(Supreme Court of North Carolina. March 29, 1922.)

1. Rape \S 52(1) — Evidence held to sustain conviction.

In a prosecution for rape on 12 year old girl, evidence held to sustain conviction.

2. Criminal law \S 1178—Exceptions not insisted upon in brief abandoned.

Exceptions not insisted upon in brief will be considered as having been abandoned.

3. Rape \S 38(1)—Testimony of 8 year old girl who witnessed offense that she was too frightened to give alarm held admissible.

In prosecution for rape, testimony of 8 year old sister of prosecutrix, who witnessed the offense, that she was too frightened to give an alarm held admissible in explanation of her failure to give alarm.

4. Rape \S 48(1)—Testimony of mother of prosecutrix that prosecutrix complained of physical and nervous suffering shortly after commission of offense held admissible.

In prosecution for rape on 12 year old girl, testimony of the girl's mother that the girl complained of physical and nervous suffering soon after the commission of the offense held admissible.

4. Criminal law \S 1038(1)—Defendant cannot complain of court's statement of his contentions in absence of objection thereto at time statement was made.

Defendant cannot on appeal complain of the court's statement of his contention in absence of objection to the statement made at time contention was stated.

5. Criminal law \S 822(14)—Instruction as to corroboration of witness by testimony as to statements made on prior occasions held not misleading.

Instruction authorizing jury to consider statements made by witness on prior occasions in corroboration of the testimony of witness, in so far as such previous statements tend to "persuade" the jury to believe as true the testimony of the witness, held not misleading in view of the charge as a whole.

7. Criminal law \S 822(10)—Instruction as to weight to be accorded testimony of character witnesses held not misleading.

In prosecution for rape, instruction as to weight to be accorded testimony of character

witnesses stating that, "if the jury find beyond a reasonable doubt that the defendant is guilty, then the question of his character cuts no figure," held not misleading in view of instructions as a whole.

8. Criminal law \S 923(2)—Denial of new trial on ground that juror expressed his opinion as to defendant's guilt before trial held properly refused.

Motion for new trial on the ground that a juror had expressed an opinion as to the defendant's guilt before the trial held properly refused where the juror did not intend to express his opinion as to whether the defendant was guilty, but merely stated his opinion as to the propriety of capital punishment for any person who was guilty of the crime.

Appeal from Superior Court, New Hanover County; Bond, Judge.

Clyde P. Montgomery was convicted of rape and he appeals. No error.

The evidence for the state consisted of the testimony of the prosecutrix, who was 12 years old at the time of the crime, as to the assault claimed to have been made by the defendant, the testimony of her 8 year old sister who witnessed the assault, and the testimony of her mother and father, and of a physician, that she had been violated. The defendant denied that he committed the offense, and introduced a number of character witnesses who testified as to his good character. Another witness for the defendant testified that she could have seen and heard a struggle at the place where defendant was alleged to have committed the crime, but neither saw nor heard anything indicating an assault, and that she saw prosecutrix shortly after the alleged crime, and that prosecutrix at such time appeared to be all right.—Statement by editor.

J. C. King, W. F. Jones, and Herbert McClammy, all of Wilmington, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. [1] The state's evidence, if believed, was amply sufficient to establish all the essential elements of the crime.

[2] The defendant's counsel in their brief do not insist upon their exceptions 1 and 2, and so they have abandoned them, under our rule. But there is no merit in them.

[3] Exception 3 was to testimony by Maude Smith, 8 year old sister of the prosecuting witness, Ruby Smith, that "she was too scared when she witnessed the act of defendant upon her sister to call out and alarm the neighborhood." The witness was clearly entitled to give this explanation of her failure to give the alarm, its weight to be determined by the jury.

[4] Exception 4 was to admission of testimony by the mother of Ruby Smith that Ruby soon after the occurrence complained

of physical and nervous suffering. Ruby Smith, however, had previously been on the stand, and had herself testified to this suffering, and the judge told the jury that they were to consider the evidence from the mother only in so far as it tended to corroborate the statement of the girl made here, and for no other purpose. This ruling was more favorable to the defendant than he was entitled to have it. Involuntary expressions as to existing suffering are admissible in themselves when physical condition is a material question in the investigation. This was made material here by the nature of the offense.

Exceptions 5, 6, 7, and 8 were all to similar evidence, which was plainly admissible. The same observation may be made to exception 9.

[5] Exception 13 was to a part of the judge's charge in which he was stating one of the contentions of this defendant. Whether or not he stated this contention correctly does not appear from the record. If it was stated incorrectly, the defendant's counsel should have called the court's attention at the time to its incorrectness, if they deemed it incorrect. To take such an exception after the charge is delivered, and in the case on appeal, is contrary to the rule, and numerous decisions of the court.

[6] Exception 14 was to the following part of the charge, especially that in brackets:

"In earlier part of the trial, gentlemen, I called your attention to this fact, that in order to corroborate a witness the law allows another witness to testify that on prior occasions he had made the same statement that he made here as a witness on the stand, and it allows the jury to consider it, not as substantive evidence, but as corroborative evidence; that is, for this purpose: [How far does it persuade the jury to believe as true the statement made by the witness on the stand, by reason of the fact that the witness has made the same statement about the same occurrence on other occasions, if the jury find that the witness did make the same statement on prior occasions?] They have a right to consider it in that view, simply as assisting them in seeing how far are they persuaded to accept as true the statements made by the witness on the stand. Now, then, as I have said to you, it is not substantive evidence tending to prove the defendant's guilt; it is to be considered only for the purpose of corroboration, as I have outlined to you."

The criticism of the defendant's counsel is directed to the use of the word "persuade." That criticism, however, if just, would, applied as it was to corroborative statements of the prosecuting witness, Ruby Smith, tend to weaken the force of those statements; that is, the jury must be induced to believe those statements before they can give them any weight. However this may be, the jury could not, in any sense, have been misled by the use of this term, taking the whole charge together. The average ju-

ror is not a philologist. He would not stop to consider the exact meaning of a word when its immediate context interpreted it. Besides the word "persuade" is also defined as "to cause to believe."

[7] Exception 15 was taken to that portion of the judge's charge included in brackets below, as follows:

"Now the defendant contends, as I said to you just now, that he has brought a large number of witnesses here upon the question of his character. The defendant has a right to prove that his character is good if he can when he is being tried for crime, and our courts have all along said that the possession of good character by a man on trial is substantive evidence to be considered by the jury as tending, along with the other evidence, to show his innocence. [The same law says, however, that, notwithstanding the evidence as to the defendant's character, if the jury find beyond a reasonable doubt that the defendant is guilty, then the question of his character 'cuts no figure'; that is, if upon consideration of all the evidence in the case the jury say that the guilt of the defendant is proven beyond a reasonable doubt, then the question of his character no longer cuts any figure.] Because it is just as much a crime for a man of good character to violate the law as it is for a man of bad character to violate the law."

It appears that this criticism is also directed to the particular language of the judge. The use of the words "cuts no figure" may have been, as argued, unfortunate, but used as they were, and in the connection in which they were, the jury could not have misunderstood them. Almost immediately the judge returned to this subject and said:

"The prisoner contends that he has come here and admitted the occurrence all along about the selling of the greens, and things of that sort, until he got to this house, and he says he has a consistently good character, which ought to persuade you that his statement should be accepted as true; that he has brought a large number of witnesses whom you have heard upon the stand testify as to his character, and that, putting all these things together, you ought to say that you did have a reasonable doubt as to whether he did anything wrong while in the house or not."

He thus draws the attention of the jury to the very point where evidence of good character would most help or benefit the defendant. Qualified as the words criticized were by their immediate context, "If the jury find beyond a reasonable doubt that the defendant is guilty," then he would be guilty regardless of the evidence as to his character, because it is just as much a crime for a man of good character to violate the law as it is for a man of bad character to violate it; they could bear no meaning to the jury prejudicial to the defendant. His honor was stating in his characteristic way a universal truth, known as well to the jury as to himself.

Exception 16 was addressed to the judge's statement of a contention of the defendant, and the remarks heretofore made under exception 13 are applicable here.

Exception 17 was to the statement of a contention of the state, a perfectly legitimate contention under the circumstances, and, so far as the record shows, not an inaccurate statement.

[8] Exception 18 was taken to the refusal of the judge to set aside the verdict because of the expression of an opinion by one of the jurors, Ira Scott, before the trial, that the defendant was guilty, and should be electrocuted. The judge, however, considered the affidavits sustaining and contradicting this allegation, and found the following facts:

"That at various times in the place of business of Ira Scott, who served on the jury, there were allusions made by various and sundry people to the Montgomery Case, and there were at times debates or colloquies between various people in said place of business upon the rightfulness or wrongfulness of capital punishment. That at different times the juror Ira Scott made some statements in the conversations, but that all that he said was not to express any opinion as to whether or not the defendant Montgomery was or was not guilty, but to give it as his opinion that, if it was shown that he was guilty of the crime of rape, that he ought to be sent to the electric chair, and that he did no more in these conversations than to argue in favor of the rightfulness of his own belief in the rightfulness of capital punishment. The court further finds that the juror, when he was examined by both sides, stated that he had not formed or expressed any opinion as to the guilt of the defendant, and the court further finds such statement to be a fact. The court finds that he stated that he knew of nothing which would prevent his sitting on the jury and giving the prisoner and the state a fair and impartial trial of the cause, and that he went into the jury box unswayed by any impressions and formed no opinion as to the guilt or innocence of the defendant until after he had heard the evidence in the case and the judge's charge and the jury had retired to consider the case.

"In the trial of this case, when the jury was being selected, the court announced that it would regard it a proper ground of challenge as to any particular juror if he stated that he had formed and expressed an opinion either way; that is, that if any juror said that he had formed and expressed the opinion that the prisoner was guilty the defendant's counsel would be allowed to challenge him, but on the other hand if any juror said that he had formed and expressed the opinion that the prisoner was not guilty, the state would be allowed to stand him aside. The court announced that it would pursue that rule unless it led to embarrassment which would cause it to notify both sides that the rule would be rescinded and that thereafter the court would follow the decisions of the Supreme Court based upon the statement of the juror that notwithstanding the

opinion formed he could make a fair and impartial juror.

"The court further finds that, at the time the juror Scott was examined by the defendant's counsel, they had not exhausted their peremptory challenges," and "that before the juror took his seat in the box that both the State and the defendant were told by the juror, when being questioned, to what extent he had participated in the discussions as set out in the affidavit of said juror, and it further finds that the other statements in the affidavit of said Scott, in addition to those already found, are true. Upon the situation, as it was, the defendant did not challenge or offer to challenge the said juror. When examined by defendant's counsel, said juror Scott stated he had not formed or expressed opinion that the prisoner was guilty." That he had not made any such statement; that he had done no more in the conversations alleged to be the foundation for the motion than to argue in favor of capital punishment.

He further finds:

"The juror, when he was examined by counsel, stated that he had not formed or expressed any opinion as to the guilt of the defendant, and the court further finds such statement to be a fact. The court further finds that he stated, when called as juror, and on his voir dire, that he knew of nothing which would prevent his sitting on the jury and giving the prisoner and the state a fair and impartial trial of the cause and that he went into the jury box uninfluenced by any impressions, and that he formed no opinion as to the guilt or innocence of the defendant, until after he had heard the evidence in the case and the judge's charge, and the jury had retired to consider the case."

The two principal exceptions in this case are those relating to the proof of the prisoner's character and the one as to the conduct of the juror Ira Scott. As to the reference in the charge to the prisoner's character, and the manner in which it should be considered by the jury, we are clearly of the opinion that the meaning of the judge was so manifest that no intelligent juror could have mistaken it. The jury could not have supposed that the court intended to deprive the prisoner of the benefit of his former good character as a fact to be considered by them in weighing the evidence when the judge plainly meant that, if upon all the testimony, including that as to his character, they found him to be guilty beyond a reasonable doubt, they could not acquit merely because he had always borne a good character.

On the other question, the matter would largely have rested in the sound discretion of the court had the judge found the facts in some respects differently upon the question of the juror's impartiality, as in the case of *State v. Terry*, 173 N. C. 761, 92 S. E. 154, and the cases therein cited—*State v. Banner*, 149 N. C. 519, 63 S. E. 84; *State v. English*, 164 N. C. 498, 80 S. E. 72; *State v. Fos-*

ter, 172 N. C. 960, 90 S. E. 785; and State v. Bailey, 179 N. C. 724, 102 S. E. 406. But upon the facts it did not appear that the juror was not qualified.

We have given close and careful consideration to the record and all the exceptions and assignments of error, and have been unable to discover by the most diligent search any ground for a reversal.

No error.

(183 N. C. 211)

CLIFTON et al. v. DUPLIN HIGHWAY COMMISSION et al. (No. 229.)

(Supreme Court of North Carolina. March 22, 1922.)

Eminent domain §45—No limitation on kind of property specially created highway commission can condemn.

The Duplin county highway commission, created by Pub. Loc. Laws 1921, c. 447, and authorized by section 12 thereof, without any limitation, to condemn land necessary for a road, may do so irrespective of presence of dwellings, trees, and yards, the provisions of C. S. § 1714, being restricted to corporations described in section 1706, and sections 3668, 3669, and 3746 being applicable only to the county road commissioners provided for in the chapter concerning roads and highways (C. S. c. 70, art. 4, pt. 2), and the power to appropriate private property to public use extending, in the absence of restriction by Constitution or statute, to every species of property.

Appeal from Superior Court, Duplin County; Lyon, Judge.

Suit by W. T. Clifton and another against the Duplin Highway Commission and others for injunction. From an order dissolving a restraining order, plaintiffs appeal. Affirmed.

W. T. Clifton owns a life estate and Lucian Clifton the remainder in certain real estate in the town of Falson, on which is situated a dwelling occupied by W. T. Clifton, together with shade trees and yard shrubbery.

The North Carolina highway commission laid out and located a public highway extending from Warsaw northward to the Wayne county line, passing over plaintiff's land, thence on to the Virginia line. Under competitive bidding the state highway commission let the construction of the highway at the place in question to the defendant Lacey, who has completed a considerable part of the work. Lacey called on the state highway commission to remove the building in the highway as laid out, and the state commission called on the Duplin county highway commission to remove the obstructions. The Duplin county commission employed J. R. Lamb to remove them at a price to be paid by the county commissioners. The defendants were preparing to move the

dwelling, when, on application of plaintiffs, Judge Lyon issued a temporary order restraining the defendants from trespassing upon or interfering with the plaintiffs' property. On the hearing the restraining order was dissolved, and the plaintiffs appealed.

The only defendants are Lamb, Lacey, and the Duplin county highway commission.

Grady & Graham, of Clinton, for appellants.

R. D. Johnson, of Warsaw, for appellees.

ADAMS, J. The Duplin county highway commission was created by act of the General Assembly at the regular session of 1921, and is not one of the corporations included in section 1706 of the Consolidated Statutes. Pub. Loc. Laws 1921, c. 447. The provisions of section 1714 are restricted to the corporations described in section 1706, and therefore do not apply to the defendant. In like manner sections 3668, 3669, and 3746 are applicable only to the county road commissions provided for in the chapter concerning roads and highways. C. S. c. 70, art. 4, pt. 2. The defendant is not one of these commissions. Whether the state highway commission entered into a contract with the Duplin county commission under section 3592 does not definitely appear, and under the circumstances is immaterial. The state commission is not a party to the action, and, as the defendants entered upon the property under the alleged authority of the Duplin county commission, the right to condemn the property of the plaintiffs must be determined by the provisions of the act under which the latter commission was created. P. L. L. 1921, c. 447. Section 12 in part is as follows:

"That the highway commission shall have power, on petition or on their own motion, to relocate, construct, widen or otherwise change public roads or parts thereof, and to lay out and construct new roads or parts thereof, and to lay out and construct new roads when in their judgment the same will be advantageous to public travel, and for such purposes are authorized through their agents to enter upon lands to make the necessary surveys. Before doing any work or construction, apart from the surveys, the board shall give to the owner of the land over which the proposed new road or change of road may run at least five (5) days notice in writing of a time and place, when and where, the highway commission will consider the question of condemning the land. If the landowner be a minor or insane, such notice shall be given to him and his guardian, or if there be no guardian, to the person with whom he is living. If the landowner be a nonresident, or cannot be found within the county, such notice shall be mailed to his last known address and publication made in a newspaper in Duplin county, at least twenty (20) days before the hearing. If the highway commission shall find the proposed improvement advantageous to

public travel, and shall decide to condemn the land necessary for the road, they shall so declare and enter the order of condemnation in their minutes. Upon the question of condemnation, the findings and order of the board shall be subject to review by appeal to superior court. No strip of land wider than forty (40) feet, with such additional width as may be necessary for cuts and fills, shall be so required by condemnation. Upon making the order of condemnation the highway commission shall have authority through its agents, to immediately take possession of the land described in the order and proceed to construct the said road."

The procedure for ascertaining the compensation also is set forth, but it in no way affects the right of condemnation.

It will be observed that this act contains no such limitation as is provided in the statutes heretofore referred to with respect to dwellings, trees, or yards. In the absence of constitutional or statutory restriction, the power of the state to appropriate private property to public use extends to every species of property within its territorial jurisdiction. *Richmond R. Co. v. L. R. Co.*, 13 How. 71, 14 L. Ed. 55; *Eastern R. Co. v. Boston R. Co.*, 111 Mass. 125, 15 Am. Rep. 13; 20 C. J. 587; *R. R. v. Davis*, 19 N. C. 452; *Wissler v. Yaddin Co.*, 158 N. C. 466, 74 S. E. 460; *Lewis on Em. Dom.* § 411.

We are of opinion that under the circumstances of this case the defendants have a right to proceed as authorized by the Legislature, and that the order of his honor dissolving the restraining order should be affirmed.

Judgment affirmed.

(183 N. C. 235)

HARRIS v. MANGUM. (No. 252.)

(Supreme Court of North Carolina. March 20, 1922.)

1. Steam — Res ipsa loquitur doctrine applicable to explosion of boiler.

In the absence of an explanation, the bursting of a boiler justly and reasonably warrants an inference of negligence within the doctrine of *res ipsa loquitur*, which in its distinctive sense permits negligence to be inferred from the physical cause of an accident.

2. Master and servant — 265(5) — Res ipsa loquitur doctrine applicable.

The doctrine of *res ipsa loquitur* may be invoked by the plaintiff in an action against an employer for an employee's death caused by the explosion of a boiler.

3. Negligence — 138(2) — Instruction on burden of proof held erroneous.

In an action for death caused by an exploding boiler, an instruction that the law raises a presumption that the explosion was due to negligence and shifts upon the defendant the burden of showing that the explosion was not neg-

ligently caused is erroneous as imposing on the defendant the burden of disproving negligence.

4. Negligence — 121(2) — Doctrine of "*res ipsa loquitur*" defined.

Where the doctrine of "*res ipsa loquitur*" applies, plaintiff, on proof of the physical cause of an accident, has a *prima facie* case of negligence; but such *prima facie* case is not a presumption in the technical sense, but simply evidence from which the jury may or may not infer negligence, and the duty then imposed on the defendant is to elect between introducing or declining to introduce evidence in rebuttal.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Res Ipsa Loquitur*.]

Appeal from Superior Court, Wake County; Bond, Judge.

Action by Nonie B. Harris, administratrix of J. C. Harris, against P. H. Mangum. From judgment for plaintiff, defendant appeals. New trial.

Civil action for the recovery of damages for the wrongful and negligent death of plaintiff's intestate, tried by Bond, Judge, and a jury, at the October-November term of the superior court of Wake. The intestate was standing near a steam boiler used by the defendant in the operation of a sawmill when the boiler exploded causing the death of the intestate. There was evidence for plaintiff tending to show that her intestate was an employee of the defendant, and evidence for defendant tending to show that he was not. The jury found that the intestate was such employee, answered the issue of negligence in favor of the plaintiff, and assessed damages. The defendant appealed.

Armistead, Jones & Son and H. E. Norris, all of Raleigh, for appellant.

R. N. Simms, J. H. Finlator and R. L. McMillan, all of Raleigh, for appellee.

ADAMS, J. Applying the doctrine of *res ipsa loquitur* to the cause of the intestate's death his honor instructed the jury as follows:

"The defendant having admitted that an explosion occurred, the law raises a presumption that the explosion was due to negligence and shifts upon the defendant the burden of showing that the explosion was not negligently caused."

This instruction the defendant assigns as error, and in our opinion his exception should be sustained. The verdict, considered in reference to his honor's charge, established as between the defendant and the intestate the relation of master and servant. In a large body of decisions, especially in those of the federal courts, the maxim *res ipsa loquitur* is not applied in actions arising from the relation of master and servant, although,

says Labatt, no satisfactory reason is given why in such cases it should not apply. Mas. and Ser. (2d Ed.) 1601. Some of the courts, emphasizing the peculiar contract of the employee who ordinarily assumes the risks incident both to his employment and to the negligence of his fellow servants, deny the applicability of the maxim in its strict and distinctive sense. To what extent these decisions may be affected by the abrogation of the common-law doctrine of fellow servants in the enactment of the federal Employers' Liability Act is not germane to this discussion. *Jones v. R. R.*, 176 N. C. 260, 97 S. E. 48. Other courts, which do not exclude the rule in cases between master and servant, nevertheless confine its application to a scope more limited than that which is generally recognized in the case of carrier and passenger. In a number of decisions rendered in this jurisdiction it is held that the maxim applies to causes originating in the relation of master and servant. *Kinney v. R. R.*, 122 N. C. 961, 30 S. E. 313; *Wright v. R. R.*, 127 N. C. 225, 37 S. E. 221; *Womble v. Grocery Co.*, 135 N. C. 474, 47 S. E. 493; *Ross v. Cotton Mills*, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. (N. S.) 298; *Hemphill v. Lumber Co.*, 141 N. C. 488, 54 S. E. 420; *Fitzgerald v. R. R.*, 141 N. C. 531, 54 S. E. 391, 6 L. R. A. (N. S.) 337.

[1, 2] In applying the maxim confusion has frequently arisen from a failure to observe the distinction between circumstantial evidence and the technical definition of *res ipsa loquitur*. This distinction is not merely theoretical; it is practically important. *Res ipsa loquitur*, in its distinctive sense, permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the accident are sufficient to carry the case to the jury on the bare question of negligence. But where the rule does not apply, the plaintiff must prove circumstances tending to show some fault of omission or commission on the part of the defendant in addition to those which indicate the physical cause of the accident. *Fitzgerald v. R. R.*, 141 N. C. 531, 54 S. E. 391, 6 L. R. A. (N. S.) 337 and note; *Byers v. Steel Co.*, 159 Fed. 347, 86 C. A. 347, 16 L. R. A. (N. S.) 214 and note.

We are not inadvertent to decisions in which it is held that the doctrine of *res ipsa loquitur* does not apply in case of injury or death caused by the explosion of a boiler; but in our opinion the better reasoning, as well as eminent judicial opinion, supports its application. The principle is embedded, not in the relation existing between the parties, but in the inherent nature and character of the act causing the injury.

"When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary

course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." *Scott v. London Co.*, 3 H. & C. 596; *Shear. & Red. on Neg.* (8th Ed.) § 58b.

When in safe condition and properly managed boilers do not usually explode; therefore, in the absence of explanation, the bursting of a boiler justly and reasonably warrants an inference of negligence. *Rose v. Trans. Co. (C. C.)* 20 Blatchf. 411, 11 Fed. 438; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Young v. Bransford*, 12 Lea (Tenn.) 232; *Judson v. Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; *Beall v. Seattle*, 28 Wash. 593, 69 Pac. 12, 61 L. R. A. 593, 92 Am. St. Rep. 892; *Lykiardopoulou v. New Orleans*, 127 La. 300, 53 South. 575, Ann. Cas. 1912A, 976; *Newton v. Texas Co.*, 180 N. C. 561, 105 S. E. 433; *Stone v. Texas Co.*, 180 N. C. 546, 105 S. E. 425, 12 A. L. R. 1297. We hold, then, upon the present record, that the plaintiff had a right to invoke in aid of her action against the defendant the doctrine of *res ipsa loquitur*.

[3] In our opinion, however, his honor's instruction is subject to the criticism of imposing upon the defendant the burden of disproving negligence. *Furniture Co. v. Ex. Co.*, 144 N. C. 639, 57 S. E. 458; *Stewart v. Carpet Co.*, 138 N. C. 61, 50 S. E. 562; *Ross v. Cotton Mills*, supra; *Womble v. Grocery Co.*, supra; *Overcash v. Electric Co.*, 144 N. C. 573, 57 S. E. 377, 12 Ann. Cas. 1040; *Page v. Man. Co.*, 180 N. C. 335, 104 S. E. 669. In the last of these cases Walker, J., said:

"It is true that expressions are to be found in some of our cases, filtered there from two or three cases based on the English rule, which justified his honor's charge, but since they were decided we have adhered to the true and correct rule, which is stated in *Stewart v. Carpet Co.*, supra; *Womble v. Grocery Co.*, supra; *Cox v. R. R.*, supra; *Shepard v. Tel. Co.*, supra, and many other cases, and which we have applied in this case, the substance of which is that the burden to prove his case is always on the plaintiff, whether the defendant introduces evidence or not. Where we have said 'it is the duty of the defendant to go forward with his proof,' it was only meant in the sense that if he expects to win it is his duty to do so or take the risk of an adverse verdict, and not that any burden of proof rested upon him. He pleads no affirmative defense but the general issue, and this puts the burden throughout the case on the plaintiff, who must recover, if at all, by establishing his case by the greater weight of evidence. The Supreme Court of the United States has so stated the rule, and it referred with approval to our cases above cited. We say this much again, in the hope that the rule, as we have stated it, may hereafter be considered as the correct one."

For the purpose of calling attention to inconsistent expressions in some of the decisions

of this court, we undertook at the last term to review the cases in which the burden of the issue and the "burden of proof" are discussed. *White v. Hines*, 182 N. C. 275, 109 S. E. 31. The origin of these inconsistencies may perhaps be found in the application against the defendant of the words "presumption" and "burden of proof." In some of the decisions the word "presumption" seems unfortunately to imply the right of the plaintiff to recover unless the defendant introduces evidence in rebuttal and to this extent assumes the burden of proof; whereas, the "presumption" is nothing more than evidence to be considered by the jury. In this case the plaintiff could have rested her case as to the first issue upon proof of the explosion and her intestate's death as the proximate result; and in that event it would have devolved on the defendant to elect between introducing and declining to introduce evidence, because, although the maxim referred to was applicable, the explosion and consequent death were only evidence from which the jury in the exercise of their reason might or might not have inferred negligence. The burden of proving by the greater weight of the evidence the explosion, the death, and the proximate cause, remained with the plaintiff throughout the trial, and the burden of disproving negligence was not at any time cast upon the defendant.

In *White v. Hines*, supra, 182 N. C. 288, 109 S. E. 33, it is said:

"When the plaintiff proves, for instance, that he has been injured by the fall of an elevator, or by a derailment, or by the collision of trains, or like other cause, the doctrine of *res ipsa loquitur* applies, and the plaintiff has a prima facie case of negligence for the consideration of the jury. Such prima facie case does not necessarily establish the plaintiff's right to recover. Certainly, it does not change the burden of the issue. The defendant may offer evidence or decline to do so at the peril of an adverse verdict. If the defendant offer evidence the plaintiff may introduce additional evidence, and the jury will then say whether upon all the evidence the plaintiff has satisfied them by its preponderance that he was injured by the negligence of the defendant. * * *

"As applicable to this class of cases the rule formulated by the more recent decisions of this court is substantially as follows: In all instances of this character, after the plaintiff has established a prima facie case of negligence, if no other evidence is introduced, the jury will be fully warranted in answering the issue as to negligence in favor of the plaintiff, but will not be required to do so as a matter of law.

When such prima facie case is made, it is incumbent upon the defendant to offer proof in rebuttal of the plaintiff's case, but not to the extent of preponderating evidence. The defendant, however, is not required as a matter of law to produce evidence in rebuttal; he may decline to offer evidence at the peril of an adverse verdict. If he offer evidence, the plaintiff may introduce other evidence in reply, and the jury will finally determine whether the plaintiff is entitled by the greater weight of all the evidence to an affirmative answer to the issue; for throughout the trial the burden is upon the plaintiff to show by the greater weight of the evidence that he is entitled to such answer."

It may not be improper to direct attention to his honor's further instruction that the law raises a presumption that the explosion was due to negligence. There are decisions which apparently sustain the instruction; but again we find that certain of the decisions are inharmonious, if not directly conflicting. For example, it has been held that in case of derailment or the collision of trains, in which the doctrine of *res ipsa loquitur* applies, the law raises a presumption of negligence (*Stewart v. R. R.*, 141 N. C. 277, 53 S. E. 877; *Hemphill v. Lum Co.*, 141 N. C. 488, 54 S. E. 420); in others, that the maxim does not create a presumption, but merely carries the question of negligence to the jury (*Fitzgerald v. R. R.*, 141 N. C. 542, 54 S. E. 391, 6 L. R. A. [N. S.] 337; *Womble v. Grocery Co.*, supra; *Ross v. Cotton Mills*, supra); and in *Cox v. R. R.*, 149 N. C. 118, 62 S. E. 884, it was held that an instruction that there was a "presumption in law of negligence" was erroneous in that it raised a legal presumption of the defendant's liability and shifted the burden of proof to the defendant.

[4] We hold that, where the doctrine of *res ipsa loquitur* applies, the plaintiff has a prima facie case of negligence; but such prima facie case is not a presumption of law, but simply evidence from which the jury may or may not infer that the issue should be answered in favor of the plaintiff. The duty then imposed on the defendant is to elect between introducing or declining to introduce evidence in explanation or rebuttal.

We deem it unnecessary to consider the remaining exceptions.

For the reasons stated, the defendant is entitled to a new trial. *Cotton Oil Co. v. R. R.*, 183 N. C. —, 110 S. E. 660.

New trial.

(183 N. C. 207)

NOBLES et al. v. DAVENPORT. (No. 217.)

(Supreme Court of North Carolina. March 22, 1922.)

1. Trial §139(1)—When evidence sufficient to go to jury stated.

Instruction directing a verdict for defendant cannot be sustained if the evidence construed most strongly for the plaintiff will warrant a finding for him.

2. Descent and distribution §118—Whether father's conveyance to son constituted advancement held for jury.

In action involving issue as to whether father's deed to son constituted an advancement, evidence held sufficient for submission of the issue to the jury.

3. Descent and distribution §93—"Advancement" defined.

An "advancement" is an irrevocable gift in present of money or real or personal property to a child by a parent to enable the child to anticipate his inheritance to the extent of the gift.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Advancement.]

4. Descent and distribution §93—Doctrine of advancement based on presumption that parent intends equality among children.

The doctrine of advancement is based on the presumption that a parent who dies intestate intends an equality among his children in the division of his property, but such presumption is subject to rebuttal by parol evidence.

5. Descent and distribution §98—Advancement depends on intention.

In the determination of the question whether a transfer of property from parent to a child is a gift, a sale, or an advancement, the intention of the grantor at the time of the transaction, as ascertained by the circumstances surrounding the interested parties at the time the property is transferred, is a controlling element.

6. Descent and distribution §115—Presumptions with reference to advancements stated.

A substantial gift of property by a parent to his child, or a conveyance of land in consideration of love and affection, or a nominal sum, is ordinarily presumed to be an advancement; but, if the transfer is made for a valuable and adequate consideration, the presumption is to the contrary, such presumptions not being affected by a reservation of a life estate.

7. Descent and distribution §116—Father's deed to son competent on issue of whether execution of subsequent deed covering same land constituted an advancement.

In action involving issue of whether parent's conveyance of land to son was an advancement, a previously executed deed from the father to the son covering the same land held admissible.

8. Evidence §121(9), 273(4)—Testimony as to father's statements as to nature of his conveyances to children, inadmissible as res gestæ or declarations against interest.

In an action involving issue as to whether father's conveyance to son constituted an advancement, testimony as to statements made by father to witnesses as to the nature of such conveyances held properly excluded; such testimony not being competent as a part of the res gestæ, or as a declaration against the interest of the father.

9. Evidence §501(7)—Opinion as to value of land admissible though based upon personal observation of property.

Witness who was qualified to express opinion as to the value of land based upon personal observation of the property should have been permitted to give such opinion.

Appeal from Superior Court, Lenoir County; Bond, Judge.

Action by Dora Nobles and others against W. H. Davenport. Judgment for defendant, and plaintiffs appeal. New trial.

Ben Nobles and Ben Davis would have testified, if they had been permitted, as to statements made by the father with reference to the nature of his conveyances to his children.

Dora Nobles and her sister Denny Nobles (the husband of each being a party) instituted before the clerk a special proceeding against the defendant (their brother) for partition of land and accounting for advancements. The plaintiffs alleged that their father, S. H. Davenport, conveyed to Denny Nobles and to the defendant each a tract of land as an advancement, and that the petitioner Denny was willing to account. The defendant filed an answer denying that he had been advanced, and the case was transferred to the civil docket. The following issue was submitted to the jury:

"Was the conveyance of land by deed referred to in the pleadings in this cause, from S. H. Davenport to the defendant, W. H. Davenport, a settlement and advancement to said defendant?"

His honor instructed the jury upon all the evidence to answer the issue, "No." Judgment for defendant. Plaintiffs appealed.

Rouse & Rouse, of Kinston, for appellants.
Cowper, Whitaker & Allen, of Kinston, for appellee.

ADAMS, J. S. H. Davenport, father of the plaintiffs and the defendant, died intestate September 8, 1919, and his wife, in January, 1909. On October 13, 1905, he and his wife executed and delivered to Denny Nobles, one of the plaintiffs, a deed for 97 acres of land, designated a "deed of gift," reserving to the grantors a life estate. This conveyance was duly acknowledged before a justice of the peace in October, 1905, and in November,

1919, it was duly probated and registered. All the parties admit that it was intended as an advancement. On October 13, 1905, S. H. Davenport and his wife signed and acknowledged before the same justice of the peace another deed, likewise designated a "gift," purporting to convey to the defendant a tract of land containing 102 acres, and reserving a life estate to the grantors. This deed has never been registered. In each deed the consideration recited is natural love and affection. On November 15, 1910, S. H. Davenport, reserving a life estate, executed and delivered to the defendant another deed for said 102 acres, reciting as the consideration natural love and affection, and \$700 paid by the grantees. This conveyance was acknowledged by the grantor in March, 1911, and registered in the following November. Simultaneously with the execution of this deed, the defendant executed and delivered to S. H. Davenport a mortgage on said land, reciting an indebtedness to the mortgagee of \$700 and the purpose "to secure the purchase money of even date" evidenced by three notes. The mortgage was acknowledged on May 10, 1911, probated and registered on March 29, 1913, and marked satisfied on December 20, 1918. On December 26, 1918, S. H. Davenport executed and delivered to the defendant a release of his reserved life estate in the land described in the deed and mortgage.

[1,2] His honor's instruction cannot be sustained if the evidence construed most strongly for the plaintiff will warrant an affirmative answer to the issue; and we are of opinion that the evidence, thus construed, should have been submitted to the jury.

[3-8] In its legal sense an "advancement" is an irrevocable gift in presenti of money or property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance to the extent of the gift; or, as somewhat differently defined, a perfect and irrevocable gift, not required by law, made by a parent during his lifetime to his child, with the intention on the part of the donor that such gift shall represent a part or the whole of the donor's estate that the donee would be entitled to on the death of the donor intestate. 18 C. J. 911; 1 R. C. L. 653; *Thompson v. Smith*, 160 N. C. 257, 76 S. E. 1010; *Hollister v. Attmore*, 58 N. C. 373; *Meadows v. Meadows*, 33 N. C. 148. The doctrine of advancements was the subject of statutory enactment in England as early as the reign of Charles II (22 and 23 Car. II, 1682-83), and in this jurisdiction it is set forth as to both real and personal property in sections 138 and 1654(2) of Consolidated Statutes. This doctrine is based on the presumption that a parent who dies intestate intends equality among his children in the division of his property, but such presumption is subject to rebuttal by parol evidence.

The decision in *Wilkinson v. Wilkinson*, 17 N. C. 376, may be considered in connection with *Thompson v. Smith*, supra; *Griffin, Ex Parte*, 142 N. C. 116, 54 S. E. 1007; *James v. James*, 76 N. C. 331; *Harper v. Harper*, 92 N. C. 300. In the determination of the question whether a transfer of property from parent to child is a gift, a sale, or an advancement, the intention of the grantor is the controlling element. *Thompson v. Smith*, supra; *Kiger v. Terry*, 119 N. C. 456, 26 S. E. 38; *Harper v. Harper*, supra; *Bradsher v. Cannady*, 76 N. C. 445; *James v. James*, supra; *Cowan v. Tucker*, 27 N. C. 78; 1 R. C. L. 656. And only such intention as exists at the time of the transaction is to be considered. Therefore a parent's transfer of property to his child may constitute in part an advancement and in part a gift or a sale. *Walker v. Brooks*, 99 N. C. 207, 6 S. E. 63; 18 C. J. 918. In endeavoring to discover the donor's intention, we must consider the circumstances surrounding the interested parties at the time the property is transferred; for the circumstances may be such as to create a presumption of advancement. Thus a substantial gift of property by a parent to his child, or a conveyance of land in consideration of love and affection, or a nominal sum, is ordinarily presumed to be an advancement. *Thompson v. Smith*, supra; *Kiger v. Terry*, supra; *Harper v. Harper*, supra. But if the transfer is made for a valuable and adequate consideration there is no presumption of an advancement, but rather the contrary. *Kiger v. Terry*, supra; *Ex parte Griffin*, supra. Nor is the doctrine of presumptions affected by the reservation of a life estate. 18 C. J. 918, § 221.

[7] Applying these principles, although the plaintiffs declare only on the deed of 1910, we conclude that his honor should have submitted to the jury any competent evidence relating to the alleged delivery and acceptance of the deeds of 1905; relating to the actual consideration of the deed and mortgage of 1910; to the value of the land conveyed; to the circumstances under which the mortgage was canceled; and to the grantor's release of his life estate, together with any other relevant evidence tending to show the intention of the grantor at the time he executed the deed of 1910. For these reasons we hold that the plaintiffs are entitled to have the issue determined by another jury.

[8] There are exceptions to evidence which may not arise in another trial; but it is not inappropriate to say that in our opinion the proposed testimony of Benjamin Nobles and Benjamin Davis, as presented in the record, was properly excluded. In the circumstances disclosed it was not competent either as a part of the res gestae or as a declaration against the interest of the grantor. *Hicks v. Forrest*, 41 N. C. 528; *Melvin v. Bullard*, 82 N. C. 84; *Roe v. Journagan*, 175 N. C.

261, 95 S. E. 495; *Roe v. Journigan*, 181 N. C. 180, 106 S. E. 690; *Reese v. Woods*, 182 N. C. 703, 109 S. E. 846; *Tart v. Tart*, 154 N. C. 502, 70 S. E. 929, Ann. Cas. 1912A, 952, 1 R. C. L. 665 et seq.; *Elliott v. Western Coal & Mining Co.*, 243 Ill. 614, 90 N. E. 1104, 134 Am. St. Rep. 398, 17 Ann. Cas. 886.

[9] We see no sufficient reason for excluding the proposed testimony of Calvin Robinson as to the value of the land, if the court should hold that he is qualified to express an opinion based upon personal observation of the property. *Bennett v. Manufacturing Co.*, 147 N. C. 620, 61 S. E. 463; *Britt v. R. R.*, 148 N. C. 37, 61 S. E. 601.

The plaintiffs are entitled to a new trial. Let this be certified to the superior court of Lenoir county.

New trial.

(183 N. C. 228)

WHITE v. FISHERIES PRODUCTS CO.
(No. 107.)

(Supreme Court of North Carolina. March 29, 1922.)

1. Evidence \S 444(2)—Written contract may be shown to have been delivered on condition that it was not to be operative except on the happening of a contingency.

A written contract may be shown to have been delivered on condition that it was to be inoperative except on the happening of a contingency, since such evidence does not vary the written instrument, but proves the effect of delivery.

2. Evidence \S 442(1)—Parol evidence not admissible to vary terms of notes and contract.

In an action for damages for negotiating notes in violation of a contract, where each note bore a printed indorsement that it was for a cash consideration, and that the holder might cash the note before it was due, and a clause in a contract for the purchase of stock, entered into at the time of executing the notes which were given to pay for the stock, provided that no condition or agreement other than those in the contract should be binding on either the seller or buyer, an oral agreement in regard to placing the notes in escrow, being in direct contradiction to the terms of the written contract, was not admissible.

3. Fraud \S 32—Issue of fraud on maker of note held proper in suit for breach of escrow agreement.

In a maker's action for damages for negotiating notes contrary to an escrow agreement in which plaintiff alleged that defendant's agent procured the notes by false and fraudulent representations, and that he sought recovery for damages occasioned by the deceit, a refusal to submit the question of fraud to the jury was error.

Appeal from Superior Court, Bertie County; Calvert, Judge.

Action by O. F. White against the Fisheries Products Company. From judgment for plaintiff, defendant appeals. New trial.

Civil action to recover damages for an alleged wrongful conversion and negotiation of plaintiff's promissory notes in violation of the understanding and agreement between the parties that same should remain in escrow and not become operative or effective unless and until the plaintiff sold his farm for \$35,000, which he never did.

Rountree & Carr, of Wilmington, and O. H. Gulon, of Newbern, for appellant.

Winston & Matthews and Gillam & Davenport, all of Windsor, for appellee.

STACY, J. [1] Plaintiff alleges that, on June 17, 1920, he gave to the defendant's agent three promissory notes, aggregating the sum of \$11,410, due June 1, 1921, the same to be placed in the Bank of Colerain for safe-keeping, and, in the event the plaintiff sold his farm in Chowan county before the maturity of said notes, it was understood and agreed that he would take them up by paying the principal sum, with interest, and receive 761 shares of the capital stock of the Fisheries Products Company; provided, further, that should the plaintiff fail to sell his farm, as above stated, the notes were to be returned and all negotiations abandoned. Instead of depositing said notes in accordance with the above understanding and agreement, it is alleged that defendant's agent wrongfully, fraudulently, and with intent to cheat the plaintiff, negotiated said notes to the Bank of Colerain, which became an innocent purchaser thereof for value, and that the plaintiff was thereby forced to pay the same at maturity, although he had not been able to sell his farm, as contemplated, and the contingency upon which the notes were to take effect, as between the original parties, had not occurred.

The law relating to conditionally delivered contracts has been sanctioned and approved by us in a number of carefully considered decisions, and it is now very generally recognized, applied, and followed in this as well as in other jurisdictions. *Farrington v. McNeill*, 174 N. C. 420, 93 S. E. 957; *Bowser v. Tarry*, 156 N. C. 35, 72 S. E. 74; *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028; *Hughes v. Crooker*, 148 N. C. 318, 62 S. E. 429, 128 Am. St. Rep. 606; *Aden v. Doub*, 146 N. C. 10, 59 S. E. 162; *Pratt v. Chaffin*, 136 N. C. 350, 48 S. E. 768; *Kelly v. Oliver*, 113 N. C. 442, 18 S. E. 698, and *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563. It is said in *Anson on Contracts* (Am. Ed.) 318:

"The parties to a written contract may agree that until the happening of a condition, which is not put in writing, the contract is to remain inoperative."

And again, in *Wilson v. Powers*, 131 Mass. 539:

"The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced."

These excerpts are quoted with approval in *Garrison v. Machine Co.*, 159 N. C. 285, 74 S. E. 821, where the same doctrine is announced by Walker, J., in an elaborate review of the authorities on the subject now in hand.

[2] But defendant contends that the foregoing principles are not applicable to the facts of the instant case; or, at least, that the evidence tending to bring them into operation cannot be admitted without violating other equally well-known and established rules of procedure. On the back of each note, over the signature of the plaintiff, appears a printed indorsement in the following words:

"To Any Bank or Banker Anywhere: This is to certify, that this note is given as a cash consideration. Therefore it will be satisfactory to me for the holder to cash this note before it is due. And I will pay same in full at maturity to the purchaser."

In addition to this indorsement there was a clause in the contract for the purchase of the stock, duly signed by the plaintiff, as follows:

"No condition or agreement, other than those printed herein, shall be binding on either the seller or buyer."

It is clear from the foregoing indorsement and stipulation, in the contract of sale, that, in the absence of any fraud or mistake, the plaintiff will not be allowed to show the oral agreement in regard to placing the notes in escrow as this would be in direct contradiction to the terms of his written contract.

"It is a rule too firmly established in the law of evidence to need a reference to authority in its support that parol evidence will not be heard to contradict, add to, take from or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound." *Ray v. Blackwell*, 94 N. C. 10.

And to like effect are many decisions in our reports, too numerous to be cited here.

In *Walker v. Venters*, 148 N. C. 388, 62 S. E. 510, the present Chief Justice, speaking of this question, aptly said:

"It is true that a contract may be partly in writing and partly oral (except when forbidden

by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well-established rule that a contemporaneous agreement shall not contradict that which is written. The written word abides, and is not to be set aside upon the slippery memory of man."

See, also, *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399, one of the leading cases on this subject, and *Sykes v. Everett*, 167 N. C. 600, 83 S. E. 585, 4 A. L. R. 751; *Mfg. Co. v. McCormick*, 175 N. C. 277, 95 S. E. 555, L. R. A. 1918F, 572; *Bland v. Harvester Co.*, 169 N. C. 413, 86 S. E. 350; *Guano Co. v. Live Stock Co.*, 168 N. C. 447, 84 S. E. 774, L. R. A. 1915D, 875; *Thomas v. Carteret County*, 182 N. C. 374, 109 S. E. 384, and cases there cited.

[3] Plaintiff also alleges that the defendant's agent procured the notes in question by false and fraudulent representations, and he seeks, in this action, to recover for the loss thus occasioned by such deceit, etc. But there was no issue of fraud submitted to the jury. His honor held that, under *Hughes v. Crooker*, 148 N. C. 318, 62 S. E. 429, 128 Am. St. Rep. 606, such would not be necessary, and directed a verdict for the plaintiff on a simple issue of indebtedness. This, we think, was erroneous.

Upon the instant record, unless the plaintiff can make good his allegation of fraud, it appears that his recovery must be denied.

For the error as indicated, there must be a new trial or a venire de novo; and it is so ordered.

New trial.

(183 N. C. 276)

WEATHERS v. BALDWIN. (No. 336.)

(Supreme Court of North Carolina. April 5, 1922.)

1. Appeal and error \S 927(3)—On review of ruling on nonsuit, plaintiff's evidence taken as true.

On appeal from an order of nonsuit, the evidence produced by plaintiff must be taken as true, with all reasonable inferences which may be drawn therefrom.

2. Municipal corporations \S 706(6)—Evidence sufficient for jury on question of willful injury by an automobile.

Under C. S. \S 768, providing that no woman shall be arrested, except for willful injury to a person, in an action for injury from being struck by an automobile, where the evidence showed that defendant was in open violation of the laws as to running of automobiles, and her conduct was without regard for the lives and safety of others, the issue as to whether her acts were willful was for the jury.

Appeal from Superior Court, Durham County; Daniels, Judge.

Action by Ed. Weathers against Hettie Baldwin. From judgment of nonsuit, plaintiff excepts and appeals. Error, and new trial.

This action was brought by the plaintiff to recover for injuries alleged to have been inflicted upon him by the willful wrong of the defendant in driving her motorcar against the plaintiff on the public streets of Apex. Issues were submitted to the jury, and verdict returned by them for \$1,250, and judgment entered thereon. At a subsequent term, upon a motion of the defendant to set aside the verdict and judgment, the court refused to do so, but reduced the amount of the judgment to \$1,000, and set aside the finding as to willful injury, and ordered that an issue as to the injury being willful be submitted to a jury at a subsequent term of the court. The issue was accordingly submitted to the jury, and evidence was taken upon the same, and at the close of the evidence the court held that there was no evidence of willful injury and nonsuited the plaintiff as to that issue.

Ed. Weathers, plaintiff, testified in his own behalf as follows:

"My name is Ed. Weathers and have lived in Durham four or five years. I know where the town of Apex is located. It is located about 20 miles from Durham, and is on the Seaboard Air Line Railway, between Raleigh and Hamlet, N. C. I went down to Apex on the 9th day of May, 1920. I was down there on Sunday, and went to or started to a funeral to be held at church. Apex is a good-sized town, and has a good many business houses. I was walking on the main street in the business section of the town, and at the intersection of two streets, when an automobile ran into me, driven by the defendant, Hettie Baldwin. At the time I was struck I was on the sidewalk, or the line of the sidewalk at the intersection of two streets. At that time I was going in the direction of the church, and it was 10 or 11 o'clock, I think. I heard a noise, at the place I was struck, and just as I turned around to see, the automobile was right on me, and I was knocked down like this (describing manner). The place where I was struck was in the business section, where there are many stores, and I think a bank was on one corner, and a drug store on the other. I can hear well, and as I heard the noise I looked around and was immediately struck. The white people were having church meetings, and there were lots of people on the street. The church was just above where I was struck. Hettie Baldwin approached me from the rear, at the rate, in my opinion, of 25 or 30 miles an hour. I was going in a southerly direction, and she was going south in the direction of New Hill. She neither blew her horn nor gave any signal of her approach. I do not know how far her car ran after hitting me, but she went some distance and ran into a telegraph pole, breaking her lights and fender. I was knocked down, and learned soon afterwards that I was painfully hurt. I was bruised about the head

and body and was confined in bed for several weeks."

Cross-examination:

"The defendant ran into a post after I was struck, and I could not tell why she did. I was raised at or near Apex and had been there before. I went from Raleigh to Mississippi when young, with an uncle and aunt. I am no preacher, but went to Apex to church. I have been living in Durham since I came back from Mississippi. I got to Apex about 10 o'clock, and went there to attend a funeral. I was going down Main street, when I was struck about 10. The main street runs toward New Hill, and I reckon is called Salem street. The street runs north and south, and another street runs at right angles with it, I reckon. The street that crosses the main street, or Salem street, runs toward the railroad. I was crossing Main street, and going along the cross street. I was going toward the railroad before I turned down Main street, to my right. When I reached Main street, I was going toward New Hill. I was coming down the cross street, and was crossing from the bank building over to the next corner, across Main street. I was struck on the sidewalk after crossing Main street, and had made two or three steps going in the direction of New Hill. I went right from the bank corner to the other corner, where the street crosses, and was struck there—the corner opposite Mr. Olive's house. I do not know whether there is a drug store on the other corner or not. There is a bank on one corner, a drug store, I guess, or brick building, on the other, and Mr. Olive's house on the other. I had crossed the street, and was on the sidewalk, somewhere near the Olive residence, when I was struck. I do not think the sidewalk was paved. There was no whistle or horn blown. The first I saw or heard of the automobile, it was right on me. I was near enough, so that when I looked around I was struck. I looked around. I do not know whether I stooped or not. I fell. I do not know what part of the car struck me. Some colored person helped me up, but I do not know his name. She did not get out of the car, and if she said anything I do not know it. If she asked me whether I was hurt, I did not know. I told the colored man I was hurt. I did not say to Mr. Wall or others that I was hurt, that I remember. If I saw Mr. Seamore, Wall, or Scott, I do not know it. I do not know that they were standing near. I do not remember any white men coming to me at all; none except a big yellow fellow. He carried me to the doctor that day, but he was not at home. He carried me to the church, and turned me over to another fellow. I did not go into the church. I did not know where the church was. I lay outside on the grass under the trees. The fellow did not stay with me all the time, but my sister-in-law did."

Redirect examination:

"I did not come to Durham until that night. I came on the train, and called a physician that night.

"Q. How long was he attending you? A. Several weeks. (Objection—objection sustain-

ed. Extent of injury, together with conduct of plaintiff, admitted by the court.)

"Q. What effect did the injury have on you, whether it made you sick or not. (Objection by defendant—objection overruled. Defendant excepts.) A. I got sick and spit up blood for a week after I was struck. I lay in bed, and there was a great knot on the back of my head, caused by the blow. My bowels were swelled, and my neck was wrenched."

Recross-examination:

"I did not tell any one I was not hurt. I called Dr. Strudwick. I do not know how long he attended me. I did not have a doctor in Apex. I have not had the doctor in court."

II. W. Hursey, witness for plaintiff, testified:

"I have known Ed. Weathers since he came back from Mississippi. His character is good. I recall the occasion on which he was injured."

The issue came on to be tried, and the court held that there was no evidence of willful injury, and nonsuited the plaintiff, whereupon he excepted and appealed.

J. W. Barbee, of Durham, for appellant.

R. O. Everett, of Durham, and Percy J. Olive, of Apex, for appellee.

WALKER, J. [1, 2] We have set forth, in the statement of the case, only the testimony of the plaintiff given in his own behalf, and that of one of his witnesses, as, upon a motion to nonsuit, the evidence introduced by the plaintiff must be taken as true, and so considered with all reasonable inferences which may be drawn therefrom. *Snider v. Newell*, 132 N. C. 614, 44 S. E. 354; *Brittain v. Westhall*, 135 N. C. at page 495, 47 S. E. 616; *Biles v. Railroad Co.*, 143 N. C. 79, 55 S. E. 512. If the testimony is thus construed, the case should have been submitted to a jury to find whether the defendant had not only wrongfully injured the plaintiff, as was done at a former term of the court, but whether she committed, not only a wrongful injury, but also a willful injury. *Consol. St. § 768*, provides:

"No woman shall be arrested in any action except for willful injury to person, character or property."

It would be useless to set out here the numerous definitions of the word "willful" or "willfully"; the former being the term used in the statute. It is sufficient to consider, and adopt, one of the definitions which will answer for the purpose of this appeal. In *Jones v. Bland*, 182 N. C. 70, at page 73, 108 S. E. 344, at page 346 (16 A. L. R. 1383), the question arose as to what would constitute "willfulness or wantonness," and the court held it to be "negligence so gross as to manifest a reckless indifference to the rights of another"—citing *Everett v. Receivers*, 121

N. C. 519, 27 S. E. 991. This, as being one of the definitions of willful injury or willful tort, was accepted and approved in *Ill. Cent. R. Co. v. Leiner*, 202 Ill. 624, 67 N. E. 898, 95 Am. St. Rep. 266, and *Cin., etc., R. R. Co. v. Cooper*, 120 Ind. 469, 22 N. E. 840, 6 L. R. A. 241, 16 Am. St. Rep. 334. In the latter case the court held that it was correct to charge the jury as follows:

"To establish the charge of willfulness, as set out in the fourth paragraph of the complaint, I instruct you that an actual intent to do the particular injury alleged need not be shown; but if you find from all the evidence that the misconduct of the defendant's servants was such as to evince an utter disregard of consequences, so as to inflict the injury complained of, this may of itself tend to establish willfulness."

The court said in this connection that the instruction not only expressed correctly the rule of law applicable to such cases, but that recklessness, reaching in degree to an utter disregard of consequences, may supply the place of a specific intent. In the case of *Ill. Cent. R. R. Co. v. Leiner*, supra, it was said by the court that, to constitute willful and wanton negligence, it is not always necessary to prove that the defendant's servants are actuated by ill-will towards the plaintiff. In *East St. Louis Connecting Railway Co. v. O'Hara*, 150 Ill. 580, 37 N. E. 917, it is said:

"If it be true, as the evidence tends to show, that the defendant's servants, at the time plaintiff was injured, were running their engine in the dark, without a headlight, or a bell ringing, and at a high and dangerous rate of speed, along a much frequented street, and where many persons were likely to be passing on their way to the ferry landing or otherwise, such acts would be liable to the construction of being in wanton and willful disregard of the rights and safety of the public generally, so as to amount in law to wanton and willful negligence. And it was not necessary, in order to raise an inference of such negligence, to prove that the defendant's servants were actuated by ill will directed specifically towards the plaintiff, or to have known that he was in such position as to be likely to be injured."

Thompson on Negligence, vol. 1, § 22, thus defines a willful injury:

"An entire absence of care for the life, the person or the property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness, such as charges the person whose duty it was to exercise care, with the consequences of a willful injury."

In *Ill. Cent. R. R. Co. v. Leiner*, supra, the court approved this instruction to the jury:

"What is meant by willful and wanton misconduct is such conduct as amounts to an intentional wrong, or of such a reckless character as shows that the person or persons, guilty of such misconduct, were at the time acting in such a manner as shows that they had an utter

disregard for the safety and lives of other persons."

See, also, *Tolleson v. So. R. R. Co.*, 88 S. O. 7, 70 S. E. 311.

It may be that there is testimony in this case to show an actual intent to willfully commit the injury; but, whether this is so or not, it is sufficient to evidence an intent to do so, by inflicting injury recklessly and in total disregard of the rights and safety of others. The defendant, if the evidence be true, was in open and almost defiant violation of the statutes as to the running of automobiles in cities and towns, and her conduct can rightfully be characterized as nothing less than reckless, and as exhibiting no regard whatever for the lives and safety of others who were at the time using the streets, as they had a lawful right to do, at the hour of the morning service in the churches of a large and populous town. It is hard to conceive how the defendant could think that she would not injure some one on the streets, as she really did. But her liability to the defendant depends upon how the jury will view the testimony. She may be right, and it may so appear upon the trial of the issue; but the jury must decide the question at issue.

There was error in the ruling of the court withdrawing the issue from the jury.

New trial.

(152 Ga. 692)

COPELIN v. WILLIAMS et al. (No. 2531.)

(Supreme Court of Georgia. Feb. 17, 1922.)

(Syllabus by the Court.)

1. Action \Leftrightarrow 28—Deeds \Leftrightarrow 8—Sale by one without authority does not divest owner's title; owner cannot waive tort and sue one selling without authority for purchase price.

The plaintiffs, as heirs of Mollie Mattox, deceased, instituted an action at law against Ida Copelin, to recover an undivided interest in a described portion of a certain tract of land with mesne profits, and one-half of the proceeds of the remaining portion of the tract, which was alleged to have been sold by the defendant in her own name, under an agreement with the purchaser that she would account to plaintiffs for their interests in the purchase price. A verdict was returned in favor of the plaintiffs. The defendant made a motion for new trial, which having been overruled, she excepted. *Held:*

Where one person without lawful authority sells and conveys as his own the land of another person and receives the consideration paid therefor, such pretended sale and conveyance will not operate to divest the title of the owner, nor will the purchaser derive any title; and the owner cannot maintain an action against the vendor for the whole or any part of the purchase-price received by him. *Crews v. Heard*, 7 Ga. 60; 21 R. C. L. 923.

(a) The principle above announced does not

conflict with another well-recognized principle, applicable where personalty is tortiously converted into money, as stated in *Merchants' Bank of Macon v. Rawls*, 7 Ga. 191 (2), 50 Am. Dec. 394, and now embodied in Civ. Code 1910, § 4407, which provides: "When a transaction partakes of the nature both of a tort and a contract, the party complainant may waive the one and rely solely upon the other."

2. Mortgages \Leftrightarrow 32(6), 138—Absolute deed may be shown a mortgage by parol, when grantor in possession; under security deed, legal title is in grantee, and equitable title in grantor.

A deed absolute in form will ordinarily transfer the title of the grantor to the land; but, if the grantor remains in possession, it may be shown by parol that the deed was made to secure a debt. Where such a deed is made to secure a debt, the legal title will vest in the grantee, and the equitable title, or right to have the property reconveyed on payment of the debt, will remain in the grantor. Civ. Code 1910, § 3258; *Waller v. Dunn*, 151 Ga. 181, 106 S. E. 98.

3. Vendor and purchaser \Leftrightarrow 228(1), 239(6)—Grantee of one taking title as security takes free from equity, if he had no notice, but otherwise subject to it.

If the grantee sells and conveys the property to a third person, who takes without notice of the outstanding equity, the purchaser, as against the original grantor or his heirs at law, will acquire the legal title unaffected by such equity. If the purchaser takes with notice of such equity, he will take subject to it.

4. Mortgages \Leftrightarrow 36, 319(1)—Vendor and purchaser \Leftrightarrow 242—Burden on heirs of one conveying as security when suing to recover land.

Where an owner conveys land by a deed absolute in form, and the heirs of the grantor seek in an action at law to recover the land from a purchaser of the grantee on the basis of an equitable title arising under circumstances specified above, it being necessary that they should have had title at the commencement of the suit and that the purchaser should have bought with notice of such title, the burden would rest upon the plaintiffs to prove that the deed so executed by plaintiffs' ancestor was effective only as security for a debt, that the debt had been paid or tendered before institution of the suit, and that the defendant purchased with notice of plaintiffs' equity.

5. Sufficiency of pleadings.

No question was made as to the sufficiency of the pleadings for application of the principles stated above to the evidence in the case.

6. Charge not accurate.

The charge of the court, as complained of in the motion for new trial, did not accurately apply the principles of law ruled above; nor was the request to charge, though substantially correct, expressed in language entirely accurate and apposite.

7. Sufficiency of evidence.

As the case will go back for another trial, no ruling will be made on the sufficiency of the evidence to support the verdict.

Error from Superior Court, Bibb County; Malcolm D. Jones, Judge.

Suit by A. M. Williams and others against Ida Copelin. Judgment for plaintiffs, and defendant brings error. Reversed.

John R. L. Smith and Grady C. Harris, both of Macon, for plaintiff in error.

R. K. Hines, of Macon, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(152 Ga. 814)

JAMES et al. v. GREENE. (No. 2409.)

(Supreme Court of Georgia. Feb. 21, 1922.)

(Syllabus by the Court.)

1. Provisions of statute.

The wife cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debt of her husband; and a sale by the wife of her separate estate to a creditor of her husband in settlement of the debt of the latter is void. Civil Code 1910, § 8007.

2. Husband and wife ⇨183—Indivisible sale of separate estate partly to settle husband's debt and partly to settle wife's is void.

A sale by the wife of her separate estate, made to a creditor of her husband in extinguishment of her husband's debt in part and in settlement of the wife's debt in part, the contract being entire, and not divisible, is void. Cross v. Cordell, 149 Ga. 383, 100 S. E. 365.

3. Husband and wife ⇨183—Wife's deed to secure husband's debt being void, creditor's sale under power therein does not convey title.

The deed of the wife to her separate estate, made to a creditor of her husband to secure the debt of the latter, being void, it necessarily follows that a deed by the creditor and grantee as attorney in fact of the wife to the creditor himself, made pursuant to sale under power contained in the deed, is inoperative to convey the title.

4. Verdict not unsupported by evidence.

Accordingly, where the evidence for the defendant in ejectment tended to show that the deed to the plaintiff was made pursuant to sale under power in a deed from defendant, a married woman, to secure an indebtedness of her husband to plaintiff's lessor, the verdict for defendant was not without evidence to support it. No error is assigned on the charge of the court to the jury, nor upon any ruling of the court made during the progress of the trial.

5. New trial ⇨53—Disqualification of jurors not ground when known to losing party.

That two of the jurors were disqualified by reason of relationship to the prevailing party afforded no reason for setting aside the verdict, it affirmatively appearing, from the note of the judge in approving the grounds of the amended

motion for new trial, that the fact of such relationship was known to the losing party or his counsel prior to and at the time of the trial. Hadden v. Thompson, 118 Ga. 207 (2), 44 S. E. 1001.

Error from Superior Court, Clay County; W. C. Worrell, Judge.

Action by Mrs. D. W. James and others against Mrs. N. J. Greene. Judgment for defendant, and plaintiffs bring error. Affirmed.

On February 23, 1914, Mrs. N. J. Greene conveyed to D. W. James the land in dispute to secure an indebtedness of \$5,633.51. The deed authorized the grantee to sell the land upon default in payment of the indebtedness, and, as attorney in fact of the grantor, to execute deed to the purchaser. On March 9, 1915, pursuant to sale by the grantee under the power contained in the deed, the grantee executed and delivered to himself a deed to the premises in dispute. On April 24, 1915, D. W. James sold the land to Thomas C. Suttle, taking from the purchaser a deed to secure the purchase money, which deed likewise contained a power of sale. Subsequently D. W. James was adjudged a bankrupt, and R. O. Waters was appointed trustee in bankruptcy. Under the power contained in the deed from Suttle to James, he sold the land and executed a deed to himself as such trustee in bankruptcy. Mrs. N. J. Greene remained in possession, and ejectment was brought against her to recover the land. The principal contention of the defendant was that the debt secured by deed from defendant to D. W. James, dated February 23, 1914, was a debt of defendant's husband. Upon the trial of the case the evidence for defendant tended to show that the deed was made to secure the debt of the husband in whole or in part, and that the transaction was entire, and not divisible. The jury returned a verdict for defendant. Plaintiff made a motion for new trial, in which complaint is made that the verdict is contrary to the evidence and without evidence to support it. The special grounds of the motion are based on the alleged disqualification of two of the jurors, by reason of relationship to Mrs. Greene. Upon the hearing of the motion for new trial, the presiding judge certified that after the jury had been selected and before the introduction of evidence by either party, the attention of counsel for plaintiff was called to the alleged relationship of the particular jurors to Mrs. Greene, and that counsel stated in open court that they would "waive the point." The countershown submitted by respondent on the hearing of the motion for new trial affirmatively shows that the attention of plaintiff's counsel was called to the alleged disqualification of the par-

secular jurors at the time of the trial, as certified by the trial judge. The motion for new trial was overruled, and the plaintiff excepted.

P. D. Du Bose and Lowrey Stone, both of Blakely, Zach Arnold and P. C. King, both of Ft. Gaines, and A. L. Miller, of Edison, for plaintiffs in error.

M. C. Edwards, of Dawson, and E. R. King and Ben M. Turnipseed, both of Ft. Gaines, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(152 Ga. 665)

FLANIGAN v. PRUDENTIAL INS. CO. OF AMERICA et al. (No. 2533.)

(Supreme Court of Georgia. Feb. 16, 1922.)

(Syllabus by the Court.)

No error in denying equitable relief.

Under the pleadings and evidence in the case, the court did not err in denying the prayers for injunction and receiver and other relief sought.

Error from Superior Court, Jackson County; Blanton Fortson, Judge.

Suit between J. R. Flanigan and the Prudential Insurance Company of America and others. Judgment for the latter, and the former brings error. Affirmed.

P. Cooley, of Jefferson, for plaintiff in error.

J. S. Ayers, A. O. Brown, and R. L. J. & S. J. Smith, all of Jefferson, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(152 Ga. 826)

ADDER MACH. CO. v. HAWES. (No. 2620.)

(Supreme Court of Georgia. Feb. 21, 1922.)

(Syllabus by the Court.)

Executors and administrators \S 437(2)—Trovee held not "suit to recover debt due by decedent" within statute forbidding suits within 12 months after qualification.

An action in trover against an administrator, wherein a recovery for the hire and value of the property involved is expressly waived, and a recovery of the property itself is sought, is not covered by Civil Code 1910, \S 4015, providing that no suit to recover a debt due by the decedent shall be commenced against the administrator until the expiration of 12 months from his qualification.

Certified Questions from Court of Appeals.

Action by the Adder Machine Company against T. S. Hawes, administrator. Judge-

ment for defendant, and plaintiff brought error to the Court of Appeals, which certified questions to the Supreme Court. Questions answered in part.

The Court of Appeals certified to this court the following questions:

"(1) A suit in trover, filed May 2, 1919, to recover an adding machine of the alleged value of \$310 and of the yearly value of \$100, accompanied by an affidavit for bail, was brought against the administrator of an estate within 12 months of his appointment as administrator. The defendant filed a plea denying that title to the property was in the plaintiff, and pleading specially that he was appointed administrator of the estate on August 2, 1918, and that, 12 months therefrom not having expired, he was exempt by law from being sued, and prayed to be discharged. Upon the hearing of the suit the plaintiff, by leave of the court, amended its petition by striking therefrom its claim for hire or yearly value of the property, and elected to take a verdict for the property itself. Under these circumstances, was this trover suit a 'suit to recover a debt due by the decedent,' within the meaning of Civil Code 1910, \S 4015, which provides that 'no suit to recover a debt due by the decedent shall be commenced against the administrator until the expiration of 12 months from his qualification'?"

"(2) If the preceding question is answered in the affirmative, then an answer is requested to the following question: In such a trover suit as is referred to in the preceding question, where the defendant had refused to replevy the property, and the plaintiff, upon such refusal, had replevied the property and taken it into his possession, and where, upon the hearing of the trover proceeding, the court, on the motion of the defendant and over the plaintiff's objection, dismissed the suit as being prematurely brought, and the defendant then elected to take a money verdict for the value of the property and interest, the plaintiff not having offered to return the property or to make restitution, was the defendant entitled, as a matter of right, to a judgment against the plaintiff for the value of the property and interest?"

Hartsfield & Conger, of Bainbridge, for plaintiff in error.

John R. Wilson and T. S. Hawes, both of Bainbridge, for defendant in error.

FISH, C. J. As appears from the first question propounded, the action of trover and bail, by amendment of the petition by the plaintiff, was converted into a plain suit of trover for the recovery of the property itself, wherein no recovery was sought for hire, or for the value of the property. As stated in the question, Civil Code 1910, \S 4015, provides:

"No suit to recover a debt due by the decedent shall be commenced against the administrator until the expiration of twelve months from his qualification," etc.

A trover suit for the recovery alone of the property therein mentioned is not a "suit to recover a debt due by the decedent," and it is only where the suit is to recover a debt that the exemption applies. See *Lanfair v. Thompson*, 112 Ga. 487 (2), 37 S. E. 717; *Redford v. Lloyd*, 147 Ga. 145, 93 S. E. 296. We therefore answer the first question in the negative.

No answer is required to the second question, as it is predicated upon the hypothesis that the first question is answered in the affirmative.

All the Justices concur.

(152 Ga. 634)

BROWN v. DETTMERING et al. (No. 2687.)

(Supreme Court of Georgia. Feb. 15, 1922.)

(*Syllabus by the Court.*)

Injunction \S 147—Refusal of injunction on conflicting evidence not error.

The exception is to a judgment refusing an interlocutory injunction. The evidence being conflicting, the court did not err in refusing the injunction.

Error from Superior Court, Fayette County; W. E. H. Searcy, Jr., Judge.

Action between G. C. Brown and O. L. Dettmering and others. Judgment for the latter, and the former brings error. Affirmed.

W. B. Hollingsworth, of Fayetteville, for plaintiff in error.

Culpepper & Murphy, of Fayetteville, for defendants in error.

GILBERT, J. Judgment affirmed.

All the Justices concur.

(152 Ga. 576)

GLENN v. CITY OF ATLANTA.

EMPIRE COTTON OIL CO. et al. v. CITY OF ATLANTA.

(Nos. 2689, 2698.)

(Supreme Court of Georgia. Feb. 21, 1922.)

(*Syllabus by the Court.*)

Cases controlled by decision in another case.

The controlling questions in both of these cases were passed upon in the case of *Coca-Cola Co. v. City of Atlanta*, 110 S. E. 730; decided by this court January 28, 1922, and there decided adversely to the contentions of the plaintiffs in error in the instant cases.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Actions between T. K. Glenn and the City of Atlanta and between the Empire Cotton Oil Company and others and the City of Atlanta. Judgments for the City, and the other parties bring error. Affirmed.

Candler, Thomson & Hirsch, Anderson, Rountree & Crenshaw, Spalding, MacDougald & Sibley, and Chas. T. & Jno. L. Hopkins, all of Atlanta, for plaintiffs in error.

J. L. Mayson and J. M. Wood, both of Atlanta, for defendant in error.

BECK, P. J. Judgments affirmed.

All the Justices concur.

(152 Ga. 798)

ROLES et al. v. SHIVERS. (No. 2703.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(*Syllabus by the Court.*)

1. Vendor and purchaser \S 231(11)—Older deed held to prevail when neither recorded within 12 months.

Before the passage of the registration act of 1889 (Civ. Code 1910, § 3320), where there was a contest between two deeds, whereby one person conveyed the same land to two different persons, and neither deed was recorded within 12 months from the date of its execution, the older deed would prevail. *Davis v. Harden*, 143 Ga. 98 (6), 100, 84 S. E. 426, and authorities cited.

(a) The plaintiff in this case relies upon a deed junior as to date of execution but senior as to date of record; plaintiff's deed being dated January 17, 1877, and recorded November 9, 1881; the defendant's deed being dated January 10, 1870, and recorded March 31, 1915.

2. Verdict properly directed.

Applying the principle above announced, which is controlling in the case, the court did not err in directing a verdict for the defendant.

Error from Superior Court, Webster County; Z. A. Littlejohn, Judge.

Action by Mrs. S. I. Roles and others against Mark Shivers. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. F. Souther, of Preston, and Yeomans & Wilkinson, of Dawson, for plaintiffs in error.

M. O. Edwards, of Dawson, for defendant in error.

GILBERT, J. Judgment affirmed.

All the Justices concur.

(153 Ga. 32)

WRIGHT v. MARTIN. (No. 2690.)

(Supreme Court of Georgia. Feb. 22, 1922.)

(Syllabus by the Court.)

Habeas corpus ¶112—Judgment may be set aside on showing of fraud; evidence held to show fraud justifying setting aside of judgment.

Where a motion was made to set aside the judgment of the city court of Floyd county in a habeas corpus proceeding awarding a minor child to the father, on the ground that the judgment was obtained by fraud practiced on the movant and her counsel by the respondent and his counsel, and the evidence on the hearing of the motion to set aside, though conflicting, supported the allegations of fraud, the court did not err, under the pleadings and evidence in the case, in overruling a motion to dismiss the motion to set aside the judgment, and in ordering that the motion to set aside the judgment be sustained.

Error from City Court, Floyd County; W. J. Nunnally, Judge.

Habeas corpus by A. R. Wright against N. J. Martin. A judgment for plaintiff was vacated and set aside, and he brings error. Affirmed.

On February 7, 1921, A. R. Wright filed his petition for habeas corpus against Mrs. Nettie J. Martin (his former wife who had been divorced), seeking to recover the custody of their minor child, Elizabeth Wright. On February 19, 1921, the defendant filed her answer to the petition for habeas corpus, claiming the legal right to retain the custody of the child. The hearing of the case was continued until Monday March 7, 1921, which date was agreed upon to hear the same. At that time, neither the defendant nor the child appearing, the court entered a judgment awarding the custody of the child to the plaintiff. A few days thereafter the defendant, Mrs. Nettie J. Martin, who had married again, filed a motion to set aside the judgment in the habeas corpus case, and alleged in substance the following: The case was set down for hearing February 21, 1921, and by mutual consent, but without any order of court, the case was continued from time to time until by agreement of the parties it was set for hearing March 7, 1921. On the morning of February 6 defendant's attorney at law called her at her home and reminded her that the case was set for trial on March 7, and requested her and husband to come to his office in order to confer about the case, the summoning of witnesses, etc. Movant informed her attorney that her child "was ill, that on the day before it had 104 degrees of fever, and then had 102 degrees of fever, and that she could not leave said child to attend said court, as she was the only one to nurse it." Her husband went to her at-

torney's office about 4 o'clock p. m. on March 6, and also called on movant's physician, who advised that the child could not leave its home on March 7, on account of its illness. The physician gave a certificate to that effect. Movant's attorney informed the attorney for the respondent of the illness of the child; and respondent's attorney then stated there could be no trial of the case on March 7, as the child would have to be produced in court, and suggested that the case be continued until Saturday following, and so that date was agreed upon, and movant was so informed on March 6; respondent's attorney stating at the time that he would call his client and inform him of the situation. It was agreed that an aunt of the respondent should visit the child in order to consider its condition. It is alleged that movant and her attorney in good faith acted on the agreement that the case should be continued until the Saturday following, owing to the fact that neither she nor the child could attend the hearing on the 7th, for the reasons stated above, all of which facts were known to respondent's attorney, who for those reasons consented to the continuance. Movant had filed her answer to the petition, and notified respondent's attorney that it was so filed. The answer set up a complete defense in the case, which movant stood ready to prove; and she now refers to that defense so filed. Relying on the agreement that the case would be continued on March 7, neither movant nor her attorney appeared on March 7; and the respondent did appear, and took undue and unfair advantage of the situation, and appeared with his attorney on March 7 with the petition in the case, but left the answer referred to above in the clerk's office, stating that he did not want it, and knowing that movant was relying upon the agreement, which she alleges was unfair and fraudulent, and deprived her of her legal rights. Movant alleges that she has a complete defense to the case, and that no reason existed, had the facts all been heard, in law or otherwise, for taking the child from her; and she prays that the judgment awarding the child to plaintiff be set aside, and that she may have a hearing upon the merits of the case.

The respondent moved to dismiss the motion to set aside the judgment in the habeas corpus case upon two grounds: First, because the motion to set aside does not lie to a judgment in a habeas corpus case, the same not being a proceeding in court, but one before the judge, and the signing of the judgment in a habeas corpus case ends the matter except by bill of exceptions; that the court had no jurisdiction to hear the motion and to determine the same; that movant's remedy, if any, was by bill of exceptions to correct any errors of law committed. Second, that, if the court had jurisdiction to determine the motion, the same is insufficient

in law, and sets forth no reason for setting aside the judgment complained of. The court overruled the motion to dismiss the motion; and, after evidence was heard on the part of the movant, sustaining the allegations in the petition to set aside the judgment in the habeas corpus proceeding, and after hearing evidence from the respondent, who denied the allegations as to the agreement to continue the case on the 7th, the court sustained the motion, and ordered that the judgment rendered on March 7, 1921, be vacated and set aside. To this judgment the respondent excepted.

M. B. Eubanks, of Rome, for plaintiff in error.

L. A. Dean and F. W. Copeland, both of Rome, for defendant in error.

HILL, J. (after stating the facts as above). This case does not fall within that class in which it has been held that a motion to set aside a judgment must be based on some defect which appears on the face of the record (see *Regopoulos v. State*, 116 Ga. 596, 42 S. E. 1014), but it falls within the class of decisions to the effect that the judgment of a court of competent jurisdiction may be set aside by the court which rendered it for fraud practiced on the defendant and the court. Under the act establishing the city court of Floyd county, that court has authority to grant new trials in all cases, both civil and criminal, tried therein, under the same rules and regulations which govern motions for new trial in the superior courts, so far as applicable. Acts 1882-83, p. 535, § 19. In *Ford v. Clark*, 129 Ga. 292, 58 S. E. 818, it was held:

"A judgment founded on a verdict obtained by fraud practiced on the defendant and the court may be set aside, and the original case reinstated, in a court of law, with proper pleadings, and with all the parties at interest as parties to the motion; the motion being made at the term of the court at which the verdict and judgment were entered, and the movant showing that he was not in laches, had a meritorious defense, and announcing ready for an instant trial."

And see *Moore v. Moore*, 139 Ga. 597, 77 S. E. 820; *Albright v. American Central Ins. Co.*, 147 Ga. 492 (1), 94 S. E. 561; *Seagraves v. Powell Co.*, 143 Ga. 572 (3), 85 S. E. 760. Civil Code 1910, § 5957, provides that a mo-

tion in arrest of judgment must be made during the term at which such judgment was obtained, while a motion to set it aside may be made at any time within the statute of limitations. The case of *Exchange Bank of Macon v. Elkan*, 72 Ga. 197, is cited by the plaintiff in error as being controlling here; but the facts of that case are distinguishable from the facts of the case at bar. In that case no answer had been filed, and no name of counsel for the defense had been marked on the docket; and, while in that case it appeared that an "understanding" was had between counsel that the case should not be heard until they had been advised, which agreement was not in writing, and although the court held in that case that no agreement of counsel is binding unless in writing, yet the judgment of the lower court, which ordered that the judgment in that case be opened, and that the defendant be allowed to plead, was affirmed. In the present case an answer had been filed, setting up what the defendant claimed was a perfect defense, and alleging that, on the day the plaintiff took judgment in the absence of the defendant, her child, and her counsel, who had absented himself on account of the agreement with counsel for the plaintiff to continue the case, the answer was not read by the plaintiff on the trial of the case. Indeed, according to the affidavit of the clerk of the court, the plaintiff's counsel, while securing the papers from the clerk's office for trial, stated to the clerk that he did not need the answer, and, so far as the record discloses, the court was not advised of the fact that an answer had been filed, or what the contents of the answer were, or that an agreement had been entered into between counsel touching the continuance of the case. We are of the opinion that the allegations of the petition in the present case, and the proof in support thereof, although conflicting on the question of fraud, fall within the rule laid down in the *Ford Case*, supra, and, consequently, that the court did not err in overruling the motion to dismiss the motion to set aside the judgment in the habeas corpus case, and in ordering that the motion to set aside the judgment be sustained.

The contention that a motion to set aside a judgment in a habeas corpus proceeding will not lie is without merit.

Judgment affirmed.

All the Justices concur.

(152 Ga. 751)

JACKSON v. GRANT et al. (No. 2511.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Judgment ¶143(17)—Negotiations for settlement held not to excuse default or failure to move to open it before judgment.

The evidence offered by the defendants to support their application to set aside the judgment rendered in a case in default, and to open the default, did not sufficiently show that the failure of the defendants to file their defense or to move to open the default before judgment, was excusable in law; and the court erred in setting aside the judgment and opening the default.

2. New trial ¶21—Absence of evidence not ground when uncontroverted allegations justified judgment.

The uncontroverted allegations in the petition required the judgment and decree in favor of the plaintiff; and the fact that no evidence was offered did not authorize the granting of a new trial, there being no verdict and judgment for the damages claimed in the petition, which might have required proof by competent evidence before the plaintiff would have been entitled to a verdict therefor.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by E. M. Jackson against B. M. Grant and others. A verdict and judgment for plaintiff was set aside, and defendants' default opened, and plaintiff brings error. Reversed.

Mallet & Bell, of Atlanta, for plaintiff in error.

Robt. C. & Philip H. Alston, of Atlanta, for defendants in error.

FISH, C. J. To the September term, 1920, an equitable petition was filed in the superior court of Fulton county, wherein Eula Maddox Jackson was the plaintiff, and Bryan M. Grant and Albert S. Adams and the Walraven Company were named defendants. Each of the defendants was duly served with process, and with an order of the court to show cause why the relief prayed for in the petition should not be granted. The defendants failed to file any appearance and failed to plead to the merits of the petition at the term to which the petition was returnable; and thereafter, to wit, on the 25th day of September, 1920, at the call of the appearance docket of the said court the entry "in default" was marked upon the docket by the judge. Thereafter, to wit, on the 6th day of December, 1920, the same being the trial term of Fulton superior court, and the case being in default, a verdict was rendered and a decree was taken pursuant thereto, granting to petitioner the relief prayed for in her petition. On the 22d day of December, 1920,

the defendants filed a motion for a new trial, a motion in arrest of judgment, and a motion to open the default and set aside the verdict and judgment. All of these motions were returnable on the first Monday in January, 1921. These three motions came on to be heard; and the judge, on the 5th day of January, 1921, after argument and over objection of plaintiff's counsel, granted the motion for a new trial. To this ruling and order granting a new trial the plaintiff excepted. The court also granted the motion to open the default and set aside the verdict and judgment, and permitted the defendants to plead, demur and answer; and to the order of the court, sustaining this motion and permitting defendants to plead, the plaintiff excepted.

[1] 1. There was not such a showing made by the defendants in this case, upon the motion to set aside the verdict and judgment and to open the default, as authorized the judge to grant the application. As showing due diligence on the part of the defendants and as an excuse for their failure to plead in time, the defendants show that negotiations were opened with the plaintiff through her attorneys of record, looking to a settlement and adjustment of the case; but, after considering all the evidence as to the pending negotiations upon this subject, this court fails to find any definite statement of anything done or said by plaintiff that would cause or induce the defendants to neglect the filing of their plea and answer in time. Conceding that, in the motion made to set aside the verdict and judgment and to open the default, the defendants show that they had a meritorious defense to the action, nevertheless they do not show that their failure to file an answer embodying this defense was excusable. The entire showing upon the subject of their failure to file a plea or answer is, in substance, as follows: When the petition was served upon the Walraven Company, its president, one of the defendants, was notified, and he advised the company that he would look after the defense; and he did have a conference with another one of the individuals named as a defendant, and the latter said that he would consult with counsel. This was done, and counsel referred to a certain defect in the process, and advised that the suit could be won, but suggested a conference between the defendants and plaintiff's attorneys. Considerable time was required before the four parties could meet in conference, although a prompt effort was made by one of the defendants in behalf of all of the defendants for that purpose. Finally, some weeks after the service of the suit, a conference was had between the attorneys of the plaintiff, and the two individuals named as defendants; and the defend-

ants stated, in the course of this interview, that they did not care to be involved in a lawsuit, and plaintiff's attorneys said that they did not wish to have the case go to trial. Thereupon propositions were made, and the defendant having these matters in charge says: "It was understood that said litigation would remain in abeyance pending negotiations." On November 4th, a letter was received by the defendants from the attorneys for the plaintiff, in which these attorneys stated that a representative of the plaintiff had written them stating that the plaintiff rejected the two propositions submitted by the defendants, but that he was "willing, as a final proposition," to settle, by voiding the lease at the expiration of the first five-year period and dropping any claims for damages or accounting, and requesting a reply at the defendants' earliest convenience as to whether they would consider this proposition. Some days after the receipt of this letter one of the defendants conducting the negotiations met one of the plaintiff's counsel, discussed the letter with him, and explained to him that the plaintiff's counterproposition was not acceptable; and the attorney thereupon asked the defendant to write him to that effect. According to this defendant's recollection, he stated that his reply would be transmitted "with a view to further negotiations." This letter was written on November 17th, as follows:

"Gentlemen: Replying to your letter of November 4th, in regard to the matter of Mrs. Eula M. Jackson v. The Walraven Co. et al., we are instructed by the parties at interest to advise you as follows: They deny any claims for damages or accounting of any sort as being due Mrs. Eula M. Jackson. They state that the proposition as made to you was an extremely liberal one, and is the only proposition that they have to make. They decline to agree to any voiding of the lease at the expiration of the first 5-year period, or to relinquish the option for an additional five years which they hold under same. Yours very truly." [Signed by the defendants.]

Above we have announced our opinion that there was nothing in these negotiations to induce or authorize the defendants to believe that there would be any postponement of the trial or the taking of a verdict and judgment in case of a failure to file their plea and answer; and consequently the judge hearing this motion was not authorized to adjudge that the failure to file the answer in time and as the law requires was excusable. Questions like this have been discussed and ruled upon in numerous cases, but it is not necessary to make lengthy quotations therefrom. Some of the cases are here cited. *Moore v. Kelly & Jones Co.*, 109 Ga. 798, 35 S. E. 168; *Kellam v. Todd*, 114 Ga. 981, 41 S. E. 39; *Murray v. Willoughby*, 133 Ga. 514,

68 S. E. 267; *Tennessee Oil Co. v. American Art Works*, 10 Ga. App. 45, 72 S. E. 517.

[2] 2. The ruling made in the second head-note requires no elaboration, in view of the explicit rulings made in other cases heretofore decided by this court. *Langston v. Langston*, 141 Ga. 675, 82 S. E. 36; *Higgs v. Higgs*, 144 Ga. 20, 85 S. E. 1041; *Mitchell v. Allen*, 110 Ga. 282, 34 S. E. 851. Other cases making pertinent rulings are referred to in the cases here cited.

Judgment reversed. All the Justices concur.

(152 Ga. 821)

KIGHT v. KIGHT. (No. 2512.)

(Supreme Court of Georgia. Feb. 21, 1922.)

(Syllabus by the Court.)

Divorce §116—Letter from defendant, arranging meeting with woman, held admissible in connection with other evidence of cruelty.

Mrs. Olympia Kight brought suit for divorce and alimony against her husband, B. T. Kight, on the ground of cruel treatment, such cruel treatment consisting of abusive language and conduct toward petitioner in connection with the charge made against him of improper conduct with another woman, together with the charge that defendant did strike and beat petitioner. The defendant, denying cruel treatment on his part, charged plaintiff with cruelty, and that plaintiff had an ungovernable temper and was unreasonably and unjustifiably jealous of all females with whom the defendant had business transactions. The jury returned a verdict granting a divorce "between the parties" and alimony for the plaintiff, and also for one of the children which was awarded to her. The evidence was sharply conflicting. The plaintiff filed a motion for new trial, which was overruled, and she excepted. One ground of the motion for a new trial was based on the refusal of the court to admit in evidence a letter, admitted by the defendant to have been written by him, to a woman seeking to arrange a meeting with her—said letter being in substance to the effect that he [the defendant] had endeavored to find an opportunity to have a short talk with the addressee; that this seemed impossible; that he was obliged to see and have a talk with her before she should leave; that she must arrange an opportunity for this; that she might go by train to Adrian under the claim that she was going to visit "Hattie," but that if she was afraid of Hattie giving anything away she could go to Dublin; that he could pretend to have business away and go by automobile and meet her at the place agreed upon; that they could come back together; that no one would think anything of this as they could claim that the addressee of the letter intended coming back on the train, but just happened up with the writer, and came along to save railroad fare and in order to reach home earlier. There were other grounds of the motion for a new trial, but they need not be stated, inasmuch as they afford no reason

for a reversal of the judgment refusing a new trial. *Held*, that the letter was admissible in connection with other evidence of cruel treatment. The court erred in refusing to permit the same to be introduced in evidence.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Suit by Olympia Kight against B. T. Kight. Judgment for defendant and plaintiff brings error. Reversed.

Robt. L. Berner, of Macon, for plaintiff in error.

J. S. Adams and R. Earl Camp, both of Dublin, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except HINES, J., disqualified.

(152 Ga. 746)

ROBERTS v. JOHNSON et al. (No. 2503.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Wills \S 68—Witnesses \S 159(8)—Plaintiff's testimony that he went to deceased's home pursuant to contract properly excluded, as involving "transaction with decedent"; evidence in action for breach of agreement to make will held irrelevant.

In an action against the executor of the will of a decedent to recover damages for a breach of an alleged parol contract by the decedent to execute a will in favor of the plaintiff, in consideration of services to be rendered by him, the plaintiff is not a competent witness to testify that he returned to the home of the decedent "pursuant to a contract" she entered into with him. Such testimony involved a transaction with the decedent within the meaning of Civ. Code 1910, § 5858.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Transaction.]

2. Wills \S 68—In action for breach of contract to make will, evidence as to what plaintiff could have made in similar lines of work irrelevant; evidence offered in action for breach of contract to make will properly excluded as irrelevant.

The court did not err in refusing to permit a witness to testify that, in his opinion, the plaintiff's services were worth so many dollars per annum, because the witness knew that plaintiff could have earned the sum stated "in similar lines" of work, and had declined offers of similar amounts during the period in question. The question to be determined was, What was the value of the particular service rendered by plaintiff to the deceased? The evidence offered was not relevant upon this question, nor did the court err in excluding other testimony complained of in the motion for new trial. All of the evidence excluded was irrelevant to any issue in the case.

3. Wills \S 66—In action for breach of contract to make will, plaintiff cannot recover on implied contract to pay for services.

The action being to recover damages for breach of an alleged express parol contract to make a will in the plaintiff's favor, and not for compensation as upon an implied contract to pay for services rendered, if the refusal of the decedent to comply with the contract was justified by the plaintiff's previous breach of the contract, he was not entitled to recover any amount as compensation for services rendered.

4. No error committed, and evidence sufficient.

There was no error harmful to the plaintiff from the charge complained of, nor did the court err in refusing the requests to charge, set forth in the motion for new trial. There was evidence to authorize the verdict.

Error from Superior Court, Emanuel County; R. N. Hardeman, Judge.

Action by A. J. Roberts against Mrs. Sarah Spence, in which J. A. Johnson, executor, was made a party defendant. Judgment for defendants and plaintiff brings error. Affirmed.

A. S. Bradley, of Swainsboro, for plaintiff in error.

J. Alex Smith & Son, of Swainsboro, for defendants in error.

FISH, C. J. A. J. Roberts sued Mrs. Sarah Spence, alleging that about the year 1909 the defendant made a contract with the plaintiff, by the terms of which he was to live with defendant, take charge of all her interests, and care for her during the balance of her life, in consideration of which defendant agreed to make a will giving all her property to plaintiff. The petition alleges plaintiff complied fully with his part of the contract; that defendant did make a will giving to plaintiff her property, but afterwards revoked it by executing another will in which the property was given to other persons. Pending the action Mrs. Spence died, and the executor named in the last will was made party defendant. The executor in his answer denied the execution of the contract, and the performance of services as alleged by the plaintiff, and averred that plaintiff had breached the contract himself, if any contract was ever made, by failing to take proper care of the testatrix, and that the plaintiff's conduct was such as to justify the testatrix in refusing to comply with the agreement, if it were made. On the trial a number of witnesses testified for each side. There was a verdict for the defendant. The plaintiff's motion for new trial was overruled, and he excepted.

[1] 1. The plaintiff offered to testify that he went to live with his aunt, the testatrix, when a boy, some 25 years before the trial; that he lived there continuously after the death of her husband until the year 1907,

when he left and followed other pursuits; that at the first of the year 1909 he returned to the home of the testatrix, and lived there continuously until the fall of the year 1917; that when he returned to the home of the testatrix in the year 1909 he returned there "pursuant to a contract" entered into with her. The court refused to admit this testimony, upon the ground that the witness was incompetent to testify to any transaction with the testatrix, she being dead, and her legal representative being a party to the case. The court was clearly right in this ruling. Manifestly the plaintiff could not testify that he returned to his aunt's home in 1909, "pursuant to a contract" entered into with her. This would be equivalent to permitting him to testify that he had a contract with the deceased, and would violate both the letter and spirit of the rule. Civil Code 1910, § 5858. The other portion of the evidence objected to was clearly irrelevant, and did not illustrate any issue in the case, and was properly excluded for that reason.

[2] 2. It is also complained that the court refused to permit a witness for plaintiff to testify that, in his opinion, the value of the services of the plaintiff under the contract which he claims to have entered into with his deceased aunt was from \$800 to \$1,000 per annum, because the witness knew that the plaintiff could have earned that much money "in similar lines" of work, and had declined offers of such amounts during the period in question. While it is competent for a witness to give his opinion as to the value of service of the nature claimed to have been performed by the plaintiff, and to give his reasons for such opinion, it was not permissible for this witness to state that the plaintiff could have earned a certain sum of money in similar lines of work elsewhere, and that he had declined offers of similar amounts during the period in question. The point at issue was, What were the particular services rendered by the plaintiff to his aunt worth during the period in which he claims the services were rendered? What he could have earned in similar lines of work elsewhere, and the fact that he had declined offers of similar amounts from other people, did not illustrate the value of the particular service rendered by him to his aunt.

It also complained that the court refused to permit another witness for the plaintiff to testify that Mrs. Spence had sold, in the fall of 1917, a tract of land for \$400 which was actually worth \$3,000. This evidence was entirely irrelevant, and threw no possible light on the question whether such a contract as the plaintiff claimed had been entered into, and, if so, what damages he had sustained by reason of its breach. The same is true of the ruling of the court excluding a power of attorney which Mrs. Spence had executed to

W. P. Ivey in 1917, giving him full authority to manage and control her business affairs. There was likewise no error in excluding the testimony referred to in the tenth ground of the motion, that a certain person had endeavored to procure a turpentine lease from Mrs. Spence, and she refused to lease it to him because he had previously taken up a fl. fa. against her, and had it levied on her land.

[3] 3. The charge complained of in the eleventh ground of the motion correctly stated the law applicable to the case, and the issues involved, and was no error for any reason assigned. One of the specific assignments of error upon this extract from the charge, which is quite lengthy, and need not be set out in full, is that the judge submitted to the jury the question whether or not the plaintiff had received sufficient compensation for services actually rendered by him up to the time of his discharge. It is insisted that there is no evidence in the record to show that the plaintiff received any compensation. We agree that the judge ought not to have submitted this issue to the jury, but not for the reason contended for by the plaintiff in error. The contract set out in the plaintiff's petition, and relied on by him, was that he would take care of his aunt and her property during her entire life, and that, if he complied with this agreement, she would, at her death give to him all of her property. The main and controlling question in the case is whether such a contract had been made, and, if made, whether the testatrix was liable in damages for its breach. The judge submitted to the jury clearly and distinctly the contentions of the plaintiff, and also the contention of the defendant that the plaintiff's conduct had been such as to justify Mrs. Spence in refusing to carry out her part of the contract. If the plaintiff violated his contract at any time before the death of Mrs. Spence, and neglected her and her business affairs, and mistreated her, as the jury were authorized to find from the evidence, he was not entitled in this action to recover anything for a breach of this contract. He sued expressly on the contract, and not for compensation as upon an implied contract to pay for services rendered by him. Therefore his right to recover anything depended absolutely upon his proving that the contract alleged in his petition was made, and that Mrs. Spence wrongfully refused to carry it out. What has just been said makes it apparent that the court committed no error in refusing the requests to charge, set forth in the twelfth and thirteenth grounds of the motion.

[4] 4. The evidence fully authorized the verdict, and there was no error in refusing to grant a new trial.

Judgment affirmed.

All the Justices concur.

(152 Ga. 803)

YOUNG v. COVINGTON CO. et al.
(No. 2530.)

(Supreme Court of Georgia. Feb. 20, 1922.)

*(Syllabus by the Court.)***1. Sufficiency of evidence.**

The finding of the court, to whom the case was submitted without the intervention of a jury, upon the issue of fact involved, was not without evidence to support it.

2. Judgment \S 853(4).—Did not become dormant when execution entered on the only docket kept by the clerk of the superior court.

While, under the law prescribing what is necessary to prevent the dormancy of judgments, as it existed at the time the judgment under consideration was rendered, the clerk of the superior court should have kept both an execution docket of the superior court and a general execution docket, and should have made an entry of the *fi. fa.* upon the execution docket of the superior court, nevertheless, where he kept but one docket, upon which he made entries of executions, that was, to that extent, the execution docket of the superior court, and proper entries upon it would prevent the dormancy of a judgment upon which the execution thus entered was issued.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Garnishment by the Covington Company and others against J. K. Young. Judgment for plaintiffs, and defendant brings error. Affirmed.

Travis & Travis, of Savannah, for plaintiff in error.

D. W. Krauss, of Brunswick, and D. S. Atkinson and Hitch, Denmark & Lovett, all of Savannah, for defendants in error.

FISH, C. J. On March 14, 1905, Covington Company recovered, in Camden superior court, a judgment for \$232.88 against J. K. Young. Upon this judgment an execution was issued, at the direction of the attorney for the plaintiff, for \$532.88, on March 8, 1912, and was entered upon the execution docket. On April 1, 1918, an entry of *nulla bona* was made upon the execution, and entry thereof was made upon the same execution docket. In 1920 garnishment upon the judgment of 1905 was issued, returnable to the superior court of Chatham county, and the garnishees answered, showing indebtedness, but alleged that the judgment was for much less than the amount claimed in the garnishment affidavit, and that the judgment was dormant and unenforceable.

J. K. Young filed his equitable petition, praying that he might be allowed to intervene, and for injunction against the plaintiff. He also set up, as did the garnishees, that the judgment was for only \$232.88; that when the judgment was entered on March

14, 1905, an execution was at once issued and entered on the general execution docket; that the execution issued in 1912 was a mere copy of the former, being issued without any proper order; that the only valid execution had been issued in 1905, and that the judgment was therefore dormant. The plaintiff admitted that only \$232.88 was due upon the execution, and that the amount for which it was actually issued was a mistake. There was no controversy as to the mistake, and as to the actual amount being \$232.88.

The case was submitted to the judge without the intervention of a jury, and he rendered judgment for the plaintiff for the amount of the judgment as correctly stated. The intervenor excepted, insisting that the only valid execution was the one alleged by him to have been issued in 1905, and that the execution issued in 1912 was not valid, but that in either case the judgment was dormant.

[1] 1. Under the evidence the judge to whom the case was submitted was authorized to find that the only valid execution which had been issued upon the judgment rendered March 14, 1905, was the execution dated March 8, 1912.

[2] 2. The judgment upon which the execution was based was not dormant. This judgment was rendered in 1905, and under the law as it stood then it was necessary that the entries of the execution and the entries upon the execution intended to prevent dormancy should be made upon the execution docket of the superior court, that being the court which rendered the judgment, and the testimony of the clerk of the court is that the execution was entered upon the general execution docket. If there had been an execution docket of the superior court, kept separately, as the law contemplated, and a general execution docket, the entry upon the general execution docket of the *fi. fa.* and the entries thereon would not have been sufficient to prevent the dormancy of the judgment. But the clerk, while testifying that these entries were made upon the general execution docket, also testified that he kept no other execution docket; his testimony upon this subject being in the following language:

"The execution docket, on which the execution of March, 1912, and entries of *nulla bona* were recorded, was the only execution docket kept for the superior court of Camden county up to 8 years ago, and when the *nulla bona* entries were made. There has been no other execution docket of this court for the past 20 years."

In 1905 the clerk of the superior court was required to keep an execution docket of that court, and also a general execution docket; but we are of the opinion that, where he kept only one execution docket, making the

entries appropriate to both the execution docket of the superior court and the general execution docket, the entries made upon the docket which he kept, and which would have been sufficient, if made upon an execution docket of the superior court, separately and properly kept, would have the effect of preventing the dormancy of the judgment upon which the execution was issued.

Judgment affirmed.

All the Justices concur.

(152 Ga. 670)

MIXON v. SAVANNAH & A. RY.
(No. 2653.)

(Supreme Court of Georgia. Feb. 16, 1922.)

(Syllabus by the Court.)

Railroads §—95(1)—Statutory duty applicable to excavation crossing highway.

The provisions of section 2673 of the Civil Code of 1910 "apply to a railroad company where the public road is crossed only by an excavation made for the purpose of laying therein, across such public road, a railroad track of the company, and before any railroad track has been laid and before the work of constructing the railroad is completed across such public road."

Certified question from Court of Appeals.

Action between J. K. Mixon and the Savannah & Atlanta Railway. Judgment for the latter, and the former brought error to the Court of Appeals, which certified a question to the Supreme Court. Question answered.

W. L. Phillips, W. T. Revell, and Frank Hardeman, all of Louisville, for plaintiff in error.

Hitch & Denmark, of Savannah, and Phillips & Abbot, of Louisville, for defendant in error.

HILL, J. The Court of Appeals desires instruction from the Supreme Court on the following question involved in this case:

"Section 2673, Civil Code 1910, reads as follows: 'All railroad companies shall keep in good order, at their expense, the public roads or private ways established pursuant to law, where crossed by their several roads, and build suitable bridges and make proper excavations or embankments, according to the spirit of the road laws.' See Ga. Laws 1888, p. 216; Cobb's Digest, 955. Do the provisions of this section apply to a railroad company where the public road is crossed only by an excavation made for the purpose of laying therein, across such public road, a railroad track of the company, and before any railroad track has been laid, and before the work of constructing the railroad is completed across such public road?"

While the question asked by the Court of Appeals does not expressly assert that the

excavation was made by the railroad company, or by one as agent for the company, yet we are of the opinion that, properly construed, the question means that the excavation was made by the railroad company itself, or some one authorized to do so for it; and the question will be answered on that assumption. See, in this connection, Civil Code 1910, § 4415 (4); Atlanta, etc., R. Co. v. Kimberly, 87 Ga. 161, 167 (4), 13 S. E. 277, 27 Am. St. Rep. 231.

The section of the Code under consideration was codified from the act of 1838 (Acts 1838, p. 216). By reference to that act it will be observed that the caption is as follows:

"An act to amend the road laws of this state, so far as to cause to be kept in good repair all places where any railroad which now is or may hereafter be chartered, crosses or may cross, any public highway in this state."

The first section of the act provides that—

"It shall be the duty of all railroad companies, which now are or may hereafter be incorporated, * * * to put and keep in good traveling order and repair, the public roads, at such point or points where the same may be crossed by their respective railroads," etc.

It seems, therefore, both from the caption and the body of the act, that the purpose of the legislation was "to put and keep in good travelling order and repair the public roads, at such point or points where the same may be crossed by their respective railroads." Nothing is said in the act or in the caption thereof with reference to the actual running of trains or laying of rails before the public roads should be kept in good order.

In the case of Cleveland v. City Council of Augusta, 102 Ga. 283, 29 S. E. 584, 43 L. R. A. 638, the exact statute here under review was considered and commented on in the well-considered opinion delivered by Mr. Justice Little in that case, though the exact question involved in that case was different from the one under review. Among other cases cited by the learned Justice in that case with approval was Boston & M. R. Co. v. County Com'rs, 79 Me. 386, 10 Atl. 113, where it was stated that the Supreme Court of Maine, in passing upon the constitutionality of a statute similar in character to the one under review, said:

"The purpose of this statute was evidently to promote the safety of travelers both upon the railroad and the county way," etc.

And in the case of Chicago & N. W. Ry. Co. v. City of Chicago, 140 Ill. 309, 29 N. E. 1109, the Supreme Court of Illinois says:

"The requirement embodied in section 8, that railroad companies shall construct and maintain the highway and street crossings and the approaches thereto within their respective rights of way, is nothing more than a police regulation. It is proper that the portion of the street

or highway which is within the limits of the railroad right of way should be constructed by the railroad company, and maintained by it, because of the dangers attending the operation of its road. It should control the *making and repairing* [italics ours] of the crossings for the protection of those passing along the street and of those riding on the cars."

In the *Cleveland Case*, *supra*, it is said that—

"Statutes requiring railroad companies to make proper crossings are founded on the most obvious principles of equity and justice. By laying its ties and rails and making its grade, the railroad renders a crossing necessary where no such necessity would otherwise exist. It is but requiring the railroad to so operate its property as not to injure the public in its property or otherwise."

In the case of *Palatka, etc., R. Co. v. State*, 23 Fla. 546, 3 South. 153, 11 Am. St. Rep. 395, it was held that—

"A grant of power to a railroad company to make a new road or open a new way across an existing highway, in the absence of an express provision to the contrary, leaves the railroad company under obligation to leave every highway it crosses in a safe condition for the use of the public, and to cause as little injury as possible to the old highway."

In 22 R. C. L. 887, § 134, the rule is laid down as follows:

"A grant to a railroad company of the right to construct its road along, upon, or across, or to use, an existing highway, in the absence of express words to the contrary, is not to be construed as a power to destroy such highway. It cannot so construct the road as to block the highway, so that it cannot be used by the public, and while trains are not passing over it, or the company is not otherwise properly using the track. * * * The principle that one who unlawfully interferes with a highway creates a nuisance and is liable in damages to one who suffers a special injury applies to a railroad company which, though authorized to construct its road along or across a street or highway, exceeds its authority or fails to exercise a proper degree of care in such construction. * * * A railroad so constructing its road at a crossing of a highway as to make it dangerous to travelers is liable for an injury occasioned thereby."

From the foregoing authorities, and others which might be cited to the same effect, a railroad company operating under its charter with the right of eminent domain has no more right to make an excavation across a public highway before it begins the operation of its trains, and to leave the excavation in an open, exposed, and dangerous condition for the public who traverse the public highway, than it would have to do so after the road is completed and the trains are in operation on said railroad and over said crossing. The manifest purpose of the Legislature

was to protect the traveling public while passing over the highways of the state against the negligence and carelessness of a railroad company both before and after the operation of its trains, but while exercising the powers under the charter which had been granted by the Legislature. The road laws provide that the crossings shall be kept in a safe condition, safe to the traveling public over the highways of the state; and this is so regardless of whether trains are being operated over the road or not.

From the foregoing we conclude that the question propounded by the Court of Appeals should be answered in the affirmative.

All the Justices concur.

(152 Ga. 726)

ENGLISH et al. v. ROSENKRANTZ.
(No. 2486.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Corporations ~~§~~284—Agreement placing voting power in hands of one person and providing for election of salaried officers held contrary to public policy and void.

An agreement between members of one faction holding a majority of the capital stock of a private corporation organized under the provisions of Civil Code 1910, § 2823, whereby such members relinquish their right individually to vote their stock in the corporation according to the judgment of each individual, and contract that the voting power shall rest unqualifiedly and absolutely in one of such members, to the exclusion of the others, for a long period of time, and that during such time certain of the members shall hold salaried offices, whether or not it be for the best interest of the corporation and all its stockholders that the persons designated as officers should be elected and kept in office, or that the specified salaries be paid, and whereby persons holding a minority of the stock of the corporation who are not parties to the agreement may be excluded from participating in the management and control of the corporation, or holding any of such salaried offices during the term of the agreement, is against public policy, and therefore void. Applying the principle stated, it was error to overrule the demurrer to the petition as amended.

2. No error in ruling on cross-bill.

The assignment of error in the cross-bill of exceptions is without merit.

Certiorari from Court of Appeals.

Action by Reble Rosenkrantz against J. W. English and others. A judgment for plaintiff was affirmed by the Court of Appeals (26 Ga. App. 234, 105 S. E. 729) on defendants' bill of exceptions and plaintiff's cross-bill, and defendants bring certiorari.

Reversed on the main bill of exceptions, and affirmed on the cross-bill.

On the 16th day of April, 1918, Mrs. Reble Rosenkrantz instituted an action against James W. English, Sr., Harry L. English individually and as administrator of the estate of James W. English, Jr., deceased, James D. Robinson, Emily English Robinson, Jennie English Kiser, and John K. Ottley. The action was to recover damages for an alleged breach of contract. The defendants filed general and special demurrers to the petition. Certain amendments to the petition were allowed, after which the demurrers were renewed. The court sustained a special demurrer to paragraph 10, and, with that paragraph stricken from the petition, overruled the demurrers upon all other grounds. The defendants excepted to so much of the judgment as overruled the demurrers; and the plaintiff filed a cross-bill of exceptions, assigning error on that part of the judgment which struck paragraph 10 of the petition. On review the Court of Appeals affirmed the judgment of the trial court on both bills of exceptions. The case comes to the Supreme Court by writ of certiorari, assigning error on the judgment rendered by the Court of Appeals. 26 Ga. App. 234, 105 S. E. 729.

It is to be gathered from the allegations of the petition as amended that James W. English, Sr., was the father of each of the other defendants, except James D. Robinson who was his son-in-law, and John K. Ottley, who was his close associate in business. The opinion of the Court of Appeals contains a statement of the substance of the petition and demurrers, which, with some change of expression and a substitution of a copy of the contract alleged to have been breached in lieu of a statement of its contents, is as follows: In the year 1885 petitioner's father, W. B. Lowe, Sr., associated with defendant James W. English, Sr., and others, organized the Chattahoochee Brick Company, a corporation engaged in general contract work and the manufacture and sale of brick. Its capital stock was 2,000 shares (\$200,000) of a par value of \$100 each. W. B. Lowe, Sr., died in 1900, leaving a will, and at the time of his death the stock was held as follows: The Lowe estate, 807 shares; James W. English, Sr., 813 shares; A. B. Steele, 380 shares. The Lowe estate was controlled by the executors appointed in the will, namely, his widow, Rebecca D. Lowe, his son, W. B. Lowe, Jr., and the petitioner. The petitioner had intermarried with James W. English, Jr., a son of James W. English, Sr., in 1896, and at the time of the death of W. B. Lowe, Sr., petitioner was the daughter-in-law of James W. English, Sr.; her married name being Reble Lowe English. She and her coexecutors differed as to the voting of the Lowe stock. The other two were opposed to the

management of the company by the Englishes, and were unwilling to re-elect James W. English, Sr., as its president. Petitioner offered to vote one-third of the Lowe stock for him, but was advised that she could not, and that the other executors, being a majority, could vote the stock. The Lowe stock with Steele's stock was a clear majority. Steele encouraged Mrs. Lowe to stand for the office of president, and she was favorable considering the suggestion. In such circumstances the petitioner's then husband, James W. English, Jr., had an interview with Steele and made a contract in the name of James W. English, Sr., to purchase the Steele stock. This was done in pursuance of an agreement between James W. English, Sr., and James W. English, Jr., that the purchase should be in the Senior's name, but that petitioner should receive one-third of the Steele shares, James W. English, Jr., one-third, and James W. English, Sr., one-third. Petitioner's attitude had estranged her from her own family, and her relations with her husband's family were then close and friendly. After the purchase James W. English, Sr., refused to recognize the agreement mentioned above, and insisted on having for himself 220 shares of the stock acquired from Steele. This would give him 1,033 shares, being a majority of the total stock of the corporation in his own name. Of the remaining 160 shares the petitioner was allotted 80, and James W. English, Jr., 80. James W. English, Jr., for himself and his wife, the petitioner, protested against this arrangement, but their consent was finally obtained upon an agreement that the parties should enter into a contract which would fix the rights of the parties and protect them against the power of the majority of the stock, which thus went to James W. English, Sr. Under such circumstances James W. English, Jr., and petitioner entered into the contract which will presently be stated. After so obtaining such majority of the stock, James W. English, Sr., for reasons of his own, caused 7 shares of his total of 1,033 shares to be apportioned, one share each among members of his family, and one share to John K. Ottley. The names of the persons taking under such apportionment appear in the contract hereinafter set out, one of them being Edward English, the share going to him being taken in the name of John K. Ottley as his trustee. All of the other persons taking under such apportionment were parties to the contract; and all were made parties defendant to this action, except Edward English or John K. Ottley, as his trustee. On the 11th day of July, 1900, all of the stock of the corporation being held by the Lowe estate and by James W. English, Sr., and the members of his family and John K. Ottley, as hereinbefore stated, a written contract was entered into by all the

persons owning all the stock of the corporation, except that held by the executors of W. B. Lowe, deceased. The executors of the Lowe estate, holding 807 shares (a minority of the entire capital stock of the corporation), did not enter into the contract. A copy of the contract was attached to the petition as an exhibit and was as follows:

"Whereas, James W. English is the owner of 1,028 shares of the capital stock of the Chattahoochee Brick Company, a corporation duly chartered and incorporated under the laws of said state, with its principal office in the city of Atlanta, state and county aforesaid, the said named shares being a majority of the capital stock of said company;

"And whereas, the following named persons are each the owners of the numbers of shares only of the capital stock of said company which is set opposite their names in the schedule below, they being therefore minority stockholders in the said corporation (the said Rebecca Lowe English, whose name appears in said schedule, being, in addition to the number of shares therein stated, likewise interested in the stock owned by the estate of W. B. Lowe, late of said county, deceased), that is to say, names of stockholders: James W. English, 1,028 shares; J. W. English, Jr., 80 shares; Rebie Lowe English, 80 shares; Emily A. English, 1 share; Emily English Robinson, 1 share; Harry L. English, 1 share; Jennie English, 1 share; James D. Robinson, 1 share; John K. Ottley, 1 share; John K. Ottley, as trustee for Edward English, 1 share;

"And whereas, the said shareholders above named are each of the opinion that the interests of the aforesaid corporation as well as their own, and the interests of all other stockholders who may be interested in said corporation, require unity of action on the part of the said shareholders above named in the matter of the conduct of the affairs of the said corporation, in order to insure the continuance of the wise, conservative, honest, and economical management of the affairs of said corporation, such as has characterized its management in the past, and in order to prevent said corporation from being in any manner exposed to the manipulations and devices of stock speculators and corporation wreckers;

"And whereas, it is believed by the shareholders above named that such unanimity of action and such protection of their respective interests and the interests of the other shareholders in the said corporation can be best assured by the manner and means herein provided:

"It is therefore, in consideration of the premises herein and in consideration of the advantages which will herefrom result to the stockholders generally, as well as for and in consideration of the special advantages which will result to the corporation itself and as well to the said shareholders, it is hereby mutually agreed between the said shareholders, each with the other, that until the 22d day of June, 1945, unless the said several parties hereto shall sooner in writing mutually otherwise agree, that said stock that is now held, or any of the said stock of said company which may hereafter be bought or acquired by any or either

of the said several parties hereto, shall at all corporate meetings of said corporation be voted as a unit, and to that end the said owners of the several shares of stock herein mentioned do by these presents hereby constitute and irrevocably appoint James W. English, and his successors as herein provided, to be their lawful agent and attorney for them and in their several names to vote said shares of stock at all corporate meetings of the stockholders of said corporation, subject only to the conditions and limitations hereinafter expressed.

"Should the said James W. English depart this life prior to the expiration of this agreement, or otherwise become unable to discharge the duties herein imposed upon him as such agent and attorney, then and in that event it is agreed that such agency shall devolve upon his heirs, together with Rebie Lowe English, and they jointly are authorized to represent the said shareholders and vote said stock in all respects as though the same had been done by James W. English. In the event a disagreement should arise among the heirs of James W. English, together with Rebie Lowe English, as to how said stock shall be voted touching any business of the corporation which shall require a vote of the stockholders, then and in that event the minority and majority of the persons constituting the heirs at law of James W. English and Rebie Lowe English shall each select a disinterested person to whom the difference of opinion among the aforesaid parties shall be submitted; and, if these two parties so selected shall fail to agree, they shall select a third disinterested party, and they three shall pass upon the differences of opinion as submitted and decide the questions at issue, and their decision shall be final. The limitations and conditions above referred to and herein expressed are as follows:

"First. During the lifetime of the said James W. English said stock shall be voted by him annually for such one of the shareholders of the said company as he may designate for the office of president thereof. In the event of his death the said stock shall be by his successors, as hereinbefore provided, annually voted for James W. English, Jr., as the president of said company. And, should the said James W. English, Jr., die before the time limited for the expiration of this agreement, then the said stock shall thereafter be annually voted for Harry L. English as the president of said company. During the lifetime of James W. English the said stock shall be voted for James W. English, Jr., as the vice president of said corporation; and, should the said James W. English, Jr., in the meantime, depart this life, then the said stock shall be voted for Rebie Lowe English, his wife, as vice president of the said company.

"If under the provisions of this agreement as hereinabove stated James W. English, Jr., shall be chosen to be president of said company, then thereafter, during the life of the said James W. English, Jr., the said Harry L. English shall be elected vice president of said company. In the event the said James W. English, Jr., and the said Harry L. English should each depart this life during the continuance of this agreement, then the said shares of stock shall be voted in the election of president of said corporation for such person, being

a stockholder of said corporation, as may be designated by the heirs at law of the said James W. English. And, should a disagreement arise between the said heirs at law as to the person to be elected president, then those of the heirs at law of the said James W. English owning a majority of the said mentioned stock and those of the heirs at law of the said James W. English owning a minority of the said mentioned stock shall each select a person who shall designate from those owning stock in the company a person to be elected president. Should those two persons so elected disagree as to whom should be elected president, then and in that event they shall select a third person to act as umpire; and the majority of the three persons so named are hereby authorized and empowered to cast the votes of the said stock for such person as they may designate for the office of president.

"It is further mutually understood and agreed by all the parties to this agreement that, in the event of the death of James W. English, Jr., the authority hereinabove conferred upon James W. English and his successors as herein provided to cast the vote of said stock shall be, and is hereby, vested in Rebie Lowe English alone, in so far as the same shall relate to the election of a vice president of said corporation; and, should the said Rebie Lowe English so desire, she is hereby authorized and empowered, and upon her to that extent all necessary authority is conferred, to cast the vote of the entire aforesaid stock owned or held by the aforesaid parties now, or which they may hereafter own or acquire, annually for such stockholder in said company as she may designate for the office of vice president of said company; and this authority is especially conferred to the end that she may, if she sees proper, vote the entire aforesaid stock for herself for the office of vice president annually during the continuance of this agreement, if she should so long desire, it being now and here admitted that she is, in the opinion of each of the parties hereto, in all respects well qualified and fully competent to discharge the duties of said office.

"Second. It is mutually agreed and understood between the parties hereto that, in the event of the death of Rebie Lowe English, the stock owned or held by her in said corporation may, on demand, be delivered to her heirs at law, provided such heirs at law be persons other than James W. English, Jr., or the descendants of the said James W. English, Jr., and Rebie Lowe English. In the event the said heirs be other than the said James W. English, Jr., or the descendants aforesaid, all relations between the said Rebie Lowe English, as well as those of her heirs at law, shall cease and determine between herself and the other parties to this agreement, and her said stock and any stock to which she would have been entitled shall be withdrawn from the operation hereof and delivered to the representatives of her estate.

"Third. In the event of the death of the said James W. English, the said shares of stock shall be voted as to authorize, by a change of the by-laws, an increase of the number of directors to eight or more, and in such manner as to authorize the election of an attorney to represent the said corporation, if such an officer

should be deemed necessary. In the event of the death or disability of any director, said number shall be diminished in like manner. And whereas in the event named, that is to say, the death of James W. English, the said persons whose names are hereinafter immediately written will in all probability then be more largely interested in the stock of said company, and whereas they do by these presents pledge themselves to co-operate each with the other in furthering the interests of said corporation, it is hereby agreed that the below named persons shall be annually elected directors of said corporation, if in life and they be then mentally competent to discharge the duties of the office, that is to say, Emily A. English, James W. English, Jr., Emily English Robinson, or her husband, J. D. Robinson, as they may decide, Harry L. English, Rebie Lowe English, Jennie English, and John K. Ottley, who shall be annually elected until such time as Edward English shall attain his majority, at which time he, the said Edward English, may, if competent to discharge the duties of the office, be elected to succeed John K. Ottley as a director and be annually thereafter so elected.

"Fourth. The said shares of stock shall be voted in such a manner as to authorize the payment to the president and vice president of a salary of two hundred and fifty (\$250) dollars per month, which salary shall be paid monthly on the 20th day of each month out of the net earnings of the said company after the payment of all current bills for the month preceding, which bills shall be paid on or before the 15th thence immediately preceding, and the said named salaries shall not otherwise be paid, and money shall not be borrowed for the purpose of paying salaries, nor shall they be increased during the continuance of this contract. Said stock shall not be voted during the continuance of this contract so as to authorize the creation for said corporation of any new salaried offices without the unanimous consent in writing of all the parties hereto, and then only when the interests of said corporation shall seem so to require, nor shall it without such consent be voted in such manner as to authorize the sale or incumbrance of the corporate business or franchises or an increase of the capital stock of said corporation. Said stock shall under no circumstances be voted in such manner as to render any shareholder in said corporation ineligible to election as director or officer therein, the rights of all shareholders being equal and entitled to be respected.

"Fifth. It is further agreed that during the continuance of this agreement neither of the shareholders herein mentioned will sell, hypothecate, transfer, or assign their said shares of stock or any part thereof or any which they or either of them may hereafter acquire, to any person other than one of the parties hereto, without first having given to each of the other parties hereto a fair opportunity to purchase said stock or such portion thereof as they might desire at its then market value; and, if disagreement shall arise between the person offering to sell and the person proposing to buy as to what is the market value of said stock, such disagreement shall be submitted to the appraisal of three disinterested persons, one to be selected by each of the parties disagreeing and a third by the two persons so chosen,

and the appraisement of the three persons so chosen shall between said persons be conclusive as to the market value of said stock, and that all such shares of stock as may be hereafter owned or acquired by any of the parties to this agreement in addition to those now covered by this agreement shall be immediately merged with the other shares herein stated, and the agency herein created shall without further agreement extend to and cover said shares. In the event said stock or any part thereof shall be sold to any person not a party to this agreement, the same shall be herefrom immediately withdrawn, and the purchaser thereof shall not in any wise become a party to this agreement or entitled to any voice in the control of the stock covered hereby remaining in the hands of the parties hereto. It is further agreed that upon each certificate of stock issued to or held by the parties to this agreement there shall be indorsed thereon the following words: 'Within shares of stock are held subject to a contract and agreement executed in quadruplicate on the 11th day of July, 1900, by and between James W. English, James W. English, Jr., Emily A. English, Rebbe Lowe English, Emily English Robinson, J. D. Robinson, Harry L. English, Jennie English, John K. Ottley, and John K. Ottley as trustee for Edward English.'

"The said shares of stock shall be deposited with James W. English as trustee, who shall issue to each of the parties hereto a certificate setting forth that the entire number of shares of stock so deposited are held by said trustee subject to the joint instructions only of the said several parties hereto and to such instructions to be given as herein provided only; that the same cannot be withdrawn, sold, hypothecated, transferred, or assigned to any person not a party hereto, except with the unanimous consent in writing of the other parties hereto. And each of the parties hereto and their heirs are authorized to draw in person from said company such dividends as may accrue to him or her by reason of the shares of stock that such person may now own or may hereafter acquire. In the event of the death of James W. English, trustee, his successor in such trust shall be appointed by the remainder of the parties to this agreement who may be then in life; and in the event of a disagreement among the said parties as to the person to be chosen as trustee, a majority of them shall have authority to name the trustee. And the said trustee so named shall enter upon and assume all the duties and responsibilities imposed upon the said James W. English as trustee.

"This agreement may be changed or amended only in the following manner: During the lifetime of James W. English it may be changed and amended in any respect by and with the consent in writing of James W. English, James W. English, Jr., and Rebbe Lowe English; and in the event of the death of James W. English it may be changed or amended with the written consent of all the parties hereto, except in so far as the same makes provision for the payments of salaries for the president and vice president, and except in so far as the same provides against the sale and incumbrance of the corporate business or franchises and the increase of the capital stock of the said corporation, and with respect to these matters the

said agreement shall not be changed, nor shall said stock be voted in such manner as to authorize any conduct contrary to those provisions of this contract during the term fixed for its continuance.

"Should any disagreement arise at any time among the parties hereto touching the meaning of this agreement or any clause thereof, then such disagreement shall be submitted in writing to three disinterested parties, who shall interpret said agreement with respect to the matter then in question, and their decision as to its intent and meaning shall be final. Said disinterested parties to whom the matter of such disagreement shall be referred shall be selected as follows: The minority and majority of the parties hereto shall each select a man; and if they fail to agree, the two so selected shall select a third man, and the decision of the majority of the board so chosen shall be final.

"In witness of all of which the parties hereto have each interchangeably set their hands and seals on this the 11th day of July, 1900."

The foregoing instrument was signed by each of the persons who are named as parties to the contract. At the time of execution of the contract petitioner, as a legatee under the will of W. B. Lowe, Sr., had title to an undivided one-third interest in the shares held by the Lowe estate; and on April 6, 1903, she became the sole holder of the legal title to all of the Lowe shares of stock, and remained such owner thenceforward; and the defendants knew of such ownership at the time of the alleged breach of the contract. James W. English, Jr., died in 1914. Prior to his death the petitioner had been granted a total divorce from him, and had intermarried with her present husband, Baron Marcus Rosenkrantz. Upon the death of James W. English, Jr., petitioner became entitled, under the above-quoted contract, to vote all the stock covered by the contract for the vice president, and could vote it for herself unless she chose to designate some one else. During the entire time up to the death of James W. English, Jr., James W. English, Sr., continued to exercise powers under the contract and to carry it out. As late as November 16, 1912, which was after petitioner's divorce from James W. English, Jr., and her marriage with her present husband, James W. English, Sr., wrote petitioner a letter referring to the contract, and stating: "I signed it and expect to live by it, as I do by all contracts I make." At a stockholders' meeting held July 2, 1914, petitioner, who had become sole executrix of the estate of William B. Lowe, Sr., in which name the 807 shares of Lowe stock stood, was represented by her husband, Baron Marcus Rosenkrantz, by proxy. At that meeting a resolution was offered providing that the officers of the company should be named and thereafter be elected by the board of directors, and their compensation be fixed by said board. Petitioner's husband offered as an amendment a resolution, which was seconded by Mr. Bid-

well, representing one share of stock, that the above contract of July 11, 1900, be filed with the board, and that they should vote in accordance therewith for the officers named therein. This amendment was defeated by the vote of all shares except those voted by Baron Rosenkrantz; and the original resolution, without amendment, was carried by the same vote. Afterwards the petitioner attended the annual meeting of stockholders of the corporation, held on January 24, 1916, at which she proposed, under the terms of the contract, to cast the vote therein mentioned for herself as vice president, together with the shares of stock known as those of the W. B. Lowe estate; and she announced, by a written statement, that she did thus cast such shares for herself, the same constituting the entire capital stock of the company. At a meeting of the board of directors held immediately after the stockholders' meeting, that body ignored the action of petitioner and elected James W. English, Sr., as president and his son, Harry L. English, as vice president, all directors voting for the said Harry L. English as vice president except the petitioner, she stating that she claimed to have elected herself vice president of the company at the stockholders' meeting, and hence voted "No." Harry L. English was declared elected vice president. It was alleged that this action was in violation of petitioner's rights under the contract; that petitioner had been deprived of a salary of \$250 per month, or \$3,000 a year, attached to the office, which salary has been paid, since the inception of the agreement of July, 1900, to the persons recognized as vice president; that the defendants have expressly repudiated the contract and denied that it has any force or effect and petitioner is therefore entitled to sue for damages for the breach of the entire contract for the full term thereof; that the contract vests in her the right to receive the salary of \$3,000 per year until and through the year 1945; and she asks damages in the sum of \$100,000.

The grounds of demurrer to the petition were: (a) That the petition shows no cause of action and no right of recovery; (b) that the contract, Exhibit A, was illegal and void and contrary to public policy; (c) that there was no consideration for the contract, and it was nudum pactum; (d) that the petitioner, having remarried, was not entitled to the office, benefits, or emoluments of the contract, even if it was originally valid. After stating the facts, the division of the Court of Appeals having the case for decision rendered the following opinion, in which two of the judges concurred:

"The court did not err in any of its rulings on the pleadings. The petition set out a cause of action. The Chattahoochee Brick Company, referred to in the contract declared on, is a private business corporation which has no func-

tions of a public character. The contract is based upon a sufficient consideration, is not void as being contrary to public policy, and is a valid contract binding upon the parties thereto; and the petitioner did not lose any of her rights under the contract by reason of her divorce and subsequent remarriage, nor by the death of her first husband, James W. English, Jr."

The other judge dissenting stated:

"I cannot concur with the conclusion reached by the majority of the court. See *Morel v. Hoge*, 130 Ga. 625, 61 S. E. 487, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935."

Brewster, Howell & Heyman and Mark Bolding, all of Atlanta, for plaintiffs in error.

V. A. Batchelor and Spalding, MacDougald & Sibley, all of Atlanta, for defendant in error.

ATKINSON, J. [1] 1. The action is for damages for alleged breach of the contract set forth at length in the statement of facts, by preventing the plaintiff as a stockholder from voting all of the stock of the corporation for herself as vice president under provisions of the contract, and thereby depriving her of stipulated salaries pertaining to the office. The action was instituted after the decision of this court in *Rosenkrantz v. Chattahoochee Brick Co.*, 147 Ga. 730, 95 S. E. 225, being a suit for specific performance, in which the judgment of the trial court dismissing the petition on general demurrer was affirmed. A controlling question is whether the contract is void on the ground that it is contrary to public policy. Prior to the purchase of the Steele stock, which was arrayed against James W. English, Sr., the latter did not have a majority of the stock of the corporation. After acquisition of the Steele stock English and his family, including the plaintiff, who for convenience may be called the English faction, had a majority of the stock, which enabled them to dominate the corporation, while the Lowe estate, who for convenience may be called the Lowe faction, had a substantial minority amounting to more than one-third of the total stock of the corporation. While the plaintiff owned an undivided interest in the stock held by the Lowe faction, she allied herself with the fortunes of the English faction, and was a party to the written pooling contract of date July 11, 1900. By the terms of this contract all of the stock held by the English faction was pooled for voting purposes, so that one person might exercise the voting power for all of the stock, whether or not its business was being operated wisely and to the best interest of the corporation or the stockholders as a whole. The contract was irrevocable and unchangeable, except upon mutual consent of all the parties thereto. The corporation was organized in 1895, under

the provisions of the statute which is now found in Civil Code, § 2823, and its period of existence fixed by statute was 20 years from the date of the charter subject to renewal. Under the provisions of the contract salaries to be paid out of net earning of the corporation were provided for the president and vice president, not to exceed \$250 per month respectively; and the right to hold such offices in the corporation was confined to members of the English faction, and should exist during the full term of the contract, which was 45 years from its date, being more than twice the term of the life of the corporation. The order in which different members of the English faction should become entitled to hold the offices of president and vice president was provided for on the basis of survivorship of James W. English, Sr., James W. English, Jr., Harry L. English, and the plaintiff, during the period of the contract. The plaintiff should become entitled to the office of vice president on the death of her husband, James W. English, Jr. Salaried offices above mentioned were to be held as above indicated, irrespective of whether or not it would be to the best interest of the corporation and the stockholders as a whole to have such persons hold the offices or to pay the salaries attached thereto. While the salaries were payable out of net income, if the net income should not be more than sufficient to pay the specified salaries, it would be possible to consume the whole of the net income in paying salaries, thus leaving nothing to be paid as dividends upon any of the stock in the corporation. Under such circumstances the holders of the majority stock who were not president or vice president, and of course the minority stock held by the Lowe faction, which was outside the contract, would be under a great disadvantage. The plaintiff allied herself with the English faction, and indirectly through her husband, and directly as a prospective vice president herself, had peculiar advantages under the contract in which her co-owners of the Lowe stock did not share. They could have no voice in the management or policy of the corporation during the whole term of the contract, whether or not the faction in control wisely and successfully conducted the business of the corporation. In such circumstances the tendency of the contract was to depress the value of the Lowe stock while in the hands of Mrs. Lowe and W. B. Lowe, Jr., and cause it to gravitate towards the plaintiff or other members of the English faction, parties to the contract, who might be willing to buy at some reduced price. In the circumstances, while the facts differ somewhat from those involved in *Morel v. Hoge*, 130 Ga. 625, 61 S. E. 487, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, the principles there ruled are applicable and controlling. In that case all of the stock of the corporation was repre-

sented in a contract, which in effect gave one faction of stockholders the right to permanently elect a majority of the directors, and thus render it possible for a minority of the stockholders in the corporation to control the policies and affairs of the corporation, whether or not the management was for the best interests of the corporation or its stockholders as a whole. The contract was held to be void as against public policy. The opinion is so apposite that it will be restated:

"The contention of the Morel faction is that an agreement was entered into between it and the Hilton faction, which agreement was a condition precedent to the incorporation of the Sylvania & Girard Railroad Company, to the effect that, in consideration of the Morel faction subscribing for 50 of the total number of 100 shares of the capital stock of the company, the Morel faction should permanently have the right of selecting and having elected three of the five directors of the company, 'and thus exercise a control over the company and its affairs.' Granting that the allegations of the answer are sufficient to sustain this contention, the question for adjudication is whether such agreement is valid. The company was incorporated by the Secretary of State under the provisions of Civil Code, § 2159 et seq. In section 2163 it is provided: 'The board of directors shall select from their number a president, and may elect one or more vice presidents, and may appoint a secretary, a treasurer, and such other officers and agents as they may deem necessary.' Therefore, if the Morel faction has the right, by virtue of the agreement, to have elected a majority of the directors of the company, favorable to the interests of that faction and willing to carry out its policies in the management of the corporate affairs, and the members of the Hilton faction are bound by the agreement to so vote their stock as to enable the Morel faction to exercise such right, then the last-named faction may indefinitely control the entire management of the company, and accordingly name all its officers and agents, fix their compensation, and choose any of them from among the shareholders identified with such faction, even though it may own, as is now the case, only a minority of the corporate shares. In *Shepaug Voting Trust Cases*, 60 Conn. 579, 24 Atl. 41, Robinson, J., said: '* * * The duty which each stockholder owes his fellow stockholder [is] to use such power and means as the law and his ownership of stock give him, that the general interest of the stockholders shall be protected and the general welfare of the corporation sustained, and its business conducted by its agents, managers, and officers, so far as may be, upon prudent and honest business principles, and with just as little temptation to and opportunity for fraud, and the seeking of individual gains at the sacrifice of the general welfare, as possible. * * * He may shirk it perhaps by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty.'

"In *Cone v. Russell & Mason*, 48 N. J. Eq 208, 21 Atl. 847, the owners of a majority of the shares of a transportation corporation mu-

tually agreed to execute, and did execute, a proxy purporting to be irrevocable for five years, authorizing the persons therein named to vote at all stockholders' meetings; and they on their part agreed to so vote that one of the parties to the agreement should be continuously employed as a manager of the corporation, at a salary specified in the agreement. This agreement was held to be against public policy, and therefore void, upon the ground that it was the obligation of corporators and shareholders to attend in person and execute the trust or franchise imposed upon them, and that the good of the public required that each stockholder should exercise his individual judgment as to all matters presented. In the opinion delivered for the court, Pitney, V. C., quoted the language of Chief Justice Shaw in *Fuller v. Dame*, 18 Pick. 484, as follows: 'Mr. Fuller was one of the original proprietors of the Worcester Railroad. His associates had a right to believe that, in all his acts as such stockholder, in choosing directors, in framing by-laws, and in doing other acts, pursuant to the powers of the corporation, he had a common, and, in proportion to his shares, an equal, interest, and they had a right to rely on his judgment, his recommendations of directors, and other acts, with all the confidence inspired by such a belief.' There are a number of other cases in which it has been held that agreements between stockholders that particular persons shall fill the offices of a corporation and draw designated salaries impair the duty of stockholders to choose for their officers such persons as are best adapted to promote the welfare of the corporation. Among them are *Guernsey v. Cook*, 117 Mass. 548; *s. c.*, 120 Mass. 501; *Woodworth v. Wentworth*, 133 Mass. 309. In *White v. Thomas, etc., Co.*, 52 N. J. Eq. 178, 28 Atl. 75, the holder of certain patents agreed with several capitalists to form a joint-stock company, a portion of the capital stock of which was to be issued to him in payment of patents to be assigned to the corporation, another portion to be issued to the capitalists for funds to be advanced by them in exploiting the patents, and the remaining shares were to be held in the treasury for sale. It was agreed that the shares other than those left in the treasury were to be transferred to a trustee, to be held for the term of ten years, and were by him to be so voted at the elections of the directors that the patentee should nominate and elect a minority of the directors, and the holders of the remainder of the stock should elect the majority. After the shares reserved in the treasury were sold and the purchasers thereof had also purchased of the patentee the greater portion of his stock, a suit was brought by such purchasers against the trustee to restrain him from voting at an approaching election the shares of stock thus held by him in trust, and to have the agreements under which he held them canceled and set aside. The court, relying upon the general principle that the right to vote stock 'cannot be separated from the ownership in such sense that the elective franchise shall be in one man, and the entire beneficial interest in another, nor to any extent, unless the circumstances take the case out of the general rule,' declared the trust in question void, and granted the relief sought by the com-

plainants. In *Harvey v. Improvement Co.*, 118 N. C. 693, 24 S. E. 489, 32 L. R. A. 265, 54 Am. St. R. 749, it was declared that 'each stockholder, whether by himself or his proxy, must be free to cast his vote for what he deems the best interest of the corporation, the other stockholders being entitled to the benefit of such free exercise of his judgment by each; and hence any combination or device by which a number of stockholders shall combine to place the voting of their shares in the irrevocable power of another is held contrary to public policy,' and 'power to vote is inherently annexed to, and inseparable from, the real ownership of each share, and can only be delegated by proxy with power of revocation.' So in *Gage v. Fisher*, 5 N. Dak. 297, 65 N. W. 809, 31 L. R. A. 557, one of the grounds upon which the transaction therein involved was held to be void was that each stockholder in a corporation has the right to demand that every other stockholder, if he desires to do so, shall have the right to exercise at each annual meeting 'his own judgment as to the best interest of all the stockholders, untrammelled by dictation and unfettered by the obligation of any contract.' We are aware that there are some cases in which a contrary principle is announced, but, in our opinion, the cases cited announce the better doctrine. One of the cases holding contrary to our opinion is *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119, the soundness of which, we think, is very justly criticised in a note following a report of the case in 56 American State Reports, 119. In that case it may be noted that the contract involved was limited to five years.

"In the instant case the motives of Morel and those acting with him may be for the promotion of the prosperity of the corporation and the welfare of the majority of its stockholders, but, in passing judicially upon the question as to the validity of the contract set up by them, and under the terms of which they claim the right to indefinitely control the affairs of the corporation, we must look alone to what such contract permits to be done, if the parties, or any of them, choose to press the privileges which it confers. According to the authorities we have cited, it is the theory of the law that the holders of the majority of the shares of stock in a corporation may control its management, and every person who becomes an owner of stock therein has a right to believe that the corporation will, and to insist that it shall, be managed by the majority. Morel and his friends owned only 50 shares of stock, just half of the whole number of shares, at the time the agreement in question was entered into; now they own only 45 shares, one of their number, contrary to an agreement entered into by them among themselves, having sold his 5 shares; and it is this minority which claims to have the right to control the corporate affairs by dictating the majority of the directors to be elected. To illustrate how small a minority might exercise such right under the alleged agreement, suppose none of the other members of the Morel faction should sell, and they should agree among themselves to vote their stock as a unit, as determined by ballot; then 23 shares would control. If this could be done, then the owners of such 23 shares could agree among them-

selves that they would hold meetings, and by a majority of their shares determine how all the 23 votes should be cast in the meeting to be held to determine how the 45 shares should be voted; and, if so, then 12 shares could determine the whole policy of the corporation, though the Hilton faction should own 25 shares, Hoge 25 shares, and Mills 5 shares, as seems now to be the case, as the answer charges merely on belief that Hilton is the real owner of the shares standing in the names of Hoge and Mills.

"Our conclusion is that the contract set up by the respondents to the rule as cause why mandamus absolute should not be granted is against public policy, and therefore void, because it indefinitely deprives the owners of the stock constituting the Hilton faction, though they may have a majority of the stock, of the power to exercise their right as well as their duty to the other stockholders, present or future, and to the public, to so vote in the election of directors for the company as will in their judgment promote its prosperity and best enable it to perform its duties to the public, and because it gives the shareholders of the Morel faction, even though they may own but a small minority of the stock, the right to indefinitely control the affairs of the corporation, including the right to fix the compensation of its officers and agents and to fill any of such positions from among their own members. It follows that the court did not err in rendering the judgment of which complaint is made."

The connection in which the Court of Appeals uses the language, "The Chattahoochee Brick Company, referred to in the contract declared on, is a private business corporation which has no functions of a public character," shows a misconception of the foregoing opinion. It is true that in the concluding paragraph of the opinion, stating reasons why the contract was void as against public policy, it was said that the stockholders owed a duty "to the public, to so vote in the election of directors for the company as will in their judgment promote its prosperity and best enable it to perform its duties to the public," but that was only one reason, and the language employed did not mean that in order to make the rule applicable the corporation must be what is commonly called a public service corporation. Other reasons were stated, all of which were discussed in the opinion based on principles applicable to contracts of the character involved, irrespective of the quasi public or private character of the corporation, or whether its functions were private or public. Numerous prior decisions of other courts, not cited in the opinion, as well as subsequent decisions, might be cited, holding such contracts void as against public policy, without regard to the public or private character of the corporation. However, the decision above mentioned by this court is the law of this state, and it would be useless again to enter into further discussion of the case. The case was distinguished in *Simmons v. Atlanta Telephone*,

etc., Co., 139 Ga. 488, 77 S. E. 377, but not on the ground of the character of the corporation the stock of which was involved. The corporation in that instance was a quasi public corporation, being a telegraph and telephone company. The nature of the contract upon which the present action is founded need not be again stated. Sufficient has been said of it to show that under application of the principles applied in the opinion in *Morel v. Hoge*, 130 Ga. 625, 61 S. E. 487, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, it is void because it is against public policy, and its breach does not afford the plaintiff a cause of action. Under this view it is unnecessary to deal with other grounds of attack on the contract raised by the demurrer.

[2] 2. The trial judge sustained a special demurrer and ordered paragraph 10 stricken from the petition. The cross-bill or exceptions assigns error on this ruling. The Court of Appeals affirmed the judgment on the cross-bill of exceptions. The substance of paragraph 10 is not of such materiality as renders it necessary to be stated. It is sufficient to state that there was no error in the ruling made.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill.

All the Justices concur.

HILL and GILBERT, JJ., concur specially in the judgment on the main bill of exceptions.

(28 Ga. App. 394)

WILLINGHAM, WRIGHT & COVINGTON
v. GLOVER et al. (No. 12646.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)

(Syllabus by the Court.)

1. Appeal and error ~~from~~ 917(3), 1139—Parties ~~to~~ 88(3)—Pleading ~~to~~ 205(4), 225(1)—When order sustaining demurrer is general, appellate court must consider special as well as general grounds; court not bound to give opportunity to amend on sustaining of special demurrer; court may grant plaintiff opportunity to correct defects subject to special demurrer; misjoinder is ground of special, and not general, demurrer.

The plaintiff law firm sued the defendants upon a quantum meruit for the value of legal services rendered under an alleged joint contract and employment in representing their interests in a factional contest with other stockholders in a corporation. The amended petition in effect charges that the three defendants expressly and simultaneously employed the plaintiffs to perform the services in question for the defendants, and that the purposes sought and results obtained from such employment were a common undertaking and for the common benefit of the defendants. Defendants demurred upon the grounds that there was a misjoinder of parties defendant and of causes

of action, because the petition showed that the alleged contract was several, and not joint, as the pecuniary holdings and interests of the defendants were separate and distinct; that certain of the alleged benefits were received by the corporation or by other stockholders or persons, for which they, and not the defendants, would be liable; that certain of the alleged services were not such as would authorize a recovery against the defendants; and that the petition is defective in form in failing to itemize the amounts claimed for each particular service and for expenses incurred. The court passed the following order: "The within demurrer sustained, and plaintiffs' case dismissed, and judgment against plaintiffs for \$—— costs." It does not appear that the plaintiffs tendered or sought to offer any amendment to avoid the order of dismissal, but they except thereto by direct bill of exceptions. *Held*:

Where a demurrer to a petition contains grounds both of general and of special demurrer, and the trial judge, without specifying the grounds or the basis of his decision, passes a general order sustaining the demurrer and dismissing the petition, the judgment will be treated as sustaining the entire demurrer upon all its grounds, and the special as well as the general grounds must be considered on review if the petition is not subject to the latter. *McClaren v. Williams*, 132 Ga. 352 (2), 64 S. E. 65; *Herring v. Smith*, 141 Ga. 825 (4), 82 S. E. 132; *De Loach v. Ga. Coast R. Co.*, 144 Ga. 678 (1), 87 S. E. 889; *Gunn v. James*, 120 Ga. 482 (2), 48 S. E. 148; *Huggins v. S. E. Lime & Cement Co.*, 121 Ga. 311 (1), 48 S. E. 933; *Crittenden v. Southern Home Ass'n*, 111 Ga. 266 (5), 36 S. E. 643; *Atlanta Post Co. v. McHenry*, 26 Ga. App. 341 (1), 106 S. E. 324. The rule is otherwise where the order of dismissal is expressly limited to the general grounds, or from its language may be so construed, in which event the special grounds will not be considered, but will be left to subsequent determination by the trial court. *Linder v. Whitehead*, 116 Ga. 206, 42 S. E. 858; *Simpson v. Sanders*, 130 Ga. 265, 271, 60 S. E. 541; *Linam v. Anderson*, 12 Ga. App. 735 (4), 739, 78 S. E. 424. While a peremptory judgment of dismissal is ordinarily not the proper disposition of a petition upon the sustaining of a special demurrer, but the result of sustaining the demurrer is only to eliminate the parts so held bad, so that under the better practice there should be no dismissal except where the plaintiff fails to amend in compliance with the court's terms affording opportunity to do so (*White v. Little*, 139 Ga. 523 [3], 77 S. E. 646; *News Pub. Co. v. Lowe*, 8 Ga. App. 333, 334, 69 S. E. 128), it is, however, the rule that, while the court may provide in its order sustaining a special demurrer that the plaintiff have an opportunity to amend so as to meet such special grounds, it is "not bound to do so, especially where no request is made for time in which to amend." (*Lamar, Taylor & Riley Drug Co. v. First Nat. Bank of Albany*, 127 Ga. 448, 452, 56 S. E. 486, 488; *Wells v. Butlers Builders' Supply Co.*, 128 Ga. 37 [3], 39, 57 S. E. 55). But where a petition has on general order been dismissed, and the appellate court finds that it is not subject to gen-

eral demurrer, or to certain of the grounds of special demurrer, but is subject to other special grounds, direction may be given that, before the judgment of this court is made the judgment of the court below, the plaintiff be allowed to amend his petition so as to cure the defects therein, that upon his doing so the case stand for trial upon the petition as thus amended, and that upon his failure to do this the judgment below be unconditionally affirmed. *Sims v. Cordele Ice Co.*, 119 Ga. 597 (3), 46 S. E. 841; *Herring v. Smith*, 141 Ga. 825 (4a), 82 S. E. 132; *Wilson v. Central of Ga. Ry. Co.*, 132 Ga. 215 (3), 68 S. E. 1121; *Brown v. Bowman*, 119 Ga. 153 (3), 158, 46 S. E. 410; *Dunn v. Western Union Tel. Co.*, 2 Ga. App. 845 (1), 853, 59 S. E. 189; *Ternest v. Ga. Coast & Piedmont R. Co.*, 19 Ga. App. 94, 96, 90 S. E. 1040; *Ga. Fertilizer & Oil Co. v. Johnson*, 18 Ga. App. 281, 89 S. E. 844.

(a) A misjoinder of parties or of causes of action is not a ground of general demurrer, but is a defect which should be taken advantage of by special demurrer filed at the first term. *Ga. R. Co. v. Tice*, 124 Ga. 459 (1), 462, 463, 52 S. E. 916, 4 Ann. Cas. 200; *Riley v. Royal Arcanum*, 140 Ga. 178 (1b), 78 S. E. 803; *Neil v. Dow Law Bank*, 138 Ga. 153, 74 S. E. 1027; *Lippincott v. Behre*, 122 Ga. 548 (2, 3), 546, 50 S. E. 467; *Armuchee Pants Mfg. Co. v. Juillard*, 14 Ga. App. 141, 80 S. E. 525. The former rule stated in *Governor v. Hicks*, 12 Ga. 189, that such a petition will be held bad on general demurrer, has been expressly modified by *Ga. R. Co. v. Tice*, supra, 124 Ga. 463, 52 S. E. 916, 4 Ann. Cas. 200. The grounds attacking the alleged misjoinder in the instant petition, while treated by counsel as a general demurrer, cannot, therefore, be so considered; but, as they point out the alleged defects with sufficient particularity, may be treated as a part of the special demurrer.

2. Attorney and client \S 166(1)—Contract of employment presumed joint, though attorneys sued on quantum meruit.

Under the allegations of the petition, while the value of the alleged services can be recovered only under implied contract, upon a quantum meruit, yet since under the allegations the employment itself was express and specific and was the simultaneous act of the defendants in furtherance of a common purpose and for a benefit common to all, the contract must be taken as controlled by the general legal presumption that such an obligation is joint. *Walker v. City of Rome*, 6 Ga. App. 59, 61, 64 S. E. 310; *Elliott v. Bell*, 37 W. Va. 834, 17 S. E. 399; *Knowlton v. Parsons*, 193 Mass. 439, 84 N. E. 798; *Pittale v. King*, 206 Pa. 193, 55 Atl. 920; *Hill v. Combs*, 92 Mo. App. 242; *Turley v. Thomas*, 81 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667; *Paige on Contracts* (2d Ed.) 3584; 40 Cyc. 2838 (note 95); 13 Corpus Juris, 577-580; 6 Corpus Juris, 730-732; 2 *Ruling Case Law*, 1032. Although disproportionate interests of beneficiaries of a contract in the subject-matter and fruits of the employment, where the nature of the contract is otherwise doubtful, may sometimes be considered in construing its nature and character as several (*Beck v. Pounds*, 20 Ga. 37; *International Hotel Co. v. Flynn*, 288 Ill. 638, 87 N. E. 855; 15 Ann. Cas. 1059;

2 Elliott on Contracts, 1478; 18 Corpus Juris, 578), yet in a contract such as is set forth by the amended petition, the express and simultaneous employment of the plaintiffs by the defendants in pursuance of a common object must be taken as the controlling factor in its construction.

3. Attorney and client ¶161—Principal and agent ¶136(3), 145(4), 149(2), 150(3)—Employer of services cannot apportion liability where he does not disclose names of others interested; agent or undisclosed principal may be held liable; after election to proceed against agent or undisclosed principal the other cannot be held; agent acting beyond authority is personally liable; agent acting for benefit of principal may expressly bind himself.

One actually employing another to perform services, in the subject-matter or results of which others besides himself may have a beneficial interest, cannot avoid or apportion his personal liability for the compensation on the theory that he acted and assumed to act partly on behalf of the other beneficiaries, where he fails to disclose their names, although he may have informed the opposite contracting party that others besides himself had a beneficial interest. *Siler v. Perkins*, 126 Tenn. 380, 149 S. W. 1060, 47 L. R. A. (N. S.) 232, and case note; 21 R. C. L. 895, 896. If the employer is in fact merely an agent and acts with the authority of an undisclosed principal, either he or such principal may be held liable at the election of the opposite party; but the contractual liability of such agent and principal is not joint, and, after an election to proceed against one, the other cannot be held. *Wylly v. Collins*, 9 Ga. 223, 229; *Lippincott v. Behre*, 122 Ga. 543 (3), 545, 50 S. E. 467; *Fontaine v. Eagle & Phoenix Mfg. Co.*, 52 Ga. 31, 33; *Commercial City Bank v. Mitchell*, 25 Ga. App. 837 (2), 105 S. E. 57. If in point of fact the employer has acted without or beyond the authority of an alleged principal, he alone becomes personally liable (*Peebles v. Perry*, 18 Ga. App. 869, 373, 89 S. E. 461; *Haupt v. Vint*, 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. [N. S.] 518, and case note); and, even though he be acting in the capacity of agent and for the sole benefit of his principal, he may nevertheless by express undertaking bind himself personally (Civil Code 1910, § 3613; *Phinizy v. Bush*, 129 Ga. 479 [9], 492, 59 S. E. 259). See, also, on the general question of liability of the employer or beneficiary for attorney's fees, *Daly v. Hines & Hobbs*, 55 Ga. 470; *Simms v. Floyd*, 65 Ga. 719 [2]; *Mathews v. Giles*, 108 Ga. 364, 33 S. E. 1006; 40 Cyc. 2837, 2838; 6 Corpus Juris, 732, 734; 2 *Ruling Case Law*, 1032. Thus, under either of the foregoing principles, the petition was not subject to demurrer as failing to allege the names and interests of beneficiaries other than defendants, or the shares of stock represented by certain of the defendants in addition to their own shares in the corporation, or as showing liability by beneficiaries other than defendants; nor was it subject to the special ground that only the corporation was liable for the alleged service in preparing new corporate by-laws, since there are allegations which may be taken

as indicating that such preparation was directed by the defendants for their own benefit.

4. Attorney and client ¶145, 167(2)—Attorneys may recover reasonable value of services in attacking combination of stockholders regardless of its legality; validity of combination of stockholders attacked as voting trust held for jury unless testimony clear and unequivocal.

While in this state a voting trust is illegal (*English v. Rosenkrantz*, 152 Ga. —, 111 S. E. 198; *Morel v. Hoge*, 130 Ga. 625, 61 S. E. 487, 16 L. R. A. [N. S.] 1136, 14 Ann. Cas. 935), it is unnecessary to determine whether the alleged agreement by other stockholders in the corporation, as set forth in the petition, was thus unlawful, since, if the plaintiffs' alleged successful attack without litigation upon such agreement and conduct of those stockholders was authorized by and beneficial to the defendants, plaintiffs might recover the reasonable value of this item of service, regardless of the legality of that combination. Nor can it be held, as matter of law, that the agreement of the defendants themselves as attached to the petition was itself such an illegal voting trust, which would preclude plaintiffs' recovery of compensation for preparing that agreement or for attacking the agreement and actions of other stockholders. So far as indicated upon its face, the defendants' agreement appears to be only defensive in character, and not such as is inhibited by law. Should the latter agreement be properly attacked by plea or answer as being thus illegal when taken in connection with sufficient other alleged facts and circumstances, the question thus raised would be for determination by the jury, unless the testimony be so clear and unequivocal that the trial court might construe the alleged agreement to be legal or illegal as matter of law.

5. Attorney and client ¶165—Petition should itemize claim for services and expenses.

The other grounds of special demurrer are without merit, except that the petition was subject to the ninth ground in failing to set forth what proportions of the total fee claimed were due for the respective items of service, and to itemize the amount charged as expenses. The defendants are reasonably entitled to have these items plead with particularity, in order to make their defenses.

6. Disposition of case.

The petition not being subject to general demurrer or to any of the grounds of special demurrer save that just stated, the judgment of the court below is affirmed, but with the direction that, before the judgment of this court is made the judgment of the court below, the plaintiffs shall be allowed to amend their petition so as to cure the defects alleged in the ninth ground of the demurrer, that upon their so doing the case stand for trial upon the petition as thus amended, but in the event of a failure so to do the judgment be unconditionally affirmed.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by Willingham, Wright & Covington against J. A. Glover and others. Judgment for defendants on demurrer, and plaintiffs bring error. Affirmed, with directions.

Denny & Wright and Maddox & Doyal, all of Rome, for plaintiffs in error.

Porter & Mebane, M. B. Eubanks, C. N. Featherston, and Nathan Harris, all of Rome, for defendants in error.

JENKINS, P. J. Judgment affirmed, with directions.

STEPHENS, and HILL, JJ., concur.

(28 Ga. App. 399)

PAYNE, Agent, v. DUNCAN & NELMS.
(No. 12758.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)

(Syllabus by the Court.)

1. Carriers \S 228(2)—Burden on carrier to show failure of shipper to give notice of injury as required by bill of lading pleaded and proved by it.

While a stipulation in a contract for the shipment of live stock that "before the property is removed from the possession of the carrier or mingled with other property, the shipper, owner or consignee shall inform in writing the delivering carrier of any injury to the property," is reasonable and valid, so that, in the absence of any express or implied waiver of it by the carrier, a recovery could not be legally had from the carrier for such an injury, where the evidence shows that the plaintiff did not comply with the stipulation (Southern Ry. Co. v. Tollerson, 129 Ga. 647, 59 S. E. 799; Roberts v. Ga., etc., Ry. Co., 10 Ga. App. 100, 72 S. E. 942), yet where the plaintiff does not sue upon the express contract of affreightment, but brings his action in tort, and where it is the carrier who sets up by its plea and introduces in evidence the bill of lading with its stipulation as to notice, the burden of proof lies upon the carrier to sustain its affirmative plea and defense by showing the failure of the plaintiff consignee, the shipper and the owner, to give the notice thus required. Southern Ry. Co. v. Bunch, 27 Ga. App. 689, 109 S. E. 523. The carrier here failed to offer such proof.

2. Carriers \S 218(8)—Stipulation in contract held not to relieve carrier of negligence in failing to provide proper facilities for unloading; risk in unloading assumed by shipper knowing of inadequate facilities but undertaking to unload.

While it has been held that a carrier of live stock may by special contract make reasonable stipulations in reference to matters

which are merely incidental to the transportation of the animals, such as loading and unloading and caring for the stock, it is not the law that such a stipulation, obligating the shipper to unload the animals from the car at his own risk and expense, and providing that any helpers which might be furnished by the carrier for the shipper's accommodation should be "deemed employees of the shipper" while so engaged, can be construed as relieving the carrier from the result of what might be deemed to be its own negligence in failing to provide safe and proper facilities for unloading the stock. Brannon v. Atlanta, etc., R. Co., 4 Ga. App. 749, 751, 62 S. E. 468; Cranor v. Southern R. Co., 13 Ga. App. 86(2), 78 S. E. 1014. But where, as here, it is shown without dispute that the alleged inadequate facilities for unloading were known to the shipper, but he nevertheless undertook through his own special agent to unload the stock himself, according to a mode and method acquiesced in by him, then and in such event the risk of their being thus injured must be taken to have been assumed by the shipper (Brannon v. Atlanta, etc., R. Co., supra, 4 Ga. App. 752, 62 S. E. 468); and it therefore follows that the verdict and judgment for the plaintiffs is without evidence to support it.

Error from Superior Court, Madison County; W. L. Hodges, Judge.

Action by Duncan & Nelms against J. B. Payne, Agent. Judgment for plaintiffs, and defendant brings error. Reversed.

B. T. Moseley, of Danielsville, and John B. Gamble, of Athens, for plaintiff in error.

Clarence E. Adams, of Danielsville, for defendants in error.

JENKINS, P. J. [1, 2] There was undisputed testimony which showed that one of the plaintiff firm at the time of the injury to the mules in question had actual knowledge of the alleged safer facilities for unloading, but made no protest to the carrier or its agent, and sent to the carrier's depot the plaintiffs' own agent, who paid the freight, took charge of the animals and haltered some, accepted the carrier's existing place and facilities for unloading, without offering any objection, and himself (whatever under the disputed evidence the carrier's agent might have done in directing or suggesting the manner of unloading) acquiesced in the agent's suggestions, and actively assisted in, if he did not wholly direct, all of the processes of unloading.

It is not necessary to add anything further to the headnotes.

Judgment reversed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 402)

BOWDEN v. VIRGINIA-CAROLINA CHEMICAL CO. (No. 12779.)

(Court of Appeals of Georgia, Division No. 2, March 20, 1922.)

(Syllabus by the Court.)

1. Master and servant ¶177—One throwing lead from window under orders of foreman under whom plaintiff worked was a fellow servant.

The negligent act alleged and proved which injured the plaintiff was that of a fellow servant engaged in the same business, for which the common master is not responsible, except in cases of railroad companies. Civil Code 1910, § 8129.

2. Master and servant ¶139, 189(2)—Employee's foreman held a fellow servant; order to throw lead from window not proximate cause of injury caused by the lead.

The plaintiff and other employees, who were throwing lead out of the upper windows, and the foreman, who instructed them to do so, were each and all in the same service. Under the rulings of the Supreme Court in *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S. E. 839, 10 L. R. A. (N. S.) 772, and *Brush Electric Light Co. v. Wells*, 110 Ga. 192, 35 S. E. 365, the foreman was only a fellow servant. Besides, the order of the foreman to the employees was not the proximate cause of plaintiff's injury, but the negligent manner in which the order was executed by these employees.

Error from City Court of Macon; Will Gunn, Judge.

Action by Rafe Bowden against Virginia-Carolina Chemical Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Bowden sought to recover for personal injuries received in the course of his employment. The trial court awarded a nonsuit, and he excepted. The petition made a case substantially as follows: The plaintiff was employed by the defendant as a lead burner, in the repairing of lead tanks in the defendant's plant, and while so engaged, under the express orders of one designated as the vice principal or alter ego of the defendant, he was injured by a piece of lead, weighing approximately 200 pounds, falling upon him from a

five-story building. By amendment he alleged that, while engaged in the scope of his duties, and while going to answer the roll call in obedience to the instructions of the superintendent, alter ego or vice principal of the defendant, he was injured as described. From the evidence it appears that the plaintiff had been employed by the defendant for a number of years as a fireman. On the day of his injury he was ordered to assist a lead burner in repairing the lead tanks of the defendant. This work was completed early in the day, and the plaintiff, without further instruction, proceeded to gather up the tools which had been used inside of the building and placed them behind the rear door, inside the building. This was his usual and regular work. The whistle blew at 4 o'clock as a signal for the employees, including the plaintiff, to report in front of and inside the building, for roll call. He opened the back door, stepped out in the yard at the back of the building, and was about to go around the building in order to get in front, to answer roll call. After getting outside the building, and proceeding to the front, he was injured by a piece of lead falling upon him from the third floor. This lead was thrown down from the upper story window by a coemployee, who was doing so in obedience to the orders of the same foreman who had ordered the plaintiff to assist the lead burner. No lead had ever before been thrown out on that side; "they" threw it out on the other side, next to the street." The plaintiff did not know that they were throwing lead out on that side, and on this occasion was not in any way warned of the danger. The defendant moved for a nonsuit, on the ground, among others, that the negligence, if there was any, was that of a fellow servant, for which the master was not responsible.

John R. Cooper, W. O. Cooper, Jr., and E. W. Butler, all of Macon, for plaintiff in error. Jones, Park & Johnston, of Macon, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 412)

UNDERWOOD v. FREY. (No. 12918.)(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)*(Syllabus by the Court.)***No error, and evidence sufficient.**

No error of law appears to have been made and the verdict is amply supported by the evidence. Indeed the verdict seems to have been demanded by the evidence.

Error from Superior Court, Cobb County; D. W. Blair, Judge.

Action between J. R. Underwood and B. T. Frey. Judgment for the latter, and the former brings error. Affirmed.

Campbell Wallace and J. H. Hawkins, both of Marietta, for plaintiff in error.

H. B. Moss and Mozley & Gann, all of Marietta, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 312)

LEE v. HILL. (No. 13069.)(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)*(Syllabus by the Court.)*

1. New trial \S 68—Verdict contrary to law and evidence, when findings adverse to plaintiff demanded.

The issue in this case was made by the filing of a counter affidavit to the foreclosure of a laborer's lien. Upon the trial the evidence demanded a finding, first, that the plaintiff was not a "laborer," within the meaning of the statute, and that he made the contract with the defendant in the capacity of a contractor, and not in the capacity of a laborer; and, second, that the contract had not been completed prior to the foreclosure of the lien. The verdict in favor of the plaintiff was therefore contrary to law and the evidence, and the court erred in overruling the defendant's motion for a new trial. See, in this connection, Civil Code 1910, \S 3359; Savannah, etc., R. Co. v. Grant, 56 Ga. 68; Kline v. Russell, 113 Ga. 1085, 39 S. E. 477; Bruton v. Beasley, 135 Ga. 412, 69 S. E. 561.

2. Estoppel \S 88(1)—New trial \S 40(4)—Erroneous legal advice not "admission," constituting estoppel when acted on; erroneous charge, not excepted to, not law of the case on motion attacking verdict as contrary to law.

The ruling in the preceding note is not affected by the fact that the evidence authorized a finding that the plaintiff was advised by the defendant to take out a laborer's lien, or by the further fact that the judge erroneously charged the jury, in substance, that if they found that the plaintiff had taken out a labor-

er's lien upon the advice of the defendant, the latter would be estopped from contending that the plaintiff had foreclosed under the wrong Code section, and that no exception was taken to this charge. Erroneous legal advice given by a person is not an "admission," within the meaning of section 5736 of the Civil Code (1910), although such advice may have been acted upon to another's injury and to the benefit of the party giving it. And especially is this true where, as in this case, it does not appear that the advice was given in bad faith or with intent to deceive or defraud. And the failure of the losing party in a case to except to an erroneous charge of the court does not make the charge the law of the case, where the motion for a new trial contains the ground that the verdict is contrary to law and the evidence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Admission.]

Error from Superior Court, Newton County; John B. Hutcheson, Judge.

Proceeding for foreclosure of a lien by J. W. Hill against Robert Lee. Judgment for plaintiff, and defendant brings error. Reversed.

Rogers & Tuck, of Covington, for plaintiff in error.

King & Johnson, of Covington, for defendant in error.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 295)

BROWN v. ROME RY. & LIGHT CO.
(No. 12745.)(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)*(Syllabus by the Court.)*

1. Trial \S 295(1)—Charges given and refused to be considered in connection with the evidence and entire charge.

When considered in connection with all the evidence, and in the light of the entire charge of the court, there is no reversible error either in the excerpts from the charge, or in the failure to give certain instructions, or in the rulings of the court on the evidence as complained of in the motion for a new trial.

2. Sufficiency of evidence.

There is ample evidence to support the verdict, which has the approval of the trial judge.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action between J. M. Brown and the Rome Railway & Light Company. Judgment for the latter, and the former brings error. Affirmed.

Willingham, Wright & Covington, and Nathan Harris, all of Rome, for plaintiff in error.

Lamar Camp and L. A. Dean, both of Rome, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 410)

GOSS v. FINGER.

FINGER v. GOSS. (Nos. 12904, 12905.)

(Court of Appeals of Georgia, Division No. 2. March 20, 1922.)

(Syllabus by the Court.)

Vendor and purchaser \Leftarrow 334(3)—Rescinding vendee held entitled to recover amount paid less damages for breach.

This is an action for money had and received as part payment of the purchase money in a contract for the sale of land. There was sufficient evidence introduced by the plaintiff as to whether there had been a rescission of the contract to submit that question to a jury. Where there has been a rescission of a contract for the sale of land possession of which remained in the vendor, the vendee named in the bond for title may, in the absence of any agreement to the contrary, recover from the vendor the amount of the purchase money paid, less any damage occasioned to the vendor by reason of the vendee's failure to perform the contract.

Error from Superior Court, Gordon County; M. C. Tarver, Judge.

Action by T. B. Goss against J. J. Finger. Judgment for defendant, and plaintiff brings error, and defendant brings a cross-bill of exceptions. Judgment reversed on the main bill, and affirmed on the cross-bill.

Goss bought the land involved in the case from Finger, and paid a portion of the purchase price in cash, and gave his promissory notes for the remainder. Finger gave Goss a bond for title. The bond for title contained no provision for the forfeiture of the money paid, nor was time made the essence of the contract. Possession of the land sold was refused to the purchaser. Goss thereafter returned the bond for title to Finger, accompanied by a letter demanding the return of the purchase money paid and the promissory notes given. No reply was ever made to this letter. Finger afterwards deeded the land to a third person as security for a debt. Goss then brought this action against Finger for the money had and received.

Lang & Lang, of Calhoun, for plaintiff in error.

J. G. B. Erwin, Jr., and F. A. Cantrell, both of Calhoun, for defendant in error.

HILL, J. (after stating the facts as above). Forfeitures are not favored by the law. Civil Code 1910, § 3717. No provision for a forfeiture of the money paid was in the bond for title given by Finger to Goss, nor was there any provision making time the essence of the contract. Time is not generally of the essence of the contract. Civil Code 1910, § 4268 (8). Usually the vendee is admitted into possession under a bond for title. Powell's Actions for Land, § 373. Goss, through his attorneys, returned the bond for title, with a letter containing the condition that Finger return to Goss the part of the purchase money paid to Finger and the promissory notes signed by Goss.

"In the ordinary course of business, when good faith requires an answer, it is the duty of the party receiving the letter from the other to answer within a reasonable time. Otherwise he is presumed to admit the propriety of the acts mentioned in the letter of his correspondent, and to adopt them." Civil Code 1910, § 5741.

Goss received no reply to his letter. Finger afterwards deeded the land to another party as security for a debt.

"If, without having completed the rescission by restoring the status, the vendor in a bond for title resells the property to a third person, who takes without notice of the vendee's equitable title, the vendee may treat the resale either as a rescission of the sale or as a breach of the bond. If he elects to treat it as a rescission, he may recover from the vendor the amount of purchase money he has paid, * * * less the damages which have been occasioned by reason of his (the vendee's) failure to perform the contract." Buck v. Duvall, 9 Ga. App. 656 (4), 72 S. E. 44.

The plaintiff had acquired an equitable title to the land under his bond for title. Whether there had been a rescission of the contract was a question of fact which should have been submitted to the jury. There was no evidence introduced as to the value of the land at any time. If the contract was rescinded, the vendor should have restored the status of the parties prior to the signing of the bond for title less any damage he may have sustained by reason of the failure of the vendee to perform the contract. This being an action for money had and received, if the contract was rescinded the vendor should restore to the vendee the purchase money paid and the promissory notes signed, less any damages occasioned to the vendor by reason of the failure of the vendee to perform his contract. Without a provision to that effect in the bond for title, or any agreement to that effect, the vendor could not arbitrarily forfeit the amount of the purchase money paid him. If the contract was rescinded the vendor could not, without any provision or agreement to that effect, keep the land, the purchase money paid, and the

promissory notes given. The status of the parties prior to the contract should be restored as far as it is practicable to do so; that is to say, the equitable title of the vendee should be returned to the vendor, and the vendor should return to the vendee the promissory notes given and the purchase money which has been paid less any damage that may have been suffered by the vendor from the transaction. *Lytle v. Scottish American Mortg. Co.*, 122 Ga. 458, 50 S. E. 402. There was sufficient evidence of a rescission for the question to have been submitted to the jury, with the right in the vendor to prove any damages occasioned him by reason of the failure of the vendee to perform his contract, if any, and the trial court erred in granting a nonsuit.

We do not think that any of the other rulings complained of, either in the main bill of exceptions or in the cross-bill, were erroneous for any of the reasons assigned.

Judgment on main bill reversed, on cross-bill affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 346)

SMITH v. STATE. (No. 13156.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

1. Sufficiency of evidence.

The defendant was convicted of unlawfully manufacturing liquor. The evidence authorized the conviction and the verdict has the approval of the trial judge.

2. Denial of continuance not abuse of discretion.

The assignment of error upon the court's failure to continue the case does not show an abuse of that discretion which the law grants to the judge.

3. Form of verdict not objectionable.

The assignment of error upon the form of the verdict is without merit. The defendant received the minimum punishment for the offense of which he was convicted.

Error from Superior Court, Harris County; Geo. P. Munro, Judge.

S. S. Smith was convicted of unlawfully manufacturing liquor, and he brings error. Affirmed.

Hardy & Peavey, of Hamilton, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 407)

COWART v. W. A. WEST & SON.
(No. 12816.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 677—Assignment complaining of service not sustained when entry of service or whether constable was party does not appear.

This being a suit wherein the defendant filed a plea in abatement or exceptions to the service of the constable, alleging therein that the defendant had not been legally served, and it not appearing what entry of service was made by the constable, and it not appearing that the latter had been made a party, the record does not present sufficient data to sustain the assignment of error in the petition excepting to the service.

2. Certiorari \S 68—Certiorari properly overruled when judgment supported by evidence.

The judgment rendered by the magistrate being supported by the evidence, the judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Whitfield County; M. C. Tarver, Judge.

Action by W. A. West & Son against A. D. Cowart. Judgment for plaintiff, and defendant brings error. Affirmed.

J. A. Longley, of Dalton, for plaintiff in error.

Geo. G. Glenn and John O. Mitchell, both of Dalton, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 390)

MILLER v. CITY OF MACON. (No. 11409.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)

(Syllabus by the Court.)

Answer to certified question controlling.

The answer of the Supreme Court to a certified question propounded by this court in this case (110 S. E. 873) is controlling, and the judgment of the lower court must be affirmed.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by J. P. Miller against the City of Macon. Judgment for defendant, and plaintiff brings error. Affirmed, in conformity to Supreme Court's answers to certified questions (110 S. E. 873).

M. P. Hall, Hall & Grice, and O. J. Bloch, all of Macon, for plaintiff in error.

R. G. Plunkett and P. F. Brock, both of Macon, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(28 Ga. App. 243)

COULTER v. STATE. (No. 13178.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1922.)

(Syllabus by the Court.)

1. Denial of continuance not abuse of discretion.

Under the facts shown on the motion to continue this case, we cannot say that the trial judge abused his discretion in refusing to continue the case.

2. Criminal law §564(1)—Proof of venue held sufficient.

The proof as to venue was sufficient.

3. Criminal law §935(1), 1160—Intoxicating liquors §137, 236(19)—Evidence held to support conviction for manufacturing; making of intoxicating beer by fermentation is complete offense; trial judge has wide discretion in ruling on motion for new trial on weight of evidence; verdict, approved by trial judge, not disturbed.

The evidence authorized the verdict. The evidence clearly showed that liquor had been distilled at the place where the officers found the defendant with a ten-gallon keg on his shoulder, and in addition thereto a witness swore that "all indications were that the still had been operated the night before or the day before that. Everything was ready and the beer was ready to make. It was fermented and was intoxicating. Beer at that stage is an intoxicating liquor."

(a) "Under the prohibition law (Ga. L. Ex. Sess. 1917, p. 18), declaring it a felony to 'distill, manufacture, or make any liquors or beverages, any part of which is alcoholic,' the act of making an intoxicating beer, through the fermentation of syrup, corn meal, and water mixed for that purpose, is of itself an offense as complete and distinct as the further act of distilling from such beer a quantity of alcohol, whisky, or rum. Williams v. State, 24 Ga. App. 53 (2) (99 S. E. 711)." Belcher v. State, 25 Ga. App. 493 (1), 103 S. E. 852.

(b) "There was some slight evidence authorizing the verdict; and, the verdict having been approved by the trial judge, under the repeated and uniform rulings of this court and of the Supreme Court, a reviewing court is powerless to interfere. When the verdict is apparently decidedly against the weight of evidence, the trial judge has a wide discretion as to granting or refusing a new trial; and whenever there is any evidence, however slight, to support a verdict, which has been approved by the trial judge, this court is absolutely without authori-

ty to control the judgment of the trial court." Bradham v. State, 21 Ga. App. 510, 94 S. E. 618, and citations.

Error from Superior Court, Walker County; Moses Wright, Judge.

O. L. Coulter was convicted of manufacturing liquor, and he brings error. Affirmed.

The prosecuting witness testified that he was told by defendant and others that the still in question was in Walker county, but on the stand defendant stated that he thought it was about 50 yards over the line in Alabama.—Statement by editor.

Henry & Jackson, of La Fayette, for plaintiff in error.

E. S. Taylor, Sol. Gen., of Summerville, and J. F. Kelly, of Rome, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, O. J., and LUKE, J., concur.

(28 Ga. App. 241)

HARRIS v. STATE. (No. 13117.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1922.)

(Syllabus by the Court.)

Intoxicating liquors §236(6½)—Circumstantial evidence held insufficient to support conviction for possessing liquors.

The defendant was convicted on circumstantial evidence. The facts proved did not exclude every other reasonable hypothesis, save that of the guilt of the accused, and the judge erred in overruling the motion for a new trial.

Broyles, O. J., dissenting.

Error from Superior Court, Fulton County.

Sidney Harris was convicted of possessing liquors, and he brings error. Reversed.

J. L. Milam testified that he was a deputy sheriff, and that he and Deputy Sheriffs Smith and Yarbrough found an automobile with corn whisky in it, standing still in an alley; that on the side upon which they approached the automobile they found a white man, named Cochran, and a negro named Williams, and by these two men a one-gallon can of corn whisky on the ground, and a suit case full of corn whisky in the automobile; that the defendant, Sidney Harris, was standing on the opposite side of the car with his foot on the running board; that they were arrested; that thereupon Cochran fired two shots from a revolver, killing Deputy Yarbrough and wounding defendant Sidney Harris, and running away, making his escape; that the automobile and the corn whisky was the property of Cochran; that

defendant admitted that he rode on the back seat of the automobile with Cochran from Buckhead, Morgan county, Ga., to Atlanta, Ga., and that he had worked for the white man, Cochran, on his farm for two years, and was so employed by him at the time he left Buckhead, Ga., but denied that he had anything at all to do with the corn whisky; that the witness never saw the defendant in possession of any whisky; that all of this occurred in Fulton county.

The defendant made his statement, the substance of which was a general denial of any knowledge of the corn whisky; also denied that he made any statement to Deputy J. L. Millam that he rode in the car with the white man, Cochran. Here both sides closed. —Statement by editor.

Cobb & Foster and R. E. Church, all of Atlanta, for plaintiff in error.

Jno. A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BLOODWORTH, J. Judgment reversed.

LUKE, J., concurs.

BROYLES, C. J., dissents.

(28 Ga. App. 405)

MITCHELL v. LIBERTY SAVINGS & REAL ESTATE CORPORATION.
(No. 12794.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)

(Syllabus by the Court.)

1. Husband and wife \S 129(3)—Verdict for one to whom husband pledged money intrusted to him for special purpose held warranted.

A wife intrusted her husband with some money in the form of gold coins, for the purpose of having the money deposited in the bank for her for safe-keeping. A special deposit of the money was made in the bank by him in his own name and as his own money. It so remained for several months, and the bank had no notice that his wife was claiming title to the money, nor did the bank have any intimation whatever that the wife had any interest in the money. This money, along with other money that the husband had on deposit in the savings department of the bank and on general deposit with the bank, was pledged by the husband as security for the payment of a note executed by the husband to the bank. The wife brought suit in the municipal court for the money. The jury were authorized to find the verdict in favor of the defendant bank.

2. Refusal of certiorari not erroneous.

The judgment of the judge of the superior court, refusing to grant a certiorari, was not erroneous for any of the reasons assigned.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by L. V. Mitchell against the Liberty Savings & Real Estate Corporation. Judgment for defendant, certiorari refused by the judge of the superior court, and plaintiff brings error. Affirmed.

J. P. Burnett and H. F. Strohecker, both of Macon, for plaintiff in error.

E. L. Wheaton, of Macon, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 408)

APREA v. OGLETHORPE SAVINGS & TRUST CO. (No. 12826.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)

(Syllabus by the Court.)

1. Bills and notes \S 343—Bona fide holder not bound to inquire whether consideration has failed.

Knowledge of the consideration of a note is not notice that the consideration has failed, if it has failed; and one who buys the note bona fide for value and before maturity is not bound to make inquiry whether there is a failure of consideration. Citizens' Bank of Vidalia v. Greene, 12 Ga. App. 49(3), 76 S. E. 795.

2. Pleading \S 354(2) — Plea not setting up defense available against bona fide holder properly stricken.

Where, therefore, the defense set up in the plea does not come within any of the provisions of section 4286 of the Civil Code of 1910, the court did not err in striking it. Benton Transfer Co. v. Marion Nat. Bank, 28 Ga. App. 562, 106 S. E. 735.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by the Oglethorpe Savings & Trust Company against Lillian Aprea. Judgment for plaintiff, and defendant brings error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiff in error.

Geo. H. Richter, of Savannah, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 400)

BAGLEY v. HINESVILLE BANK.
(No. 12766.)(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)*(Syllabus by the Court.)*

Usury §78, 146—When note was for usurious interest, entire amount forfeited; promise to pay usury unenforceable, whether as to interest already earned or to accrue.

The defendant executed on December 1, 1916, a promissory note for \$1,000, due to the plaintiff bank on January 1, 1917, with interest at 8 per cent. per annum from maturity. No interest having been paid, the maker, on August 27, 1919, executed in favor of the bank another note for \$360, due January 1, 1920, bearing interest at 8 per cent. from its date. The bank brought suit against the maker solely on the latter interest note. In the trial there was undisputed testimony by the defendant, in support of his plea of usury, to the effect that he gave the plaintiff the interest note sued on "to cover 12 per cent. interest on the \$1,000 note * * * from January 1, 1917, to January 1, 1920," but that at the time he gave such interest note \$218.86 was the correct interest at the lawful rate due and unpaid on the \$1,000 note from its maturity, January 1, 1917, to the date of execution of the latter note, August 27, 1919. The court on its own motion directed a verdict in favor of the plaintiff for \$218.86, as representing the lawful interest accrued on the original note at the time the interest note actually sued on was given. *Held*, the act of August 18, 1916 (Acts 1916, p. 43; Park's Ann. Code Supp. 1917, §§ 3438, 3438 [a]), provides that "any person, company, or corporation violating the provisions of sec. 3438, shall forfeit the entire interest so charged or taken, or contracted to be reserved, charged or taken." Since, under the undisputed evidence, the note sued on represents interest charged or taken upon the original note in excess of the 8 per cent. originally contracted for, the defendant was entitled to invoke the statutory forfeiture, not only as to the 4 per cent. excess charge, but of the entire interest represented by the note sued on, and it was error for the court to direct a verdict, against the defendant's plea of usury, in favor of the plaintiff in the amount of interest which had legally accrued at the time the usurious interest note actually sued on was given. A promise in which the sole obligation is for the payment of interest infected with usury is altogether incapable of enforcement, and it makes no difference whether such invalid and usurious promise relates back to the payment of an alleged amount on account of interest already earned, or whether it relates to usurious interest which shall accrue in the future.

Error from City Court of Hinesville; J. P. Dukes, Judge pro hac.

Action by the Hinesville Bank against J. R. Bagley. Judgment for plaintiff, and defendant brings error. Reversed.

Darsey & Mills, of Hinesville, for plaintiff in error.

M. Price, of Ludowici, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 412)

SCOTT SCHOOL DIST. et al. v. CARTER et al. (No. 13198.)(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)*(Syllabus by the Court.)*

Schools and school districts §97(4)—Notice for 30 days in newspaper for publication of sheriff's advertisements is condition precedent to bond election.

As a condition precedent to the holding of an election for school bonds under section 143 of the Code of School Laws, approved August 19, 1919 (Ga. L. 1919, pp. 345, 348), a notice of such election must be published for 30 days next preceding the day of the election, in the newspaper in which the sheriff's advertisements for the county are published.

Error from Superior Court, Johnson County; J. L. Kent, Judge.

Proceeding by Scott School District and others against J. W. Carter and others. Judgment dismissing the petition, and petitioners bring error. Affirmed.

Larsen & Crockett, of Dublin, and E. L. Stephens, of Wrightsville, for plaintiffs in error.

J. S. Adams and R. Earl Camp, both of Dublin, for defendants in error.

STEPHENS, J. This was a proceeding instituted in the superior court of Johnson county by E. L. Stephens, solicitor general of the Dublin judicial circuit, acting for and in behalf of the state of Georgia, for the purpose of validating a proposed issue of bonds authorized by an election held in Scott school district. The defendants in error regularly intervened and demurred to the proceedings, upon the ground that it does not appear from the petition that any notice of the proposed election was published in a newspaper for the space of thirty days next preceding the day of the election, as required by law. The court sustained the demurrer and dismissed the petition, and to this judgment the petitioners except.

Neither the petition nor the notice declaring the result of the election given by the trustees of the school district to the solicitor general shows that such notice was given. The election was called upon the question of issuing bonds for school purposes, and was

held under the authority of section 143 of the Code of School Laws enacted by the Legislature of this state, approved August 19, 1919 (Ga. L. 1919, pp. 345, 346). This section provides that when an election is called under its authority the authorities named therein in the act shall "call such election in terms of law now provided for a county issue of bonds except as herein otherwise provided." It follows, therefore, that in the absence of any provision in this act as to any notice required as a condition precedent to the holding of the election, the provision as to notice required when an election is called for a county issue of bonds applies. The notice there required is publication in the newspaper in which the sheriff's advertisements for the county are published for a space of 30 days next preceding the day of the election. Civil Code 1910, § 440.

It is contended by the plaintiffs that section 143 of the Code of School Laws adopted in 1919 contains a specific provision, otherwise providing that only 10 days' notice, under certain conditions, be given prior to the holding of an election called under this act, and that therefore such provision renders inoperative the provision as to 30 days' notice in Civil Code (1910), § 440, regulating the issuance of bonds by counties, and which would be otherwise applicable to elections held under the provisions of section 143 of the act of 1919. The provision of section 143 of the act of 1919 thus relied on by the plaintiffs reads as follows:

"Said board of trustees or board of education may order such election to be held on the school site or other suitable place in the school district, consolidated district or county, of which they shall give notice by posting same at three public places in said school district, consolidated district or county, not less than ten days previous to said election."

This provision as to 10 days' notice, by its very terms, applies only when the proposed election is to be held at some place other than the regular voting or election precinct in the district, without which notice the election must necessarily be held at the regular voting or election precinct as required by section 441 of the Civil Code (1910), governing an election for a county issue of bonds. This provision of section 143 of the act of 1919, providing for 10 days' notice that the election is "to be held on the school site or other suitable place in the school district," is not the notice required as a condition precedent to the holding of the election, and therefore does not supersede the provision as to 30 days' notice required for a county issue of bonds which, unless "otherwise provided," is applicable to elections held under section 143 of the act of 1919.

It not appearing that the required 30 days' notice was given of the intention to hold the election, the proceedings instituted by the

solicitor general to validate the proposed issue of bonds was subject to the demurrer interposed. The court, therefore, did not err in sustaining the demurrer.

Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(28 Ga. App. 376)

ROWNTREE BROS. v. BUSH. (No. 12624.)

(Court of Appeals of Georgia, Division No. 2.
March 9, 1922. Rehearing Denied April 1, 1922.)

(Syllabus by the Court.)

1. Contracts \S 26—When offer made by mail, contract complete when acceptance mailed, though not received.

A person who by the United States mail sends to another an offer or proposal which requires only the latter's acceptance or confirmation to create a valid contract, and who says nothing as to how the answer of acceptance or confirmation shall be communicated, nor that it shall take effect only upon the actual receipt of the acceptance by the offerer, impliedly adopts the mails as his agency, and authorizes its use in the transmission to him of an acceptance. Where the recipient of the offer thus duly deposits his acceptance in the mail, in an envelope properly stamped and addressed to the offerer, the contract thereupon becomes complete and binding, without reference to whether or not the acceptance actually reaches the addressee. Civil Code 1910, § 4231; *Levy v. Cohen*, 4 Ga. 1(2); *Bryant v. Booze*, 55 Ga. 438(5); 6 *Ruling Case Law*, 610-613; 18 *Corpus Juris*, 800, 801, and cases cited.

2. Contracts \S 353(2) — Evidence \S 89 — Testimony as to nonreceipt of letter to be considered with other facts on question whether mailed; charge as to considering evidence of nonreceipt of letter on question whether it was mailed not erroneous.

The rule that, where a letter is written, properly addressed, stamped, and mailed, the presumption arising that it was received by the addressee is merely prima facie, and may be successfully rebutted by uncontradicted evidence of the addressee that he did not in fact receive it (*Hamilton v. Stewart*, 108 Ga. 472, 476, 34 S. E. 123; *Cassel v. Randall*, 10 Ga. App. 587[1], 73 S. E. 858; *Strauss Bros. v. Pearlman*, 15 Ga. App. 86[1], 82 S. E. 578; *Parker v. Southern Ruralist Co.*, 15 Ga. App. 334[2], 337, 83 S. E. 158) has no application in a case such as here stated, except in so far as the addressee's evidence that he did not receive the letter of acceptance may be considered by the jury along with the other facts and circumstances, as negating the other party's evidence that it had been mailed. This in effect was what the court charged. Immediately after, and in the same connection with the excerpt complained of, wherein the court charged that, if the acceptance was properly addressed, stamped, and mailed, the presumption of

law is that the addressee would receive it, he proceeded to make clear that the real question was not whether the acceptance was actually received, but whether it was thus addressed, stamped, and deposited in the mail, by informing the jury that, if it was not received, "then you can take that, in connection with all the facts and circumstances, in determining whether or not this acceptance on the part of the plaintiff was ever mailed in the manner in which I have designated to you."

On Motion for Rehearing.

(Additional Syllabus by Editorial Staff.)

3. Contracts —29—Whether acceptance of offer was mailed held a question for the jury.

The other facts and circumstances, in addition to the positive testimony for plaintiffs that a letter accepting defendant's offer was mailed, and defendant's positive testimony that it was not received, held to make a question for the jury as to mailing of the acceptance.

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action by Rowntree Bros. against F. A. Bush. Judgment for defendant, and plaintiff brings error. Affirmed.

T. T. James and R. S. Wimberly, both of Lumpkin, for plaintiff in error.

G. Y. Harrell, of Lumpkin, for defendant in error.

JENKINS, P. J. [1, 2] Judgment affirmed.

STEPHENS and HILL, JJ., concur.

On Motion for Rehearing.

JENKINS, P. J. [3] In the 2d division of the syllabus, it is held that—

"The addressee's evidence that he did not receive the letter of acceptance may be considered by the jury along with the other facts and circumstances, as negating the other party's evidence that it had been mailed."

It is contended by plaintiffs in error that "there was in the evidence in the cause no other facts and circumstances tending to negative the evidence of Rowntree that the letter in question was mailed," and that, therefore, the charge of the court (which in effect was as stated in the syllabus) was error, and the evidence demanded a verdict for the plaintiffs. Their argument is that—

"Where a sender testifies that he properly mailed a letter to the addressee, and the addressee testifies that he did not receive it, then the presumption as to the regularity of the mails, which would call for the conclusion that the letter was duly received, must yield to the presumption that witnesses speak the truth, and the only conclusion admissible is that the letter was lost in the mails;" there being no facts and circumstances to corroborate the presumption that the letter was received, or to discredit the testimony that it was not received.

In *Parker v. Southern Ruralist Co.*, 15 Ga. App. 334 (2), 83 S. E. 158, it was held:

"Where the evidence shows that a letter was written and duly mailed, properly addressed, a presumption arises that it was received by the addressee; but this presumption is successfully rebutted where there is uncontradicted evidence of the addressee that the letter was never received, unless the presumption is supported by such aliunde evidence that it was in fact received as is sufficient to raise an issue as to the credibility of the positive testimony that it was not received."

In *Strauss Bros. v. Pearlman*, 15 Ga. App. 86, 82 S. E. 578, it was held:

"While the presumption that a letter properly addressed, stamped, and mailed was in due course of mail delivered to the addressee is not conclusive, and may be rebutted by proof that it was not received, still the probative value of the testimony adduced in rebuttal is a question solely for the jury. Unless this presumption is supported either by circumstances or by direct proof showing that the letter was received by the addressee, positive testimony that it was not received, if neither contradicted nor discredited, is sufficient to rebut the presumption. But in any case where the presumption, aided and supported by evidence that the addressee in fact received the letter, comes in conflict with positive testimony that the letter was not received, the issue raised is one of fact only, for solution by the jury."

In such a case, the presumption that the properly mailed letter reached the addressee in due course "rests upon the inference, supported by experience, that the postal authorities, as the governmental agency for delivering mail matter, will perform their duty." In other words, there is a presumption arising both from the fact that the mails are an official agency of the government and from the daily facts of common experience, that properly mailed and addressed letters are not lost in the mails. This presumption comes to the aid of the sender's positive evidence as to the mailing of the letter, and authorizes, in the absence of other proof, a conclusion that it was actually received by the addressee. But where the addressee swears positively that he did not receive the letter, and there is no aliunde proof as to such actual receipt, the presumptive evidence yields to the positive, and the jury must find in favor of the addressee.

Whether, in a case where the question is not whether the letter was received, but, as in the instant case, whether or not it was mailed, the presumption of safe delivery would so aid the positive testimony of the addressee that he did not receive the letter as could permit such testimony, without any other facts and circumstances, to rebut the sender's testimony of proper mailing, it is unnecessary here to determine; this for the reason that in the case at bar there appear

certain other facts and circumstances which the jury was authorized to consider in determining the issue as to whether the letter had been mailed. In a letter from plaintiffs to defendant, dated November 5, 1919, there is the following statement over the plaintiff's signature:

"We are just in receipt of your letter of the 3d inst., replying to our telegram of same date, in which you state that you have not sold us any cotton, that you tried to, but that we never confirmed purchase. Replying beg to advise that on August 16th we confirmed purchase from you of 20 bales of cotton as per your contract dated August 14th."

In the plaintiff's depositions there is a variance as to this alleged date of confirmation, as follows:

"The contract with F. A. Bush in which we purchased 20 bales of cotton from him was accepted by us immediately on receipt of his contract, which we received by mail on August 18th, when a letter of confirmation was sent him, Exhibit 2 being herewith attached, which is a carbon copy of letter of confirmation sent him."

This exhibit, which is the alleged letter in question, also bears date August 18, 1919. As an additional fact and circumstance, the addressee testified, without dispute, that the time required for a letter to go from Richland, Ga., to Bartlett, Tex. (the address of defendant to that of plaintiffs), was "not over 30 hours." As August 14 was the date of defendant's offer and letter to the plaintiffs, this evidence tended to rebut plaintiff's testimony that they accepted and confirmed defendant's offer "immediately on receipt of his contract" on August 18, by mailing to him on that date a confirmation and acceptance. The record does not disclose the price at which November cotton was quoted at the time the alleged contract was made on August 18. The record does, however, show that spot cotton on that date was worth but 27 cents; although the plaintiffs allege and testify that they then agreed to pay the amount of 33 cents, or an excess of 6 cents a pound, for cotton to be delivered about three months thereafter.

Motion for rehearing denied.

(28 Ga. App. 393)

GEORGIA LAND CO. v. DAVIS.
(No. 12713.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)

(Syllabus by the Court.)

1. Principal and agent §22(2)—Declarations of agent may be admissible as *res gestæ* to prove agency where there is other evidence of agency.

This is an action for damages against a corporation for an assault and battery by its

alleged agent upon the plaintiff. Plaintiff alleged that the defendant, through its superintendent and other laborers, was proceeding to construct wire fencing upon property owned and possessed by plaintiff, and after the defendant had been notified in writing of the plaintiff's title and possession; that when the plaintiff attempted to cut the wire, this agent and superintendent, without excuse or provocation, struck the plaintiff upon the hip with a club axe, felling him to the ground, and, when the plaintiff attempted to rise, again struck him with the axe, splitting open his face and otherwise injuring him, so that he was rendered unconscious; and that this agent repeated the assault while the plaintiff was on the ground, in a helpless condition, by kicking him and striking him on the body with a hammer. The plaintiff and the defendant corporation both offered evidence tending to show title in themselves to the property in question. The defendant sought to disclaim any agency on the part of the person committing the assault, but only on the theory that, while the fencing was being done upon property claimed by the corporation, it was for and on behalf of two of the corporate officers as individuals. The testimony for the plaintiff fully sustained his allegations; and there was uncontroverted evidence that after he had been felled to the ground and was lying in a helpless condition the alleged agent renewed the battery by striking the plaintiff with a hammer and kicking him. A verdict in the amount of \$500 was rendered in favor of the plaintiff. The defendant excepts to the overruling of its motion for a new trial. *Held:*

"Declarations of an alleged agent are not by themselves admissible to prove agency, but it may be established by proving circumstances, apparent relations, and the conduct of the parties; and where the extraneous circumstances, independently of and without regard to the declarations of the agent himself, clearly tend to establish the fact of his agency, his declarations, though inadmissible if standing alone, may, as a part of the *res gestæ* of the transaction, be considered." *Collier v. Schoenberg*, 6 Ga. App. 498, 106 S. E. 581. The record discloses certain direct and positive evidence, as well as facts and circumstances, under which the declaration of the alleged agent was admissible, and from which the jury was fully authorized to find such agency.

2. Assault and battery §27, 32—Evidence §71—Muniments of title admissible in action growing out of property dispute; evidence that defendant was informed of plaintiff's claim to land in connection with which assault committed admissible; letter shown to have been mailed not inadmissible because not shown to have been received.

The defendant, as well as the plaintiff, introduced in evidence its muniments of title; but irrespective of whether under these circumstances the defendant can be heard to complain of such evidence in behalf of the plaintiff, the question is controlled adversely to the defendant by the ruling of this court in *Zoucks v. State*, 19 Ga. App. 744(3), 92 S. E. 228. Likewise, for a similar reason and as a circumstance affecting the right and amount of punitive damages, the letter written by plaintiff to de-

rendant prior to the injury, in which he informed it of his claim of title and possession of the land on which the assault was committed, was admissible; nor was it inadmissible on the ground that there was no proof of its receipt by defendant before the injury, since it was shown to have been properly mailed in time to have been duly received before the alleged agent attempted to fence the land. *Hamilton v. Stewart*, 108 Ga. 472, 476, 84 S. E. 123; *Rowntree Bros. v. Bush*, 111 S. E. 217, and cases cited.

3. Remaining assignments without merit.

The remaining assignments of error, including the exceptions taken upon the instructions of the court and the failure to charge as requested by the defendant, are without merit; and, as we view the record, not only was the verdict for the plaintiff authorized, but under the evidence submitted a verdict in his favor was demanded.

Error from Superior Court, McIntosh County; W. W. Sheppard, Judge.

Action by T. C. Davis against the Georgia Land Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Travis & Travis, of Savannah, for plaintiff in error.

E. A. Cohen, of Savannah, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 391)

SEABOARD AIR LINE RY. CO. v. HENDERSON LUMBER CO. (No. 12811.)

(Court of Appeals of Georgia, Division No. 2. March 20, 1922.)

(Syllabus by the Court.)

Carriers \S 66—Contracts \S 346(12)—Judgment \S 250—Plaintiff must recover on cause of action pleaded; no recovery on quantum meruit, when express contract pleaded; railroad in no contractual relationship to parties to whom another road furnishes a car.

A plaintiff must recover upon the cause of action as laid in the petition. *Napier v. Strong*, 19 Ga. App. 401(2), 91 S. E. 579. In the instant case the petition is in one count, and sues for a "debt contracted with petitioner" upon defendant's "obligation to pay" \$1 per day for the use of a described car. Having thus sued on an express contract to pay a certain amount, the plaintiff was not entitled to recover on a quantum meruit. *Frierson v. Fincher*, 184 Ga. 113, 67 S. E. 541; *Baldwin v. Lessner*, 8 Ga. 71; *Haygood v. Perkins*, 142 Ga. 168, 82 S. E. 544; *Sylvania R. Co. v. Sylvania Lumber Co.*, 8 Ga. App. 656, 70 S. E. 51; *Shropshire v. Heard*, 27 Ga. App. 256, 107 S. E. 892. Moreover, even if the

petition could be construed as being an action on a quantum meruit, the evidence fails to disclose any sort of actual or implied contractual relationship between the plaintiff and the defendant from which a promise to pay could be implied, since it appears that the car was in fact furnished by a different railroad company, and there is nothing to indicate that the defendant asked for or accepted the car from the plaintiff, or that in its dealings with the other company it was in fact dealing with the plaintiff through its agent.

Error from Superior Court, Irwin County; R. Eve, Judge.

Action by the Seaboard Air Line Railway Company against the Henderson Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Whipple & McKenzie, of Cordele, for plaintiff in error.

Quincey & Rice, of Ocilla, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 216)

HARRISON v. STATE. (No. 13118.)

(Court of Appeals of Georgia, Division No. 1. Feb. 14, 1922.)

(Syllabus by the Court.)

1. Criminal law \S 424(1)—Statement of one jointly indicted with defendant held admissible.

Under the facts of the case the admission of the testimony complained of in the first ground of the amendment to the motion for a new trial was not error.

2. Witnesses \S 274(2)—Cross-examination of character witness as to having heard that defendant was charged with stealing property permitted.

There is no merit in ground 2 of the amendment to the motion for a new trial. The record shows that a witness for the defendant, who had just testified to the good character of the accused, was asked by the solicitor general, on cross-examination, the following question: "Did you know that this man Harrison, the defendant, is charged with the offense of stealing gasoline from a drug store out here in West End, breaking into the gasoline tank and stealing gasoline?" The witness answered, "I have just heard it." The admission of this evidence was not error for any reason assigned. Moreover, substantially the same evidence was subsequently given by the same witness without any objection.

3. Ground not approved.

Ground 3 of the amendment to the motion for a new trial is disapproved by the trial court.

4. Criminal law §1103—Ground complaining of failure to charge on impeachment by contradictory statements not sustained when brief of evidence shows no contradictory statements.

Complaint is made in the remaining special ground of the motion for a new trial that the court erred in its charge upon the impeachment of witnesses, because the charge contained no reference to the impeachment of a witness by proof of previous statements made by him which were material to the case and to his testimony and contradictory to his testimony upon the trial of the case. It is alleged in the ground that this omission was error because "the principal ground on which the principal witness for the prosecution was sought to be impeached was by proof of contradictory statements which were material to the issue on trial and which were made on a previous trial in the city court." There is no merit in this ground of the motion, as a careful examination of the brief of evidence fails to disclose any such contradictory statements.

5. Criminal law §935(1)—New trial properly denied when evidence sufficient.

The conviction was amply authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Fulton County; Jno. D. Humphries, Judge.

A. E. Harrison was convicted of robbery by intimidation, and he brings error. Affirmed.

The first ground of the amended motion for a new trial was as follows:

First. Because material evidence was illegally admitted by the court over objection of the defendant, to wit: Because the court permitted T. P. Thrallkill, a witness for the state, to testify that the day the offense for which the defendant was on trial was alleged to have been committed, one Cathey, jointly indicted with the defendant and who was not on trial, came to the witness' place of business and left with him some money; that the said Cathey was alone at the time, and the defendant was not with him, and the witness did not know the defendant, and permitted the witness to give the particulars of the conversation which the witness had with the said Cathey at the time the money was left with the witness, the witness stating that the said Cathey left with him \$225, or told the witness that he had \$225 in the roll of money which he handed him (the witness), the witness saying that he had never counted it; that the money belonged to his (Cathey's) wife and that he wanted him (the witness) to keep the money until he returned from a raid on which he was going; that this occurred on the morning of the day after the alleged crime was committed, and on the same day, about 11:30, Cathey came back and got the money and left. Defendant, through his attorney, objected to the aforesaid testimony: First, because there was no evidence showing any conspiracy whatever between Cathey and the witness and the defendant Harrison on

the trial; second, the defendant, Harrison, was not present when the statement was made testified about; third, that if there was a common enterprise or conspiracy between the defendant, Harrison and Cathey, such enterprise and conspiracy had been ended, and any declaration made by Cathey was not admissible as evidence against Harrison under the statutes of this state, even assuming that the conspiracy had been entered into as alleged between Harrison and the witness; fourth, because there was no evidence whatever that a conspiracy had been entered into between Harrison, the defendant, and Cathey. Movant, says that the evidence thus admitted was illegal and extremely harmful and prejudicial to the defendant, and the court illegally admitted the same over objection of attorney for the movant which was then and there urged as herein set forth.

—Statement by editor.

Fred E. Harrison, of Atlanta, for plaintiff in error.

Jno. A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 363)

DAVIS v. STATE. (No. 13189.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1922.)

(Syllabus by the Court.)

Criminal law §552(3)—Circumstantial evidence must exclude every reasonable hypothesis but guilt.

The state depended upon circumstantial evidence to convict the defendant, and the evidence did not exclude every reasonable hypothesis save that of his guilt. The verdict of guilty was therefore unauthorized, and the court erred in overruling the motion for a new trial.

Error from Superior Court, Dooly County; O. T. Gower, Judge.

J. T. Davis was convicted of an offense, and he brings error. Reversed.

Gilbert C. Robinson, of Montezuma, and W. V. Harvard, of Vienna, for plaintiff in error.

J. B. Wall, Sol. Gen., and Jesse Grantham, both of Fitzgerald, Watts Powell, and Henderson & Davis, all of Vienna, and E. B. Dykes, of Byronville, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(23 Ga. App. 355)

CREWS v. HANSON. (No. 13085.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1922.)*(Syllabus by the Court.)***No error committed.**

Hanson sued Crews for the alleged value of a certain crop which Hanson pleaded that Crews had purchased from him. Crews defended, and asserted that he did not purchase the crop as alleged. Upon conflicting evidence, the jury found a verdict in favor of the plaintiff. The charge of the court was adjusted to the pleadings and evidence, and for no reason assigned are the excerpts complained of harmful. The verdict of the jury has the approval of the trial judge; and for no reason assigned was it error to overrule the motion for a new trial.

Error from City Court of Carrollton; Leon Hood, Judge.

Action by R. D. Hanson against Joe Crews. Judgment for plaintiff, and defendant brings error. Affirmed.

James Beall, of Carrollton, for plaintiff in error.

Willis Smith and Emmett Smith, both of Carrollton, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 345)

FLOYD et al. v. STATE. (No. 13153.)(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)*(Syllabus by the Court.)*

Criminal law §935(1)—New trial properly denied, when evidence sufficient and verdict approved by trial judge.

A conviction of the offense of larceny from the house was fully supported by the evidence, the verdict has the approval of the trial judge, and the defendants had a legal trial. It was not error to overrule the motion for a new trial, which was based only upon the usual general grounds.

Error from Superior Court, Pulaski County; Eschol Graham, Judge.

Ed Floyd and others were convicted of larceny from the house, and they bring error. Affirmed.

D. R. Pearce and H. F. Lawson, both of Hawkinsville, for plaintiffs in error.

M. H. Boyer, Sol. Gen., of Hawkinsville, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 408)

SHEPHERD v. WALLACE, SHACKLEFORD & CO. (No. 12824.)(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)*(Syllabus by the Court.)*

Replevin §4—Buyer of growing crop entitled to sue subsequent purchaser of severed crop in trover.

The title to a crop which was up and growing was legally conveyed in writing and the writing duly recorded. A portion of this crop was afterwards gathered and placed in the hands of one who had furnished fertilizer used in making the crop, and the agreed value of it credited on the fertilizer account. The holder of the title brought an action of trover for this portion of the crop against the fertilizer dealer, in whose hands it had been placed. All these transactions occurred in the same county. The judge did not err in directing a verdict for the plaintiff. Williams v. Mitchem, 151 Ga. 227, 106 S. E. 284.

Error from City Court of Monroe; A. C. Stone, Judge.

Action by Wallace, Shackleford & Co. against E. L. Shepherd. Judgment for plaintiff, and defendant brings error. Affirmed.

J. J. Avret, of Social Circle, and Clifford Walker, of Monroe, for plaintiff in error.

Williford & Lambert, of Madison, and R. L. & H. C. Cox, of Monroe, for defendants in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 313)

ABERNATHY v. WILSON. (No. 13073.)(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)*(Syllabus by the Court.)*

Petition properly dismissed.

The court did not err in dismissing the amended petition on general demurrer.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by J. D. Abernathy against C. L. Wilson. Judgment for defendant, and plaintiff brings error. Affirmed.

Lowrey Stone, of Blakely, for plaintiff in error.

A. H. Gray, of Blakely, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 347)

JONES v. STATE. (No. 13180.)(Court of Appeals of Georgia, Division No. 1
March 7, 1922.)*(Syllabus by the Court.)***No error committed.**

The defendant was convicted of forgery. The assignments of error upon the admission of testimony are without merit. The charge of the court was full and fair. The motion to declare a mistrial, as presented here, is also without merit. The defendant has had a legal trial, and his guilt was abundantly established. It was not error to overrule the motion for a new trial.

Error from Superior Court, Bibb County; Malcolm D. Jones, Judge.

S. J. Jones was convicted of forgery, and he brings error. Affirmed.

John R. Cooper, W. O. Cooper, Jr., and Viola Ross Napier, all of Macon, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., of Macon, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 334)

COLLIER v. CHAMLEE. (No. 13104.)(Court of Appeals of Georgia, Division No. 1
March 7, 1922.)*(Syllabus by the Court.)*

1. Appeal and error \Leftrightarrow 966(2)—Denial of continuance for illness of party present when motion made not disturbed, unless discretion abused.

Where a party to a cause makes a motion for a continuance upon the ground of his illness, and he is present when the motion is made, and his condition is passed upon by the court as by inspection, the discretion of the court in denying the motion will not be controlled, unless manifestly abused. *Carter v. Pitts*, 125 Ga. 792, 54 S. E. 695. Under this ruling, and the facts of the instant case, the refusal of the motion for a continuance was not error.

2. Verdict properly directed.

The direction of a verdict in favor of the plaintiff for the full amount sued for, together with interest and attorney's fees, was not error for any reason assigned.

3. Denial of new trial not error.

The court did not err in overruling the motion for a new trial.

Error from Superior Court, Monroe County; Malcolm D. Jones, Judge.

Action by Mrs. A. Chamlee against Mrs. M. J. Collier. Judgment for plaintiff, and defendant brings error. Affirmed.

B. H. Manry, of Goggansville, for plaintiff in error.

Persons & Persons and S. Rutherford, all of Forsyth, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 316)

MILLS v. BRASWELL. (No. 13076.)(Court of Appeals of Georgia, Division No. 1
March 7, 1922.)*(Syllabus by the Court.)*

Appeal and error \Leftrightarrow 1005(2)—Approved verdict, supported by evidence, not disturbed.

There is no substantial merit in any of the special grounds of the motion for a new trial. The verdict is supported by some evidence, and, having been approved by the trial judge, this court is without authority to interfere.

Error from City Court of Ft. Gaines; Ben M. Turnipseed, Judge.

Action between Mrs. A. E. Mills and Mrs. E. D. Braswell. Judgment for the latter, and the former brings error. Affirmed.

E. R. King, of Ft. Gaines, for plaintiff in error.

E. L. Smith, of Edison, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 236)

SLOTIN v. VINSON. (No. 12740.)(Court of Appeals of Georgia, Division No. 1
March 7, 1922.)*(Syllabus by the Court.)*

Trial \Leftrightarrow 139(1)—Error to direct verdict, when there are issues of fact for the jury.

There being issues of fact in this case, which should have been, under appropriate instructions from the court, submitted to the jury and the verdict not being demanded by the evidence, it was error for the court to direct a verdict.

Error from Superior Court, Tattnall County; H. B. Strange, Judge.

Action by C. E. Vinson against M. Slotin. Judgment for plaintiff, and defendant brings error. Reversed.

C. L. Cowart, of Glennville, for plaintiff in error.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 363)

SHAHAN v. STATE. (No. 13128.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1922.)*(Syllabus by the Court.)***Criminal law** ¶935(1)—Error to deny new trial when evidence insufficient.

The defendant was convicted of the offense of manufacturing liquor. His conviction was dependent entirely upon circumstantial evidence. A careful examination of the entire record convinces us that his conviction was not authorized. It is not necessary to consider the special grounds of the motion for a new trial. It was error to overrule the motion for a new trial.

Broyles, C. J., dissenting.

Error from Superior Court, Walker County; Moses Wright, Judge.

David Shahan was convicted of manufacturing liquor, and he brings error. Reversed.

F. W. Copeland and G. E. Maddox, both of Rome, and Henry & Jackson, R. M. W. Glenn, and D. F. Pope, all of La Fayette, for plaintiff in error.

E. S. Taylor, Sol. Gen., of Summerville, and J. F. Kelly, of Rome, for the State.

LUKE, J. Judgment reversed.

BLOODWORTH, J., concurs.

BROYLES, C. J., dissents.

(28 Ga. App. 343)

SHAHAN v. STATE. (No. 13129.)(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)*(Syllabus by the Court.)***Criminal law** ¶401—Evidence that purchaser of whisky from defendant gave him a check not violation of best evidence rule.

The defendant was convicted of a violation of the prohibition law. Upon conflicting evidence the jury were authorized to find him guilty. The defendant's special ground in his motion for new trial, which alleges that the court erred in permitting the state's witness to testify that he paid the defendant for the whisky which the defendant sold him by giving him a check, is without merit. The best evidence rule does not apply in an instance like this. The witness having sworn that he bought the whisky, it was not error to allow him to testify that he paid for the whisky by giving a bank check for it. The check was not the basis of the action, and was only collaterally involved. See, in this connection, *Southern States v. McManus*, 113 Ga. 982(2), 39 S. E. 480; *Sasser v. Campbell*, 9 Ga. App. 178(2), 70 S. E. 980, and *Avery v. Armour*, 17 Ga. App. 458(3), 37 S. E. 698. It was not error to overrule the motion for a new trial.

Error from Superior Court, Walker County; Moses Wright, Judge.

David Shahan was convicted of a violation of the prohibition law, and he brings error. Affirmed.

F. W. Copeland and G. E. Maddox, both of Rome, and Henry & Jackson, R. M. W. Glenn, and D. F. Pope, all of La Fayette, for plaintiff in error.

E. S. Taylor, Sol. Gen., of Summerville, and J. F. Kelly, of Rome, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 282)

MUMFORD v. STRIBBLING. (No. 12728.)(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)*(Syllabus by Editorial Staff.)***1. Replevin** ¶59—Description of cotton held insufficient.

In bail trover, a description of the property in the petition as a sufficient amount of cotton at 23 cents a pound, grown on B.'s place, to pay a specified principal sum with interest, which amount of cotton was above the amount due defendant as rent, defendant having no other cotton except that grown on the place, whether in the seed or in the field, or packed in jute bags or otherwise, was insufficient, as it would not enable the court to seize the chattels and did not isolate the thing sued for from the general class to which it belonged.

2. Pleading ¶34(4)—Taken most strongly against pleader when contradictory.

When the terms of a description of cotton in a petition in bail trover are contradictory, the pleading must be taken most strongly against the pleader.

Error from Superior Court, Lincoln County; E. T. Shurley, Judge.

Action by O. A. Stribbling against J. Q. Mumford. Judgment for plaintiff, and defendant brings error. Reversed.

O. J. Perryman, of Lincolnton, for plaintiff in error.

Burnside & McWhorter, of Lincolnton, for defendant in error.

BLOODWORTH, J. [1] This was a bail-trover case. In the petition as amended the description of the property for which suit was brought is as follows:

"A sufficient amount of cotton at 23 cents per pound, grown on the place of Joe Butler in Lincoln county, Georgia, to pay the principal sum of \$280.21, besides interest on said sum at 8 per cent. per annum, which amount of cotton was over and above the amount said Mum-

ford was due as rent of the premises on which same was grown in the year 1920, said Mumford having no other cotton except that grown on said place, whether in the seed or in the field, or packed in jute bagging or otherwise, which said cotton was raised on the place of Joe Butler in Lincoln county, Georgia, in 1920, the defendant having in his possession no other cotton than that raised on said place."

In bail-trover proceedings the rule as to the description of the property sued for, as laid down by this court and the Supreme Court, is that—

"The goods should be described with such particularity as would enable the court to seize the chattels for which the suit is brought, and hold them for restitution in the event of final recovery by the plaintiff." *Gatlin v. Mathews*, 16 Ga. App. 645, 85 S. E. 953, and citations.

See, also, *Harper v. Jeffers*, 139 Ga. 760 (2), 78 S. E. 172.

This rule is somewhat differently expressed in *Collins v. West*, 5 Ga. App. 429(1), 63 S. E. 540, where this court said:

"In an action of bail trover, the petition must definitely identify the property by a particular description, or by a general description coupled with such additional allegations as to the time and place or manner of the taking or conversion as plainly to isolate the thing sued for from the general class to which it belongs."

See citations.

Applying the ruling in the above-cited cases to the facts of the case now under consideration, the cotton sought to be recovered is not "described with such particularity as would enable the court to seize the chattels for which the suit is brought and hold them for restitution in the event of final recovery by the plaintiff;" nor is the description of the property such as "plainly to isolate the thing sued for from the general class to which it belongs." Had nothing been said in the description about interest, it would be easy to determine the number of pounds of cotton for which the plaintiff sued; but this cannot be done when the amount due for interest is uncertain. Even if the exact number of pounds of cotton could be arrived at, still the particular cotton represented by the number of pounds is not pointed out. Granting, but not conceding, that the amount of cotton which would be arrived at by such a calculation would be sufficient to cover all the cotton raised on the place of Joe Butler in

111 S.E.—15

1920, the officer would not be authorized to seize all of this cotton, because the petition shows that the cotton sought to be recovered by the plaintiff was not all of the cotton, but was that portion "over and above the amount said Mumford was due as rent of the premises on which same was grown in the year 1920."

[2] Some of the terms of the description of the cotton are contradictory, and in such a case the rule is that the pleadings must be taken most strongly against the pleader. Moreover, to say that the cotton was "in the seed, or in the field, or packed in jute bagging, or otherwise," leaves the description so indefinite that it would not permit of the seizure by the officer of any particular cotton. The court therefore erred in overruling the demurrer to the petition, and the subsequent proceedings were nugatory.

Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 409)

FULFORD v. CHESTER. (No. 12878.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)

(Syllabus by the Court.)

Verdict demanded by evidence.

The undisputed evidence shows a violation by the defendant of section 227, Pen. Code 1910. Besides, the fire which burned the property of the neighbor was set out by the defendant against the neighbor's protest and while a dangerous wind was blowing. All the evidence shows unquestioned negligence on his part in so doing. No error of law is complained of, and the verdict was demanded by the evidence.

Error from City Court of Wrightsville: J. L. Kent, Judge.

Action by W. C. Chester against J. T. Fulford. Judgment for plaintiff, and defendant brings error. Affirmed.

A. L. Hatcher, of Wrightsville, for plaintiff in error.

E. L. Stephens, of Wrightsville, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 400)

BAGLEY v. HINESVILLE BANK.
(No. 12766.)(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)*(Syllabus by the Court.)***Usury** ¶78, 146—When note was for usurious interest, entire amount forfeited; promise to pay usury unenforceable, whether as to interest already earned or to accrue.

The defendant executed on December 1, 1916, a promissory note for \$1,000, due to the plaintiff bank on January 1, 1917, with interest at 8 per cent. per annum from maturity. No interest having been paid, the maker, on August 27, 1919, executed in favor of the bank another note for \$360, due January 1, 1920, bearing interest at 8 per cent. from its date. The bank brought suit against the maker solely on the latter interest note. In the trial there was undisputed testimony by the defendant, in support of his plea of usury, to the effect that he gave the plaintiff the interest note sued on "to cover 12 per cent. interest on the \$1,000 note * * * from January 1, 1917, to January 1, 1920," but that at the time he gave such interest note \$218.86 was the correct interest at the lawful rate due and unpaid on the \$1,000 note from its maturity, January 1, 1917, to the date of execution of the latter note, August 27, 1919. The court on its own motion directed a verdict in favor of the plaintiff for \$218.86, as representing the lawful interest accrued on the original note at the time the interest note actually sued on was given. *Held*, the act of August 18, 1916 (Acts 1916, p. 48; Park's Ann. Code Supp. 1917, §§ 3438, 3438 [a]), provides that "any person, company, or corporation violating the provisions of sec. 3436, shall forfeit the entire interest so charged or taken, or contracted to be reserved, charged or taken." Since, under the undisputed evidence, the note sued on represents interest charged or taken upon the original note in excess of the 8 per cent. originally contracted for, the defendant was entitled to invoke the statutory forfeiture, not only as to the 4 per cent. excess charge, but of the entire interest represented by the note sued on, and it was error for the court to direct a verdict, against the defendant's plea of usury, in favor of the plaintiff in the amount of interest which had legally accrued at the time the usurious interest note actually sued on was given. A promise in which the sole obligation is for the payment of interest infected with usury is altogether incapable of enforcement, and it makes no difference whether such invalid and usurious promise relates back to the payment of an alleged amount on account of interest already earned, or whether it relates to usurious interest which shall accrue in the future.

Error from City Court of Hinesville; J. P. Dukes, Judge pro hac.

Action by the Hinesville Bank against J. R. Bagley. Judgment for plaintiff, and defendant brings error. Reversed.

Darsey & Mills, of Hinesville, for plaintiff in error.

M. Price, of Ludowici, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur,

(28 Ga. App. 412)

SCOTT SCHOOL DIST. et al. v. CARTER
et al. (No. 13198.)(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)*(Syllabus by the Court.)***Schools and school districts** ¶97(4)—Notice for 30 days in newspaper for publication of sheriff's advertisements is condition precedent to bond election.

As a condition precedent to the holding of an election for school bonds under section 143 of the Code of School Laws, approved August 19, 1919 (Ga. L. 1919, pp. 345, 346), a notice of such election must be published for 30 days next preceding the day of the election, in the newspaper in which the sheriff's advertisements for the county are published.

Error from Superior Court, Johnson County; J. L. Kent, Judge.

Proceeding by Scott School District and others against J. W. Carter and others. Judgment dismissing the petition, and petitioners bring error. Affirmed.

Larsen & Crockett, of Dublin, and E. L. Stephens, of Wrightsville, for plaintiffs in error.

J. S. Adams and R. Earl Camp, both of Dublin, for defendants in error.

STEPHENS, J. This was a proceeding instituted in the superior court of Johnson county by E. L. Stephens, solicitor general of the Dublin judicial circuit, acting for and in behalf of the state of Georgia, for the purpose of validating a proposed issue of bonds authorized by an election held in Scott school district. The defendants in error regularly intervened and demurred to the proceedings, upon the ground that it does not appear from the petition that any notice of the proposed election was published in a newspaper for the space of thirty days next preceding the day of the election, as required by law. The court sustained the demurrer and dismissed the petition, and to this judgment the petitioners except.

Neither the petition nor the notice declaring the result of the election given by the trustees of the school district to the solicitor general shows that such notice was given. The election was called upon the question of issuing bonds for school purposes, and was

held under the authority of section 143 of the Code of School Laws enacted by the Legislature of this state, approved August 19, 1919 (Ga. L. 1919, pp. 345, 346). This section provides that when an election is called under its authority the authorities named therein in the act shall "call such election in terms of law now provided for a county issue of bonds except as herein otherwise provided." It follows, therefore, that in the absence of any provision in this act as to any notice required as a condition precedent to the holding of the election, the provision as to notice required when an election is called for a county issue of bonds applies. The notice there required is publication in the newspaper in which the sheriff's advertisements for the county are published for a space of 30 days next preceding the day of the election. Civil Code 1910, § 440.

It is contended by the plaintiffs that section 143 of the Code of School Laws adopted in 1919 contains a specific provision, otherwise providing that only 10 days' notice, under certain conditions, be given prior to the holding of an election called under this act, and that therefore such provision renders inoperative the provision as to 30 days' notice in Civil Code (1910), § 440, regulating the issuance of bonds by counties, and which would be otherwise applicable to elections held under the provisions of section 143 of the act of 1919. The provision of section 143 of the act of 1919 thus relied on by the plaintiffs reads as follows:

"Said board of trustees or board of education may order such election to be held on the school site or other suitable place in the school district, consolidated district or county, of which they shall give notice by posting same at three public places in said school district, consolidated district or county, not less than ten days previous to said election."

This provision as to 10 days' notice, by its very terms, applies only when the proposed election is to be held at some place other than the regular voting or election precinct in the district, without which notice the election must necessarily be held at the regular voting or election precinct as required by section 441 of the Civil Code (1910), governing an election for a county issue of bonds. This provision of section 143 of the act of 1919, providing for 10 days' notice that the election is "to be held on the school site or other suitable place in the school district," is not the notice required as a condition precedent to the holding of the election, and therefore does not supersede the provision as to 30 days' notice required for a county issue of bonds which, unless "otherwise provided," is applicable to elections held under section 143 of the act of 1919.

It not appearing that the required 30 days' notice was given of the intention to hold the election, the proceedings instituted by the

solicitor general to validate the proposed issue of bonds was subject to the demurrer interposed. The court, therefore, did not err in sustaining the demurrer.

Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(28 Ga. App. 376)

ROWNTREE BROS. v. BUSH. (No. 12624.)

(Court of Appeals of Georgia, Division No. 2.
March 9, 1922. Rehearing Denied April 1, 1922.)

(Syllabus by the Court.)

1. Contracts \S 26—When offer made by mail, contract complete when acceptance mailed, though not received.

A person who by the United States mail sends to another an offer or proposal which requires only the latter's acceptance or confirmation to create a valid contract, and who says nothing as to how the answer of acceptance or confirmation shall be communicated, nor that it shall take effect only upon the actual receipt of the acceptance by the offerer, impliedly adopts the mails as his agency, and authorizes its use in the transmission to him of an acceptance. Where the recipient of the offer thus duly deposits his acceptance in the mail, in an envelope properly stamped and addressed to the offerer, the contract thereupon becomes complete and binding, without reference to whether or not the acceptance actually reaches the addressee. Civil Code 1910, § 4231; *Levy v. Cohen*, 4 Ga. 1(2); *Bryant v. Booze*, 55 Ga. 438(5); 6 *Ruling Case Law*, 610-618; 18 *Corpus Juris*, 800, 801, and cases cited.

2. Contracts \S 353(2) — Evidence \S 89 — Testimony as to nonreceipt of letter to be considered with other facts on question whether mailed; charge as to considering evidence of nonreceipt of letter on question whether it was mailed not erroneous.

The rule that, where a letter is written, properly addressed, stamped, and mailed, the presumption arising that it was received by the addressee is merely prima facie, and may be successfully rebutted by uncontradicted evidence of the addressee that he did not in fact receive it (*Hamilton v. Stewart*, 108 Ga. 472, 476, 34 S. E. 123; *Cassel v. Randall*, 10 Ga. App. 587[1], 73 S. E. 858; *Strauss Bros. v. Pearlman*, 15 Ga. App. 86[1], 82 S. E. 578; *Parker v. Southern Ruralist Co.*, 15 Ga. App. 334[2], 337, 83 S. E. 158) has no application in a case such as here stated, except in so far as the addressee's evidence that he did not receive the letter of acceptance may be considered by the jury along with the other facts and circumstances, as negating the other party's evidence that it had been mailed. This in effect was what the court charged. Immediately after, and in the same connection with the excerpt complained of, wherein the court charged that, if the acceptance was properly addressed, stamped, and mailed, the presumption of

and there was a very warm attachment and unusual devotion between the father and the son, the court, in granting the mother a divorce from the father, did not err in giving the father custody of the child each alternate week.

6. Divorce \Leftrightarrow 194—Wife entitled to counsel fees and expenses of brief on affirmance of decree on husband's appeal, in which she had assigned cross-error as to portion of decree relating to custody of child.

On husband's appeal from decree granting wife a divorce, in which the wife assigns as cross-error that portion of decree giving husband the custody of their child each alternate week, the wife on affirmance of the decree will be allowed a reasonable attorney's fee for services of her counsel in the appellate court and the expenses of the preparation and the printing of the counsel's brief.

Appeal from Circuit Court, Norfolk County.

Suit by Alice Smith Barnard against W. Frank Barnard. Judgment for plaintiff, and defendant appeals. Affirmed.

Williams, Loyall & Tunstall, of Norfolk, for appellant.

E. R. F. Wells, of Norfolk, for appellee.

BURKS, J. Alice Smith Barnard brought a suit for a divorce from bed and board against her husband, W. Frank Barnard, on the ground of cruelty, reasonable apprehension of bodily harm, and constructive desertion. The bill also prayed for the custody of their child, a boy about five years of age, for suit money and for alimony. The defendant answered the bill denying specifically every allegation thereof, and further charging his wife with various acts of incontinence and with conduct on her part entitling him to a divorce from the bond of matrimony. He prayed that his answer, in so far as it charged his wife with incontinence and misconduct, be treated as a cross-bill, and it was so treated, and the wife answered the same, denying specifically every allegation thereof. On the motion of the complainant (Mrs. Barnard) and with the consent of the defendant, the trial court ordered that the testimony in the cause (except that of certain witnesses beyond the jurisdiction of the court) be given orally in open court, and a day fixed for the hearing. The testimony was subsequently so taken, and 44 witnesses were examined in open court, and five, who were nonresidents, testified by depositions, after due notice. On October 23, 1920, the trial court entered a decree dismissing the defendant's cross-bill and granting to the complainant (Mrs. Barnard) a divorce from bed and board on the grounds stated in her bill. Costs were awarded to Mrs. Barnard, and she was given a decree against her husband for \$100 a month for the support and maintenance of herself and of her child while

the latter is in her custody, and the custody of the child was awarded to each of the parents for one week at a time, alternate weeks. The cause was retained on the docket until the further order of the court. From this decree the defendant, W. Frank Barnard, was awarded an appeal.

[1] The testimony in the case is of the most conflicting nature. There is hardly a material fact in the case upon which the testimony on the two sides is in harmony. It is necessary, therefore, in the outset to determine what weight is to be given to the decree of the trial court which heard the parties, and most of their witnesses testify orally, in open court. We have no interpretation of our statute on the subject. Section 5109 of the Code is as follows:

"In any suit for divorce the trial court may require the whole or any part of the testimony to be given orally in open court, and if either party desires it, such testimony and the rulings of the court on the exceptions thereto, if any, shall be reduced to writing, and the judge shall certify that such evidence was given before him and such rulings made. When so certified the same shall stand on the same footing as a deposition regularly taken in the cause."

This section is taken from Acts of 1914, p. 154, which is as follows:

"In all divorce cases pending at the time this law goes into effect, or thereafter instituted, it shall be within the discretion of the court to require the testimony, or any part of it, to be delivered *ore tenus* in open court, and testimony so delivered, together with exceptions taken to the rulings of the court on questions of evidence, together with the evidence taken in the cause, shall be preserved and put into the record of the cause for the purpose of an appeal, and the cause on appeal shall be heard as other chancery causes and not as on a demurrer to evidence, and within the same time as now provided by law."

[2] There is no revisor's note to section 5109 indicating what, if any, change was intended by the change in the phraseology of the act, which generally means that no material change was intended, as explained by the revisors in the preface to the Code, pp. xi, xii. There is, however, one material change made by the Code. The act of 1914 declared that the oral testimony taken on the hearing "shall be preserved and put into the record of the cause for the purpose of an appeal," whereas section 5109 of the Code only requires this to be done "if either party desires it." There was no necessity for this expense unless one of the parties, for some cause, desired it, and if no appeal was to be taken the parties might prefer that the testimony should be kept out of the permanent files of the court as well as to avoid the costs thereof. This difference between the two statutes is manifest and must be given ef-

fect even though not noted by the revisors. Other differences in the phraseology of the two statutes do not manifest an intent to change the meaning, and the presumption, supported by the statement of the revisors in the preface aforesaid, is that no change was intended. The act of 1914 declared that "the cause on appeal shall be heard as other chancery causes and not as on a demurrer to evidence," whereas section 5109 of the Code, referring to the certificate of the oral testimony, declares that "when so certified the same shall stand on the same footing as a deposition regularly taken in the cause." In other words, the suit was still a suit in chancery, and the rule requiring cases at law to be heard as on a demurrer to the evidence had no application. The language of the Code is not as apt as it might have been to accomplish this purpose, but it is fairly plain that the revisors did not intend any substantial change in this respect, and this view accords with the notes of the writer of this opinion who was one of the revisors. Other sections of the chapter on divorce clearly negative the idea that a suit for divorce could ever be heard "as on demurrer to the evidence." Section 5109, however, does not determine what weight shall be given to the decree of the trial court where the evidence has been given orally before it. When all of the evidence in a chancery cause, as well as the pleadings, have been reduced to writing, and that court has nothing before it but the written record, including the evidence prepared by others, it has little, if any, advantage of this court in determining the right of the cause. But the case is entirely different where the trial court has the witnesses before it and can observe their demeanor on the stand, and their manner of testifying. This is important in determining their credibility and the weight to be given to their testimony. It is something that cannot be photographed or otherwise placed on the record for review by an appellate court, and great weight has always been attached to the finding of the tribunal charged with weighing such evidence, whether it be a commissioner in chancery, a jury, or a court. Of these tribunals, the least weight is given to the findings of a commissioner in chancery, but even in that case it is said:

"When, therefore, the commissioner has seen and examined the witnesses, and the testimony is conflicting, and his conclusions are clearly supported by competent and unimpeached witnesses, the court will not set aside or disturb his report, unless the weight of the testimony which is contrary to his conclusions is such, on account of the number of the witnesses and the nature of their evidence, as to make it clear that the commissioner has erred." *Shipman v. Fletcher*, 91 Va. 473, 479, 22 S. E. 458, 460.

In enacting the act of 1914 the Legislature may have thought that, because the testimo-

ny was taken orally, some one might conceive the idea that it might be demurred to, or that on an appeal the case should be heard as on a demurrer to the evidence, and inserted the provision, out of abundant caution, in order to negative that idea, but no such idea could ever have been sustained. The suit for divorce is a chancery suit, where the court decides both the law and the facts, and no jury is needed, and, where there is no jury, there can be no demurrer to the evidence. *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868. But, more particularly, there can be no demurrer to the evidence nor hearing of a case as on a demurrer to the evidence in a suit for divorce because the concessions required in such case are forbidden by section 5106 of the Code, which has been the fixed policy of this state for over three-quarters of a century. Code 1849, c. 109, § 9. There was no necessity, therefore, for the clause in the act of 1914 forbidding the hearing as on a demurrer to the evidence, and it was omitted by the revisors. The same principle now prevails, and the case cannot be heard as on a demurrer to the evidence. Whether, under the existing law, the finding of the trial court shall be given the same force as the verdict of a jury, as is done in actions at law where the whole case is submitted to the judge, without the intervention of a jury, it is unnecessary to decide, as we are of opinion that such finding is, at the least, entitled to the weight of the report of a commissioner in chancery, upon conflicting testimony, who saw and heard the witnesses testify, and whose report is supported by competent evidence and approved by the trial court. The provision of section 5109 of the Code putting the certified evidence on "the same footing as a deposition" could not have been intended to deprive the trial court of the chief benefit conferred upon it by that section, that of seeing the witnesses and hearing them testify. The judge was to hear the case and decide it on its merits, "independently of the admissions of either party in the pleadings or otherwise," and, in order to reach a righteous judgment, the statute, for the first time in this state, conferred upon the court the right to "require the whole or any part of the testimony to be given orally in open court." The object of the statute was not to save costs to the parties, nor to keep the testimony from the permanent files of the court, but to give the court the opportunity of seeing and hearing the witnesses. The right to have oral testimony in open court is not conferred upon the parties, but upon the court, and it could only have been for the reasons stated. To give to such testimony only the weight given to a deposition taken before some other officer would practically nullify the statute, which could never have been intended. A deposition of a witness must be

reduced to writing. It must be signed by the deponent. It must be taken after due notice to the adverse party. It must be taken before an officer authorized by law to administer an oath, who must certify that he did administer the oath to the deponent, all exceptions to questions must be noted at the proper place, and he must then return the deposition to the officer and in the manner required by law. It must in some way appear from the record that the opposing party was afforded the opportunity to cross-examine the witness. In these respects the certified evidence is to stand on "the same footing" as a deposition regularly taken in the cause. But the two are not entitled to the same weight, and the language of the statute, when read as a whole as it should be, manifests a purpose on the part of the Legislature to put the trial court in a better position to decide the case, by hearing the evidence "orally in open court," than it was when confined to hearing the case on depositions only.

The evidence in this case is very voluminous, consisting largely of many charges and counter charges, explanations and counter explanations, and inculpatory or explanatory circumstances or corroboration of one side or the other. The record shows that the litigants are persons of character and good standing in the community in which they live, and, in our view of the statute aforesaid, a detailed examination and discussion of the evidence is unnecessary, and to place it upon the permanent records of this court would not be conducive to the happiness of the litigants or their offspring. It must be sufficient to say that it has been carefully read and considered, with an earnest desire to do justice between the parties. The learned and upright judge of the trial court was in a far better position than this court to correctly determine the rights of the parties, and, while there is much conflict in the testimony, there is abundant evidence to support his decree, and we are unable to say that even the weight of the testimony is contrary to his conclusion. Indeed, if the certified evidence was given no more weight than a deposition, we should still be unable to say that the decree of the trial court was erroneous. His finding, therefore, will be affirmed.

[3] The appellee assigns as cross-error the refusal of the trial court to increase the allowance of \$100 a month to her for the support and maintenance of herself and child to \$150 a month. In this there was no error. The appellant is a young lawyer with no fixed income, but a practice of variable value, with no income-producing property. His income from his practice for the year 1919 was about \$3,500, but for the six months prior to the date of testifying did not exceed \$100 a month. He lives in an expensive home which he had provided for himself and wife,

but it is heavily mortgaged, and upon this he has the interest to pay besides the expense of the upkeep. He is also indebted from \$1,000 to \$1,500, and has now all the expense of both sides of this litigation to pay, and it is not clear what, if any, surplus would remain if these debts were paid. It must also be borne in mind that the appellee is a young woman, only 28 years of age, and that under modern conditions there is open to her practically every avenue for making money that is open to her husband; that by the decree of the court she is released from her former household duties; that her time is her own; that she has no right to remain idle at the expense of her former husband; and that it is her duty to minimize his loss, albeit it was through his fault that she was compelled to ask that the contract of marriage be rescinded.

[4, 5] The appellee also assigns as cross-error so much of the decree as gives to the appellant the custody of their child each alternate week. Of course, the welfare of the child is the question of primary importance. Conceding the suitability of the appellee and propriety of custody by her, it may be said on behalf of the father that it appears from the testimony that there is a very warm attachment and unusual devotion between the father and son; that it has been the habit of the father to undress him and to put him to bed at night, and to wash and dress him in the morning, and to be his constant companion when at home during the day; and that the father's home is out of the city, where the child can have abundant playground and fresh air. The record discloses that the custody of the father is as suitable and proper as that of the mother. It does not disclose any error on the part of the trial court in dividing the custody between them. The case is retained on the docket. The decree as to the custody of the child is temporary and may be changed at any time and in any manner that the best interest of the child demands. The subject of the custody of the child in a case of this kind is one of the most difficult that the courts have to deal with, and this is especially true of an appellate court. The only general rule that can be announced is that the welfare of the child is the primary matter for consideration, and that this rule is to be administered with as much consideration for the tender ties of affection of the parents as possible under the circumstances. When that appears from the record to have been done by the trial court, this court will not hunt for any other reason to affirm its decree.

[6] The appellee asks this court to give her a decree against the appellant for the clerical expense of the preparation of the brief of her counsel in this court and for the printing the same, aggregating \$143.40, and also for a reasonable fee to her counsel for his

services in her behalf in this court. She is entitled to this. The fee of her counsel in this case in this court will be fixed at \$100, and a judgment will be entered in this court in her favor against the appellant for the aggregate of these two sums, and for her costs, and the decree of the circuit court of Norfolk county will be affirmed.

Affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 771)

ROGERS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 16, 1922. Rehearing Denied April 3, 1922.)

1. Witnesses §40(2)—Competency of child discretionary with court.

There is no fixed age at which a child must have arrived in order to be competent as a witness; the question being discretionary with the trial court.

2. Criminal law §1153(2)—Trial court's determination as to competency of small child not disturbed except for manifest error.

Trial court's determination as to competency of child as a witness will not be disturbed on appeal except for manifest error.

3. Witnesses §40(1)—That child is too young to be convicted of perjury is not decisive of its competency.

That a child may be too young to be convicted of perjury is not decisive of its competency as a witness.

4. Witnesses §40(1), 45(2)—Rule as to competency of child stated; child witness must have consciousness of duty to speak truth.

To be competent as a witness, a child must have sufficient mental capacity to observe the data about which it has testified and record it in mind, and thereafter understand questions put to it and give intelligent answers, and must have a sense of moral responsibility, at least as to the extent of the consciousness of a duty to speak the truth.

5. Witnesses §77—Evidence held to show competency of 6 year old girl who had been victim of assault.

In prosecution for assault and battery on a girl not quite 6 years old, examination of the girl as to competency held to sustain action of court in permitting her to testify.

6. Assault and battery §91—Evidence held to sustain conviction of assault on 6 year old girl.

In prosecution for assault and battery on a 6 year old girl, in which the defendant claimed an alibi and produced character witnesses to prove his good character, evidence held to sustain conviction.

7. Criminal law §280(11)—Where jury was waived, judgment of court upon credibility of witnesses and weight of testimony stands on same footing as verdict.

Where a jury was waived, and the case was submitted to the judge, the judgment of the court upon the credibility of the witnesses and the weight to be given their testimony stands on the same footing as the verdict of a jury.

Error to Hustings Court of Portsmouth.

H. F. Rogers was convicted of assault and battery upon a girl less than six years of age, and he brings error. Affirmed.

Venable, Miller, Pilcher & Parsons, of Norfolk, and J. C. Foster, of Colonial Beach, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

BURKS, J. The accused (plaintiff in error) was convicted of assault and battery upon a little girl less than 6 years of age. The case was heard de novo in the Hustings court of Portsmouth, on an appeal from the police justice, and, by consent of parties, a jury was waived and the case submitted to the judge of the court, who pronounced judgment against the accused and fixed his imprisonment at six months in jail. The chief witnesses for the commonwealth were the little girl, who lacked 2 months of being 6 years old, and her brother, of the age of 8 years. The assignments of error are, (1) the incapacity of these two children to testify, and (2) that the judgment is contrary to the law and the evidence.

[1-3] There is no fixed age at which a child must have arrived in order to be competent as a witness. Of course no one would think of calling a child 2 or 3 years of age as a witness in a case, but the whole question of competency must be left largely to the discretion of the trial court, and its judgment will not be reversed except for manifest error. He has the opportunity of seeing the child and its demeanor on the stand, which cannot be photographed in the record, and unless what is in the record clearly shows that he has committed error, his action will not be reversed. The child may be too young to be convicted of perjury, but this is not decisive of its competency as a witness. Commonwealth v. Robinson, 165 Mass. 426, 43 N. E. 121.

[4] In order to be competent as a witness, the child must have sufficient mental capacity to observe the data about which it has testified and record it in mind, and thereafter understand questions put to it and be able to give intelligent answers. There must also be a sense of moral responsibility, at least to the extent of a consciousness of a duty

to speak the truth. 1 Wigmore on Evidence, § 506.

In *Wheeler v. United States*, 159 U. S. 523, 18 Sup. Ct. 93, 40 L. Ed. 244, it is said:

"While no one would think of calling as a witness an infant only 2 or 3 years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous."

It is further said in the same case:

"Of course, care must be taken by the trial judge, especially where, as in this case, the question is one of life or death. On the other hand, to exclude from the witness stand one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice."

In *Commonwealth v. Ramage*, 177 Mass. 349, 58 N. E. 1078, a child 6 years and 4 months old was received as a witness in a trial for an indecent assault upon her person; it being stated that the examination on the voir dire disclosed no unusual mental condition.

In *Trim v. State* (Miss.) 33 South. 718, a child 5 years of age was permitted to testify to the identity of a man who had killed her mother.

In *State v. Blythe*, 20 Utah, 378, 58 Pac. 1108, a little girl about 6 years old was permitted to testify on a prosecution of a defendant for assault upon her with intent to commit rape, and it was said that the appellate court would not interfere with the holding of the lower court if the lower court, upon examination made upon its voir dire, or upon all of its testimony, concludes that the child is competent to testify, unless there is clear abuse of its discretion apparent from the record.

In *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 468, 40 S. E. 415, 55 L. R. A. 911, 88 Am. St. Rep. 884, the trial court refused to hear the testimony of infants 9, 10, and 14 years of age, respectively, on account of lack of capacity, and the appellate court said, in affirming the ruling:

"We cannot judge of the real character or degree of intelligence of these witnesses from their mere paper evidence. The judge of the circuit court had a means of decision in this matter not possessed by us, their presence face to face before him, affording him a su-

perior means to judge, of which we are deprived. In almost every case that is the deciding test. In a great majority of cases the decision of the trial court in the matter of the competency of a child, depending as it does, not on age, but on intelligence, must be final, and 'it must be a very flagrant case of error to authorize this court to reverse the judgment.'"

Among other authorities cited are, *Peterson v. State*, 47 Ga. 524; *Wharton on Ev.*, § 368; *State v. Edwards*, 79 N. C. 648; *State v. Manuel*, 64 N. C. 601; *State v. Michael*, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 610.

The case at bar was decided by an able and experienced judge, who had before him, not only the statements of the children on their voir dire, but also their testimony on the merits of the case. We need not go into the testimony of the boy 8 years of age, because he disclosed certainly as much intelligence and knowledge of the duty to tell the truth as his younger sister, and it is sufficient, therefore, to look to the testimony of the latter.

On the subject of the obligation of an oath, she testified that she was in regular attendance upon the Sunday school; that she did not know what it was to be a witness, or what was meant by the obligation of an oath. On this subject, however, she testified in part as follows:

"Q. Do you know what it means to tell the truth?"

"A. Yes, sir.

"Q. What would happen to you if you did not tell the truth?"

"A. Go to the bad man.

"Q. Go to the bad man?"

"A. Yes, sir.

"Q. If you say anything here, are you going to tell the truth, or not to-day?"

"A. Yes, sir.

"Q. Everything you say will be true?"

"A. Yes, sir. * * *

"By the Court: Q. Do you know what the Bible is?"

"A. Yes, sir.

"Q. What is it?"

"A. It is learning to be good.

"Q. Whose book is it?"

"A. The Lord's.

"Q. The Bible is the Lord's book, and it teaches you to be good?"

"A. Yes, sir.

"Q. When you put your hand on the Bible, do you understand you are calling upon the Lord as bearing witness that you are telling what is true, and that you are not telling what is not true? Do you understand that?"

"A. Yes, sir."

During the course of the examination of the witness on the merits of the case she stated that she did not hear what was asked her when she was sworn, and thereupon the court said that it would swear her over again. Then the following questions and answers ensued:

"Q. Your name is Mildred Cherry?"

"A. Yes, sir.

"Q. This is the Bible, and when you put your hand on the Bible it means you are calling on the Lord to bear witness to the fact that you are telling the truth. Now, put your hand on the Bible. Will you, in answer to all the questions that are asked you in this case, tell the truth, the whole truth, and nothing but the truth, so help you God?"

"A. Yes, sir.

"Q. All right. Now, in giving the answers to the questions that these gentlemen asked you and that these gentlemen who represent the defendant asked you, have you told the truth?"

"A. Yes, sir.

"Q. You have told the truth?"

"A. Yes, sir."

On cross-examination on this subject, the following questions were asked and answers given, while referring to something which the mother had said to the witness:

"Q. Did she tell you what to say when they asked you if you knew what it meant to tell the truth, and where you would go if you didn't?"

"A. Yes, sir.

"Q. What did she say about that?"

"A. She asked me did I know where I would go if I didn't tell the truth, and I said yes.

"Q. Did she tell you that they would ask you that this morning?"

"A. She said they may and may not.

"Q. She said that they may and may not? Did she tell you if they did ask you that what you must say?"

"A. Yes, sir.

"Q. What did she say you must say?"

"A. That I would go to the bad man.

"Q. That is the reason you told the judge that, wasn't it?"

"A. Yes, sir."

In view of the foregoing answers, we cannot say that the ruling of the trial court in permitting the witness to testify was plainly wrong.

On the argument of this case it was insisted by counsel for the accused that the witness had been coached by her mother, and that she simply gave categorical answers to leading questions. There are many such questions and answers in the record, but an examination of the testimony of this little child discloses an amount of intelligence which seems to be quite above the average. She was asked over 100 questions on her voir dire and examination in chief, and about 100 questions on cross-examination. She was in the courtroom before strangers, and her intelligence is displayed by her answers. She was asked many questions on cross-examination which it could not have been anticipated she would be asked, and hence could not have been coached as to them.

There is much confusion in the record in the testimony of a number of witnesses, especially the adult witnesses, about dates in connection with the offense charged; but it is fairly plain that the alleged assault and

battery must have taken place on the 19th of March, 1921. The testimony showed that the assault and battery occurred in a moving picture show, in the city of Portsmouth, on Saturday night, March 19th. The little girl did not report it to her mother until the following day. On the following Saturday night the same two children were sent to the same moving picture show for the purpose, if possible, of catching the party who had committed the assault on the evening of the 19th, and it was arranged that if the party came and renewed his advances, the little girl should notify her brother and he should go out and get their father, who was working near by, and bring him in so as to apprehend the guilty party. In order to show the character of the testimony of the little girl on this subject, we make the following extract from the record of questions asked her on cross-examination, and her answers thereto, on matters about which it seems to be fairly certain she could not have been coached:

"Q. After that first Saturday, when did you next see the man?"

"A. It was the next Saturday night.

"Q. What time?"

"A. Mamma sent me there the same time as I went the first Saturday.

"Q. Had you told your mother what this man did to you?"

"A. Yes, sir.

"Q. And so you were going back to the pictures with your little brother?"

"Q. When you went in the theater that night, in the Pallace that night, was this man sitting there again?"

"A. No, sir; we went in, and he came in after we did.

"Q. He came in after you did?"

"A. Yes, sir.

"Q. Where did you sit the second night?"

"A. The same place.

"Q. When the man came in did he take a seat by you, or by your little brother?"

"A. By me.

"Q. How did he come and sit by you when you and your brother went—who went in the seats first, you or your brother?"

"A. Who went to the seats?"

"Q. Who went into the seat first when you and your brother got there the second night?"

"A. Me.

"Q. You went in first and your brother came in next?"

"A. Yes, sir.

"Q. Was he nearer the aisle than you?"

"A. I came on the second seat, and he was the first.

"Q. When the man came in, did he have to pass your brother and then by you?"

"A. Yes, sir.

"Q. He passed by your brother and then by you, and took his seat next to you?"

"A. Yes, sir.

"Q. Did you say anything to him when he first came in?"

"A. No, sir.

"Q. Why didn't you and your brother get up and leave when he came?"

"A. Mamma wanted us to catch him.
 "Q. Wanted you to catch him?
 "A. Yes, sir.
 "Q. Had you seen the man since the last Saturday night?
 "A. No, sir.
 "Q. You had not seen him at all?
 "A. No, sir.
 "Q. Well, how long did you stay in the movies the second Saturday night?
 "A. No longer than we did the last Saturday night.
 "Q. You stayed in there an hour?
 "A. Yes, sir. * * *
 "Q. Well, could your little brother hear what he said to you?
 "A. No, sir.
 "Q. Did you tell your little brother that he was troubling you again?
 "A. He heard some of it, though, but he didn't hear it all.
 "Q. Did you tell your little brother that it was the same man, and that he was troubling you?
 "A. Yes, sir, and he knew it too.
 "Q. How do you know that he knew it?
 "A. Because he seen him.
 "Q. Well, why didn't you get up and leave when he commenced troubling you again?
 "A. Mamma told me to stay there and wait until brother got daddy.
 "Q. Stay there and wait until your brother got daddy. How long did little brother stay after this man started to fooling with you?
 "A. It wasn't long before he went and called daddy."

[5] We are satisfied from this testimony that the trial judge made no mistake in holding that the little girl was of sufficient mental capacity to testify as a witness.

We need not go into the same line of examination as to the boy, for he certainly disclosed as much intelligence as his younger sister, and evoked from counsel for the accused during the examination the remark that, "He is a pretty smart boy."

[6, 7] The remaining assignment of error is that the judgment of the court was contrary to the law and the evidence. After the commonwealth had introduced its evidence and had proved the assault by the little girl, and the identity of the accused by both the little girl and her brother on the night of March 26th as the same man who had sat by her on the night of March 19th, the accused introduced a number of witnesses to prove his good character, and also several witnesses to prove an alibi on the night of the 19th. In addition to this he testified himself, denying unqualifiedly that he was at the picture show on the 19th, or that he committed any assault at any time on the little girl. This testimony is directly in conflict with the testimony of the little girl, and also of her brother, as to his being at the theater on the night of the 19th. In addition to this the testimony of the little girl as to the injury done her is apparently corroborated by

the testimony of her mother and that of the doctor who attended her, as to the injury which she had sustained. It is true that the doctor testified that the injury might have come from some other cause, but there is no doubt about the existence of the injury, and there was no evidence before the trial judge of any other cause which might have produced it. The question was one to be decided by the trial judge, and his judgment upon the credibility of witnesses and the weight to be given to their testimony stands on the same footing as the verdict of a jury. *Martin v. Richmond, etc.*, 101 Va. 406, 44 S. E. 695; *Hoster v. Stag Hotel Corp.*, 111 Va. 223, 68 S. E. 50; *Carson v. Mott Iron Works*, 117 Va. 25, 84 S. E. 12; *Town of Appalachia v. Mainous*, 126 Va. 423, 101 S. E. 359.

Under these circumstances the judgment of the trial court cannot be set aside for this cause.

Upon the whole case we are of opinion that the judgment of the trial court must be affirmed.

Affirmed.

This case was argued before Judge WEST took his seat on the court.

(122 Va. 238)

HARRISON v. GARDNER INV. CORPORATION.

(Supreme Court of Appeals of Virginia. March 16, 1922.)

1. Evidence \S 121(3) — In purchaser's suit against vendor's agent for amount paid on execution of contract, contract held admissible as part of res gestæ.

In purchaser's action against vendor's agent to recover amount paid on execution of contract subsequently rescinded for fraudulent representations, in which the defendant claimed the right to keep the amount under the provisions of the contract, the contract was admissible in evidence as a part of the res gestæ.

2. Trial \S 134—Statute forbidding peremptory instructions not applicable where question is one of law.

Code 1919, \S 6003, forbidding peremptory instructions, does not apply where verdict depends necessarily and exclusively upon a question of law, such as the legal effect of a deed, or contract.

3. Trial \S 194(13)—Instruction directing verdict for defendant on ground that plaintiff was not a party to the contract held erroneous in view of contrary uncontradicted evidence.

In purchaser's action against vendor's agent to recover amount paid on execution of contract following a rescission thereof for fraudulent representations, instruction directing a verdict for defendant on the ground that the purchaser's agent in executing the contract had acted as the principal, and that the plain-

tiff was not a party to the contract, *held* erroneous, both because it took from the jury their consideration of the evidence on this question of fact and because under the uncontradicted evidence the contract, if binding, was one between the vendor and plaintiff.

4. Principal and agent \S 124(3) — Whether purchaser had authorized his agent to make contract *held* for jury.

In purchaser's action against vendor's agent to recover earnest money, on rescission for fraudulent representations, the question whether purchaser had authorized his agent to enter into such a contract *held* for the jury.

5. Principal and agent \S 174 — Whether purchaser ratified contract by his agent *held* for jury.

In purchaser's action against vendor's agent to recover earnest money, on rescission for fraudulent representations, in which it was claimed that the purchaser had not authorized his agent to make such a contract, the question of whether the purchaser had ratified the contract *held* for the jury.

6. Vendor and purchaser \S 341(4) — Whether vendee had been induced to enter into contract by fraudulent representations *held* for jury.

In a purchaser's action against vendor's agent to recover earnest money, the question whether the purchaser violated the contract by refusal to proceed therewith on the ground that a contract had been induced by fraudulent representations *held* for the jury.

Error to Circuit Court of City of Norfolk.

Action by W. H. Harrison against the Gardner Investment Corporation. Judgment for defendant, and plaintiff brings error. Reversed.

This is an action of assumpsit instituted by W. H. Harrison, the plaintiff in error (hereinafter called plaintiff), against the Gardner Investment Corporation, the defendant in error (hereinafter called defendant), the declaration containing the common counts of a declaration in assumpsit at common law; the object of the action being to recover the sum of \$500, money of the plaintiff alleged to have been "had and received by the defendant to the use of the said plaintiff."

The defendant pleaded the general issue of nonassumpsit, on which issue was joined. The following grounds of defense were filed by the defendant:

"Each and every defense which may be made under the general issue, and in addition:

"That there is no privity between the parties to this case.

"That defendant acted merely as agent in the deal in question in this case.

"That nothing is due from defendant to plaintiff.

"That plaintiff has no standing or right of recovery in this case."

There was a trial by jury which resulted in a verdict for the defendant. The trial

court entered judgment accordingly, and the plaintiff brings error.

Certain facts appearing from the evidence seem to be uncontroverted. Such of those facts as are material may be stated as follows:

On August 1, 1919, the plaintiff, being at the time at Tutwiler, Miss., saw in a recent issue of a newspaper published in the city of Norfolk, Va., the following advertisement of property for sale:

"Fairfax avenue—garage and lot, lot 25x125 feet, brick garage, tile roof, six garages renting for \$42 month and about 15 or 20 more can be built; rental of these will be guaranteed, price \$8,000. \$2,000 cash, \$2,550 six years, \$2,500 ten years."

The evidence does not show whether or not the advertisement had any name signed to it, of the owner, or agent of the owner of the property, or why the plaintiff connected the defendant with the subject. But the fact was that on seeing this advertisement the plaintiff cut it out of the newspaper, and on August 1, 1919, from said place in Mississippi, wrote the following letter to the defendant, inclosing therein the said newspaper clipping:

"Gardner Invest. Corpn.: I will take it. Write up papers & let me know how much you want till we can get papers fixed.

"[Signed] W. H. Harrison."

The defendant did not reply to this letter.

Afterwards, on what date does not appear, the plaintiff wired to one W. L. Wagner, who was in the city of Norfolk, and who had money belonging to the plaintiff deposited in his hands subject to the order of the plaintiff, "to see" the defendant, the Gardner Investment Corporation, "in regard to this matter" and to "secure that property" by depositing with defendant money of the plaintiff of such an amount as the defendant might require, "until [the plaintiff] could get there." (Whether the authority to Wagner "to secure that property" limited him to merely making the deposit or commissioned him to enter into a contract as agent for the plaintiff, and, if so, what contract, are questions of inference left in doubt by the evidence, as hereinafter mentioned.) This telegram does not appear in evidence, nor does any witness undertake to give its language. The telegram was the only communication of the plaintiff to Wagner on the subject so far as appeared from the evidence. The plaintiff did not send Wagner any copy of the advertisement.

On receipt of the telegram Wagner went to see the defendant, not as acting for himself, but as the agent of the plaintiff; and the uncontroverted testimony is express that the defendant then, and in all the transactions

with Wagner subsequently, "knew" that Wagner "was dealing" for the plaintiff, and not for himself. But the defendant required Wagner to sign an agreement in writing in which Wagner was named as the purchaser, without mention of the fact that he was such as the agent of the plaintiff, and to deposit \$500, both of which Wagner did; the uncontroverted testimony, however, being that the defendant knew at the time that the \$500 deposited consisted of money belonging to the plaintiff "and were deposited according to instructions [Wagner] received from" the plaintiff; and that Wagner was acting in signing the agreement as agent for the plaintiff and not for himself; so that the agreement was made by Wagner for the sole benefit of the plaintiff.

The agreement referred to, so far as material, was in the following form:

"This agreement of sale made in triplicate, this 11th day of August, 1919, between Gardner Investment Corporation, agents for E. H. Odend'hall (hereinafter known as vendor), and W. L. Wagner (hereinafter known as the purchaser).

"Witnesseth: That for and in consideration of the sum of five hundred no/100 dollars (\$500.00), receipt of which is hereby acknowledged, the vendor agrees to sell and the purchaser agrees to buy for the sum of eight thousand no/100 dollars, all that certain piece or parcel or lot of land described as follows, to wit: * * *

"The purchase price to be paid as follows:

"First. The five hundred no/100 dollars (\$500.00) cash above received to apply to the purchase price.

"Second. Two thousand four hundred no/100 dollars (\$2,400.00) cash when the deed is delivered and full settlement is made.

"Fourth. The purchaser further agrees to give a deed of trust to secure the payment of five thousand one hundred no/100 dollars (\$5,100.00) evidenced by notes, bearing interest at the rate of six per cent. per annum, payable semiannually, as follows:

"One-half in five years, and one-half in ten years.

"The vendor agrees to deliver the above property with a general warranty deed and the usual covenants of title signed and executed by all parties interested in the property, same to be prepared at the expense of the vendor.

"All taxes, insurance, rents and interest are to be prorated as of date of settlement and settlement is to be made on or before September 1, 1919.

"It is understood that Gardner Investment Corporation are the agents for the vendor and he agrees to pay them a commission for making this sale of 5 per cent. on the first five thousand dollars and 3 per cent. on the balance of the total purchase price.

"It is further understood that should purchaser fail to consummate this contract, any amount paid will be refunded as liquidated damages at the option of the vendor. * * *

"Witness the following signatures and seals this 11th day of August, 1919.

"[Signed] Gardner Investment Corp'n,
"Agents. [Seal]
"J. W. Gardner, President. [Seal]
"W. L. Wagner, [Seal]"

The plaintiff came from Mississippi by automobile. He engaged a certain title company to examine the title and represent him in closing the purchase of the property. On or about September 10, 1919, the attorney for Odend'hall, the owner of the property, had prepared a deed conveying the property to the plaintiff, not to Wagner, and had the deed with him duly executed and acknowledged, ready for delivery, and met the plaintiff at the office of the title company with a view to closing the contract. Meanwhile the deed of trust and notes provided for by the agreement in writing aforesaid had been drawn by the title company, at the direction of the plaintiff, but in accordance with the "dictation" of the attorney for Odend'hall, the owner, as that attorney himself testified. This attorney further testified on the subject of what occurred on this occasion as follows:

"We were about to go to the stage of carrying out the contract of prorating the taxes and the rents and so on, when Dr. Harrison [the plaintiff] raised the objection then that the contract, as he understood it, provided that the garages were rented, and that the rents for the garages were guaranteed for a year."

It may be here noted that the agreement in writing aforesaid contained no provision as to the property being rented, or as to guaranteeing the rents, those references appearing in the advertisement only; so that the plaintiff could not have been here referring to said agreement in writing as "the contract," if he knew its contents. The witness proceeded further with his testimony as follows:

"When he told me that, Mr. Odend'hall not being with me, I told them they would have to postpone the settlement, as I was not authorized by Mr. Odend'hall to carry out any such contract as that. Several * * * after that Mr. Odend'hall came to my office and directed me to carry out the terms of the contract with this modification, that he was to allow Dr. Harrison one year's rent on those garages, I think at \$7.00 per month, and credit that as accrued interest on the back of the note. After receiving those directions I went back to the title company, at the hour designated, and waited for about three-quarters of an hour, and Dr. Harrison did not put in an appearance."

On the subject of what occurred after he got to Norfolk, and at his meeting with the attorney for the owner above referred to, when they failed to close the contract of purchase, the plaintiff testified as follows:

"In the first place, I understood I was to pay \$1,500.00 more, but they wanted \$2,400.00

more, I think it was. I passed that and was about—I did draw a check for \$2,400.00, and then I found that the garages were not rented, that there were only three of them rented, and I tore the check up. That is my recollection.

"Q. Did they show you a copy of any contract that had been made in relation to this property?"

"A. Showed me a contract which says that the money shall be returned to me if not satisfactory. I think that is written in the contract."

Wagner testified on the same subjects as follows:

"Q. Please tell the court and jury what occurred as soon as he [the plaintiff] came here and found the condition of the property?"

"A. We first went to the office of the Gardner Investment Corporation to take up the matter of transferring the title. There was some difficulty in finding out whether or not the garages were rented. It was finally decided that that matter would be settled later, and we adjourned to meet later in the office of the Guaranty Title & Trust Company in order to transfer the title to the property, but upon finding that the garages were not all rented the deal was postponed.

"Q. Was the deal consummated?"

"A. No, sir.

"Q. Why was it not consummated?"

"A. It was not consummated because the property was not as represented, and we didn't want it."

It was also shown in evidence as an uncontroverted fact, that the defendant had the \$500.00 in its hands at the time of suit, but had been instructed by Odend'hall not to turn it over to the plaintiff, and that at the time of the trial the defendant still had the money in its hands.

There are only three questions on which any conflict is perceived in the evidence. Those questions are: (1) Whether Wagner, by reason of the general terms of the telegram to him, was given such large discretion that he was authorized by the plaintiff to enter into the contract as expressed in the written agreement aforesaid, as agent for the plaintiff, so as to constitute that agreement the contract binding on the plaintiff? (2) whether the conduct of the plaintiff, after he arrived in Norfolk and knew of the agreement in writing, was such that he ratified that agreement? and (3) whether, if such agreement was binding on the plaintiff as his contract, there was a breach of that contract on the part of the plaintiff.

There may be further questions in the case whether the refunding of the money paid, mentioned in the contract, means what is there said, and, if so, whether the option there mentioned goes to the refunding or merely to the effect thereof; or whether there was a meeting of the minds of the parties on the meaning of "retained" instead of "refunded," the word used in the writing, there being in such case a mere clerical er-

ror and mutual mistake in using the word "refunded" instead of "retained." These may be questions of law, or mixed questions of law and fact, if fully developed by the evidence. They are not fully developed by the evidence in the record, and need not be further specifically mentioned.

Of the evidence bearing on the three questions of fact above stated, it is sufficient to say that the conflict is more in the inferences which may be contended should be drawn from the evidence than in the evidence itself; and what inferences should be drawn from the evidence, whether in favor of the plaintiff or defendant, upon these questions, are, under the circumstances disclosed, controverted matters of fact, about which reasonable minds may reasonably differ in conclusions.

The action of the trial court on the subject of the instructions appears from the record to have been as follows:

"The following instruction granted at the request of the defendant is the only instruction granted. It was granted over the objection of the plaintiff, and the plaintiff excepted:

"The court instructs the jury that under the law it is the duty of the court, that is, the judge, to construe the written contract in evidence in this case; so construing said written contract in this case, the court instructs you that the defendant is not liable to the plaintiff in this case."

"Before granting this instruction, the court stated to the plaintiff's counsel, in the presence of the jury, in response to objections to the instruction, which plaintiff's counsel argued:

"The Court: 'The defendant company is haled into court upon a claim that it has money belonging to plaintiff. Defendant admits having \$500 paid him on account of property bought by a Mr. Wagner, with whom a sealed contract was entered into with one Odend'hall—neither one of these are parties to the suit. This contract has been admitted as evidence because defendant received the \$500 in pursuance thereof. If the plaintiff, who is not a party to the contract, is permitted to recover, there is nothing to prevent Wagner, who is not a party to the suit, from proceeding on his contract in a separate action to recover the same \$500.

"I feel constrained, therefore, to tell the jury that under this contract and the evidence connected therewith, there cannot be a verdict for the plaintiff."

The following instruction was requested by the plaintiff but refused by the court:

"The court instructs the jury that if they believe from the evidence that the defendants advertised the garages on Fairfax avenue for sale, and that by letter in writing, August 1st, the plaintiff agreed to take the property, and in pursuance thereto instructed a deposit of a sum of money to secure the property until he could come on and close the deal, and that after he came on to close the deal he found that the property was not rented, as stated in the advertisement, and refused to close the deal on the ground of material misrepresentations, that he is entitled to have his deposit returned in

this case, and they should find for the plaintiff."

J. Edward Cole, of Norfolk, for plaintiff in error.

Jas. G. Martin, of Norfolk, for defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The questions presented for our decision by the assignments of error will be disposed of in their order as stated below.

[1] 1. Did the court err in refusing to exclude from the jury the agreement in writing between the defendant, as agent for the owner of the property, and Wagner, as agent for the plaintiff, as the latter undertook to act and as dealt with by the defendant as an action in the matter, as shown by the uncontroverted evidence, although the last-named agency was not stated in the writing?

This question must be answered in the negative.

The defendant, according to the testimony in its behalf, received the \$500 sued for, certainly partly in pursuance of the provisions of this writing. The execution of this writing was one of the circumstances which attended the payment of this money into the hands of the defendant. Clearly, therefore, the writing was properly admissible in evidence as a part of the *res gestæ*. Its effect as evidence—how far it would be relied upon by the defendant as authorizing it to hold the \$500 sued for—was and is another question, dependent upon the question of fact whether the writing proved to be what the evidence for the defendant tended to show the defendant considered it to be at the time it received the money of the plaintiff, namely, a contract binding upon the plaintiff, and under the terms of which the defendant had the right to receive and hold possession of the said money of the plaintiff.

2. Did the court err in granting the single instruction which was given the jury at the request of the defendant, which is set forth above?

This question must be answered in the affirmative.

[2] In the argument of the assignment of error involving this instruction it is urged that it was reversible error in the court to give it for the reason that it is a peremptory instruction, and hence in violation of the statute (section 6003 of the Code), forbidding peremptory instructions. But, as held in *Small v. Va. Ry. & Power Co.*, 125 Va. 416, 99 S. E. 525, that statute is not to be construed as applying to cases in which the verdict of the jury depends necessarily and exclusively upon a question of law, such as the legal effect of a deed or contract. The instruction in question contained merely the

construction of the written contract by the trial judge. Therefore it was not *per se* in violation of the statute just mentioned. However—

[3-6] The instruction under consideration, when read in the light of the statement of the trial judge before the jury in explanation thereof, and in the light of the evidence in the case, in effect, told the jury that the writing above mentioned was a contract between Wagner and the owner of the property sold, and could not be considered as a contract between the defendant, as agent of the owner, and Wagner, as agent of the plaintiff, in any aspect of the case. The uncontroverted evidence before the jury was to the effect that if the writing was a binding contract at all, it was a contract between the parties last named, and not a contract between Wagner and the owner. The instruction was therefore erroneous, both because it took from the jury their consideration of the evidence on this pure question of fact, and because it embodied a conclusion of fact which was directly contrary to the uncontroverted evidence.

There is only one hypothesis upon which we could decline to reverse the case because of such erroneous instruction, and that is this: If the evidence was such that, regarding the agreement in writing as having been entered into by the defendant with Wagner, as agent of the plaintiff, the jury would not have been warranted in coming to any other conclusion than that the plaintiff was bound by such writing as his contract, either because (1) he had authorized Wagner to make it for him, or (2) he had ratified it after it was made; and further, that the plaintiff had unjustifiably broken the contract, and as a result had forfeited the \$500. In such case the instruction might be considered as harmless error. But the evidence before the jury on all three of those questions of fact (not to here mention the difficulties in the way of arriving at the result just referred to upon the meager facts pertaining thereto appearing in the evidence), was such that they were seriously controverted questions of fact, about which reasonable minds may reasonably differ in conclusions. They are therefore peculiarly jury questions, and they should have been left to the decision of the jury, under suitable and proper instructions, if asked for by either of the parties. Hence the instruction under consideration cannot be considered as harmless error, and the hypothesis mentioned cannot save the case from reversal.

3. The only remaining question presented by the assignments of error is whether the court erred in refusing to give the instruction set forth above, asked for by the plaintiff.

The instruction contains obvious defects. However—

As it is not probable that an instruction in this precise form will be asked for by the plaintiff upon a new trial, we deem what we have said above in general terms in regard to the instructions which should be given upon a new trial sufficient to dispose of the subject for all practical purposes, should the issues and the evidence on a new trial be the same as upon the one already had, and we feel that it is unnecessary for us to say anything further concerning the precise instruction last mentioned, either in approval or disapproval of it.

The verdict and judgment under review will be set aside and annulled and a new trial de novo will be awarded the plaintiff. Reversed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 268)

WASHINGTON-VIRGINIA RY. CO. v. STRUDER.

(Supreme Court of Appeals of Virginia. March 16, 1922.)

1. Railroads \S 316(2)—Speed ordinance inapplicable to street terminating at track.

A city ordinance prohibiting the operation of trains over grade crossings at more than five miles an hour and requiring warning signals is not applicable at a point where there was no grade crossing, but the street ended at the railroad track, and only a cinder path led therefrom to the station platform on the other side of the track.

2. Railroads \S 348(4)—Negligence in failing to have headlights held not shown.

A charge that an electric railroad company was negligent in failing to have headlights on the train which struck decedent is not sustained where the motorman's testimony that the lights were burning was contradicted only by testimony they were not burning when the train was still 1,000 feet from the place of the accident, and where it was still daylight, so that no lights were necessary.

3. Carriers \S 305(2)—Failure to have station lighted held not cause of accident.

Negligent failure of an interurban railroad company to have its station lighted does not impose liability for the death of a passenger who was killed in attempting to cross the track to the platform on the opposite side from the station, where there was no showing that the absence of station lights in any way contributed to the accident.

4. Trial \S 156(3) — Demurrer to evidence admits truth of adverse party's evidence and all inferences therefrom.

A demurrer to the evidence admits the truth of all the adverse party's evidence and all just inferences that can be properly drawn therefrom, and waives all the demurrant's evidence which conflicts with that of his adversary or

which has been impeached and all inferences from his own evidence which do not necessarily result therefrom.

5. Evidence \S 588—Testimony of motorman held not impeached.

The testimony of the only eyewitness, the motorman of an interurban train which struck decedent, is not impeached by the fact that he testified decedent was thrown right down the track, while another witness testified he saw what he thought was a bundle of rags fly out of the car in the air, and by the motorman's testimony that he did not hear decedent groan after she was struck, though other witnesses did hear her.

6. Carriers \S 346(1)—Evidence held to show contributory negligence of intending passenger in crossing track without looking.

Evidence that an intending passenger crossed an interurban railroad track to reach the station platform where she intended to take a car without looking for a car approaching on the first track, though she was familiar with the situation and with the schedules of the cars, and could have seen down the track 280 feet before she stepped on it, held to show contributory negligence as a matter of law.

7. Carriers \S 327—Circumstances held not to warrant assumption no train was approaching.

Where there was no evidence that there was a train immediately preceding the interurban train which killed decedent, and no other unusual circumstances to warrant a belief no train was approaching, it was contributory negligence for an intending passenger to attempt to cross the track without looking for an approaching train.

8. Carriers \S 327—Passenger going to station must exercise ordinary care to avoid injury by trains.

Though an intending passenger going to a railroad station may rely on the railroad company to use ordinary care to protect her against injury by its trains, the passenger owes the corresponding duty to use ordinary care to protect herself, and the failure to use such care on her part is negligence.

Error to Circuit Court, Arlington County.

Action by James A. Struder, administrator of Julia Della Struder, deceased, against the Washington-Virginia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and judgment entered for defendant.

Carlin, Carlin & Hall and Geo. B. Vest, all of Alexandria, for plaintiff in error.

Edmund Burke, of Washington, D. C., for defendant in error.

WEST, J. This is a suit brought by Julia Della Struder's administrator against the Washington-Virginia Railway Company to recover damages for her death resulting from the alleged negligence of the defendant company.

The plaintiff's intestate was a young woman, 19 years old, in the full enjoyment of all her faculties. She resided in the town of Potomac, between Alexandria and Washington, and was employed by the Bureau of Engraving in Washington. Her home was near St. Elmo station, where the accident occurred, and she traveled almost daily from St. Elmo to Washington and return over the defendant company's road, and was well acquainted with the conditions and surroundings at St. Elmo station, and with the schedule of the cars over said road.

The defendant company's road at St. Elmo has two parallel tracks and runs nearly north and south, the east track being used by north-bound cars and the west track being used by south-bound cars. Just south of St. Elmo station these tracks pass under an overhead bridge, and the abutments to this bridge obstruct the view of the tracks to the south from any one approaching the station from the east until he arrives near the east track. St. Elmo station is approached from the east by a path which runs just north of this embankment, and the station is on the west side of the west track. There is a cinder platform on the east side of the east track and on the west side of the west track.

The accident occurred just before dark on the afternoon of October 21, 1919. Plaintiff's intestate walked toward the station, approaching it from the east side, to take the train on the west track for Alexandria. One of the defendant company's electric trains, consisting of one freight car, had left Alexandria at 6:27 p.m. and made the run to St. Elmo, a distance of 3.11 miles, in about 16 minutes. As plaintiff's intestate attempted to cross the east track, on her way to the station, she was struck by this train, and died of her injuries the next day, without regaining consciousness.

Upon the trial, after all the evidence on both sides had been introduced, the defendant filed a demurrer to the evidence, which was overruled, and judgment was entered in favor of the plaintiff in the sum of \$3,000, the amount of damages assessed by the jury, subject to the decision of the court.

The only assignment of error relied on by the plaintiff in error is the action of the court in overruling its demurrer to the evidence.

The only eyewitness to the accident was the motorman, Edward D. Groves, who testified as follows: That he was standing at the time of the accident in the motorman's stand on the front of the car; that he blew his whistle, two longs and two shorts, a warning, before reaching the Washington & Old Dominion overhead bridge; that his car was running 12 or 15 miles an hour with his headlights burning, when he approached St. Elmo station; that when he first saw the lady he applied the brakes, rang the bell, and blew

the whistle, two short jerks; that the lady walked deliberately on the track 12 or 15 feet in front of the car; that she was walking with her head down like she was in deep study and was not thinking where she was, and never made any move to get out of the way or step up when he blew the whistle, but "just went along looking down like she was studying," and was about the middle of the track when the car struck her.

Witness Groves also testified that he blew the station whistle at the regular place, south of the embankment, which statement was not contradicted by any other witness.

The undisputed evidence of witness Sinclair, chief engineer of the defendant company, is that a trolley pole on the east side of the north-bound track, approximately opposite the station at St. Elmo, is $8\frac{1}{4}$ feet from the center of the north-bound track, and that a person standing by and on a line with that trolley pole and looking south can see 280 $\frac{1}{2}$ feet down the center of the north-bound track without obstruction.

Witness had made a sketch and measurements of the physical conditions at St. Elmo station, and there is filed with his evidence a sketch and plat showing the physical conditions to be as stated by him.

Was there any primary negligence on the part of the defendant company, as claimed by the defendant in error, consisting of five specific violations of the law, as follows:

1. Running the car past the station at a reckless and dangerous rate of speed.

Groves, the motorman, testified that his car left Alexandria at 6:27 p. m. and made the distance of 3.11 miles to St. Elmo station in about 16 minutes, which was about 12 miles per hour. He said he looked at the clock on the office wall just as he started and at his watch between Del Ray and Mt. Ida, and it was then 6:41, and that the accident happened about two minutes thereafter, or at 6:43.

No other witness testified as to the time the train arrived at St. Elmo, or as to the rate of speed the car was running, except plaintiff's witness Beall, who testified that he first saw it at the overhead bridge, and it was "going fast"; how fast, he did not know. It is true plaintiff's witness Conlon, who arrived 15 minutes after the accident, gave testimony as to where he found the car after his arrival at the station, but he could not say "for sure" where the car that struck deceased was standing when he got there, "for the simple reason that I was sort of excited at the time."

In *Spring v. Virginia Ry. & P. Co.*, 117 Va. 826, 86 S. E. 65, this court said:

"As to the speed of the car, plaintiff in error in testifying in the case gave no estimate as to its speed, while other witnesses for him who undertook to speak in comprehensible language vary in their estimates of the speed of the car at from 25 to 35 miles an hour;

while others use such expressions as 'going at a considerable rate of speed,' 'pretty rapid,' 'running like lightning.' None of these witnesses, however, gave any evidence capable of conveying to the ordinary mind a definite conception of the physical fact, viz. the actual speed of the car."

[1] 2. Violation of the ordinance of the town of Potomac as to speed.

The answer to this question involves the construction of the ordinance referred to, which reads as follows:

"Railroad Regulations.

"(1) *Speed Limit.*—No locomotive engine or motorcar shall be propelled over and upon any grade crossing at a greater rate of speed than five miles per hour, and all such engines shall be provided with a spark protector or apparatus to prevent danger of fire from their passing through the town.

"The person or persons having charge of such locomotive engines shall ring or cause to be rung, and the person or persons having charge of such motor car shall sound or cause to be sounded a gong or other bell or signal while approaching any such crossing. For violation of this section the person or company so violating shall pay a fine of not less than five nor more than twenty dollars."

The undisputed evidence shows that the town of Potomac has no street which crosses the Washington-Virginia Railway at or near St. Elmo station, and that Braddock avenue, or, as it is sometimes called, La Verne avenue, terminates at the eastern boundary of its right of way. The only approach to the station is by two footpaths, which lead to the cinder sidewalk on the east of the tracks, or by coming down stairs, on the west side, from the right of way of the Washington & Old Dominion Railway. It is manifest, therefore, that there is no grade crossing at St. Elmo, within the meaning of this ordinance, and that the ordinance has no application to this case.

3. Violation of the ordinance requiring the sounding of a gong or bell or signal while approaching the crossing.

For the reason just stated this part of the ordinance has no application here.

[2] 4. Failure to have headlights on the car.

Motorman Groves testified that the lights were burning when he reached St. Elmo, and is not contradicted by the testimony of any other witness. Hatton, plaintiff's witness, testified there was "no headlight lit" when the car passed Hume, but made no statement as to the lights when the car arrived at St. Elmo, which is 900 to 1,000 feet north of Hume. Besides, the car arrived at St. Elmo at 6:43, daylight saving time, or 5:43 sun time, and therefore before dark, making the lights unnecessary.

[3] 5. Omission to have station lighted as required by law.

The plaintiff's intestate was injured before

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she reached the station, and there is nothing in the record to show that lights in the station would have in any way prevented the accident. If the lack of lights in the station was negligence, it was in no way the proximate cause of the injury complained of.

[4] The familiar law applicable to demurrers to the evidence is stated by this court in *Duncan v. Carson*, 127 Va. 319, 320, 103 S. E. 685, 689, thus:

"On a demurrer to the evidence, the demurrant is considered as admitting the truth of all his adversary's evidence and all just inferences that can be properly drawn therefrom by the jury, and as waiving all his own evidence which conflicts with that of his adversary or which has been impeached, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom. This admission embraces the credibility of the demurree's witnesses and the existence of all facts which demurree's evidence (which includes testimony) conduces to prove, or which may be reasonably inferred from his whole evidence, direct and circumstantial; and, if several inferences may be drawn from that evidence, differing in degrees of probability, the court must adopt those most favorable to the demurree, provided they be not forced, strained, or manifestly repugnant to reason. The court, however, is not obliged to accept as true what it knows judicially to be untrue, nor what in the nature of things could not have occurred in the manner and under the circumstances mentioned, nor what is not susceptible of proof."

[5] We cannot accede to the contention of the defendant in error that the testimony of Motorman Groves was impeached. In fact, it was not contradicted, except in a few instances, and as to matters immaterial to a proper decision of the case. To illustrate, Groves testified that he did not hear Miss Struder moan or groan while lying unconscious on the station bench, and Mrs. Underwood, the plaintiff's witness, testified that she heard her moaning and groaning. And again Groves testified that when the car struck decedent she was thrown "right down on the track on the rail," and Beall, plaintiff's witness, testified that he saw, as he thought, a "bundle of rags or clothes fly out of the car in the air." Both statements are probably true.

A fair consideration of his testimony as a whole will not lead an impartial mind to the conclusion that Groves has testified falsely in any respect. His testimony being true, and the physical conditions at St. Elmo's being as shown in evidence, we have no difficulty in reaching a just and proper conclusion on the question of contributory negligence.

[6] Having due regard for the demurrer to the evidence rule, it conclusively appears from the evidence that Julia Della Struder came to her death by thoughtlessly and negligently stepping on the defendant company's railroad track just in front of one of its

moving trains, under such circumstances that the company was powerless to save her from injury and death, when, by simply looking down the track to the south, before reaching the east rail of the track, she could have seen the approaching train for a distance of 280 feet and saved herself from injury.

[7] The exception to the rule of negligence per se relied on by the defendant in error exists only "when the circumstances are so unusual that the injured party could not have reasonably expected the approach of the train at the time he went upon the track." In the instant case no such circumstances exist, for, as stated, the physical conditions at St. Elmo and the schedules of the regular trains were well known, and the fact of running extra trains is presumed to have been well known to the plaintiff's intestate.

The situation alluded to in the opinion of the court in *Wilmouth v. Southern Ry. Co.*, 125 Va. 520, 99 S. E. 665, and in the authorities there cited, relied on by the defendant in error, as being a situation in which the action of a person going on the track without looking to see if a second train is coming is not negligence per se, was the immediately preceding passage of another train. In the instant case there is no evidence that any train immediately preceded the one which killed the deceased. So far as the evidence discloses, the next preceding train was on its schedule time, which was seven minutes ahead of the train which struck the deceased.

Sims, J., speaking for the court in the *Wilmouth Case*, says:

"The conduct of the plaintiff's intestate in stepping upon the track in front of such visible danger, almost immediately upon him, must, under all of the authorities, be regarded as negligence per se, which was the proximate cause of his death"—citing *Thompson on Neg.*, 1666, 1667, 1672.

[8] It is contended by defendant in error that plaintiff's intestate was on the premises

of the defendant company by its invitation to become a passenger on its trains, and that she had a right to assume that the railroad company would so operate its trains as not to put her in peril, and that in such cases the strict rule as to looking and listening does not apply.

It is true that passengers going to or from railway trains, at railroad stations, may rely upon the railway company to use ordinary care to protect them against injury from the operation of its trains, but this puts upon the passenger the corresponding duty to use ordinary care to protect himself, and a failure to use such care on his part is negligence.

In the case of *Gordon v. Director General*, 128 Va. 431, 104 S. E. 797, which was the case of a passenger who was killed soon after she stepped from the train, *Prentiss, J.*, speaking for the court, said:

"If one who is in the full possession of his faculties steps upon a railroad track, in full view of and immediately in front of a rapidly approaching train, and thus meets death, his administrator cannot recover because the decedent's own negligence is the proximate cause thereof."

This authority, if authority be necessary, is conclusive of the instant case.

Upon the whole record, for the foregoing reasons, we are of the opinion that the plaintiff in error was guilty of no negligence which was the proximate cause of the injury complained of, and that the contributory negligence of the plaintiff's intestate was the direct and proximate cause of her death and bars a recovery.

It follows, therefore, that the circuit court erred in overruling the demurrer to the evidence relied on by the defendant; and the judgment complained of will be reversed, and judgment entered here for the plaintiff in error.

Reversed.

(132 Va. 342)

VIRGINIA RY. & POWER CO. v. DRESSLER.(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Carriers ⇐320(1)—Whether place of accident was proper transfer point for injured passenger held for the jury.

Whether the place of an accident was a proper transfer point for an injured passenger, notwithstanding the regulations of street railway company to the contrary, held to be a question for the jury.

2. Carriers ⇐269—Street car passenger can assume transfer given without comment was the one called for.

Where a passenger asked a street car conductor for a transfer from a given point for a given direction, and he punched a transfer and handed it to her without objection or comment, she had the right to assume that the conductor had complied with her request, and that the transfer was one that she could use.

3. Carriers ⇐320(2)—Whether person transferring to another street car is a passenger is question of law if facts are undisputed.

The question whether a person, while in the street for the purpose of transferring from one street car to another, is a passenger, is a question of law where the facts are undisputed, so that it was error to submit such question to the jury.

4. Courts ⇐107—General expressions in opinion are to be taken in connection with the case in which they are used.

In determining the authority of precedents, general expressions used in an opinion are to be taken in connection with the case in which they are used, and, though such expressions are entitled to respect, they are not controlling.

5. Carriers ⇐247(5)—Person transferring to another street car is not a passenger after reaching place of safety.

A person who has alighted from a street car for the purpose of transferring to another car and has reached a place of safety on the highway or the sidewalk, so that the street car company has no control over her movements or over provisions for her safety, is not a passenger to whom the street car company owes the high degree of care of a carrier to its passenger, but is entitled only to the same degree of care from the street car company as any other pedestrian upon the highway.

6. Appeal and error ⇐1178(6)—Cause remanded for determination of question of negligence and proximate cause only.

Where a judgment must be reversed because the case was submitted to the jury on the erroneous theory that plaintiff was a passenger at the time of her injury, the verdict established plaintiff's freedom from contributory negligence and the amount of the damages, so that, under Code 1919, § 6385, the case will be remanded, with directions to submit only question whether defendant failed to exercise toward plaintiff the degree of care it

owed to a pedestrian, and whether such failure was the proximate cause of plaintiff's injuries.

Error to Hustings Court of Richmond.

Action by Naomi C. Dressler against the Virginia Railway & Power Company to recover damages for personal injuries. Judgment for the plaintiff, and defendant brings error. Reversed and remanded, with directions to impanel a jury to determine whether defendant was negligent, and whether such negligence was the proximate cause of plaintiff's injury.

E. R. Williams and T. Justin Moore, both of Richmond, for plaintiff in error.

Fulton & Wicker and J. M. Turner, all of Richmond, for defendant in error.

BURKS, J. This is a personal injury case in which the defendant in error (hereinafter called the plaintiff) recovered a judgment against the plaintiff in error (hereinafter called the defendant) for the sum of \$7,500, which we are asked to reverse for the reason hereinafter stated.

Naomi C. Dressler (the plaintiff) had resided in South Richmond for several years prior to the injury complained of, and she and her sister for about two years had been working in the factory of the British-American Tobacco Company, located near Broad street, west of First, in the western end of the city. In going to and from their place of business they traveled on cars of the defendant company, which operated a double-track electric street car line between the points mentioned. The defendant operated several different lines over Main and Broad streets between Fourteenth street and First street, among them a line known as Oakwood and Broad. The main line operated in South Richmond was known as the Hull street line. During the period aforesaid, about two years, the plaintiff had regularly boarded the Hull street car, asked for and obtained a transfer over the Main street line at the intersection of Fourteenth and Main streets, and been carried to her destination. On March 3, 1918, the defendant established and put into operation a through route by which certain Hull street cars entered the Main street line at Fourteenth street, and, passing over designated portions of Main and Broad streets, went to the western suburbs of the city. On this route, Fourteenth and Main was a transfer point for passengers going east, but not for passengers going west. According to the regulations of the company, the only proper transfer point for a passenger going West on Broad beyond First street was First and Broad.

On March 30, 1918, the plaintiff and her two sisters and a friend, all of whom worked

at the factory of the British-American Tobacco Company, boarded one of these through cars in South Richmond, paid their fares, and asked for transfers at Fourteenth and Main west. The conductor punched and handed to each of them a transfer, without explanation or suggestion that the transfers were not what they desired, or could not be used for the trip desired. Fourteenth and Main was a proper transfer point for cars on the Hull street route known as "trippers," or cars that turned back at that point. It does not appear that the plaintiff and her companions had notice of the establishment of the new through route and the regulations as to transfers therefrom, but the plaintiff's sister testified that after March 3, 1918, as well as before, they had obtained and used (without notice to the contrary, or demur) transfers west at Fourteenth and Main. The testimony for the defendant is clear that no one had authority to issue a transfer west at Fourteenth and Main, but the testimony of the conductor who issued the transfer is not altogether satisfactory as to transfers issued by him, for, after testifying that "I didn't give them west Main at Fourteenth," he was asked by counsel for the defendant company, "Would you have given a transfer there at all west?" He replied: "I don't think I would, but, as to remembering whether I did or not, I don't remember." Brice, the division superintendent of the defendant company, also testified that he had heard "since the trial was on" that some of the company's men had accepted transfers west on Main at Fourteenth street and some had refused them, and that, if the plaintiff had asked for a transfer west at Fourteenth and Main, the conductor should have given her one at First and Main, and that "he should have told her."

The plaintiff and her companions accepted the transfers as usual without examining them to see how they were punched. The transfer actually given was lost in the confusion of the subsequent collision and was never found. An unpunched transfer of the same class was offered in evidence. The Hull street car on which the plaintiff was riding stopped in Fourteenth street at the usual stopping place for passengers to alight a short distance south of Main street. The point where the plaintiff actually alighted to the pavement on Fourteenth street was approximately 40 to 50 feet south of the southern curb line of Main street. She was one of the first passengers to alight from the car at this point, and was the first of her party. After alighting to the street on Fourteenth street, she walked over to the eastern side of Fourteenth street and waited on the sidewalk for her companions to join her there. She and her companions then walked along the sidewalk on Fourteenth street towards Main street until they reached the south

curb of Main street, and then undertook to cross Main street from the south sidewalk to the north side of the street, where she and her companions intended to board the west-bound Broad and Main street car, which would carry them to their destination on Broad street west of First. There was no Broad and Main car standing for passengers to board at Fourteenth and Main streets at that time, but such a car was approaching in sight some considerable distance east of Fourteenth street.

The plaintiff and one of her half-sisters walked ahead, and the other half-sister and her friend came along just behind. The plaintiff and her companions intended to go to the usual stopping place for west-bound cars along Main street at Fourteenth, which was a short distance east of Fourteenth street, and to await for this approaching Broad and Main car to arrive, then to board the same, and to tender in payment of their fares on the Broad and Main car the transfers which they had received from the conductor of the Hull street car. The front of the Hull street car had then gotten on the east-bound Main street track, and, according to the plaintiff's testimony, completely obstructed her view and that of her other three companions west. When the plaintiff and her companions were about 5 feet from the track which they were going to cross they looked west and saw the Hull street car rounding the curve out of Fourteenth street into Main. About this time the motorman of the Hull street car looked west and saw the Oakwood and Broad car No. 138 west of Twelfth street, and before it had reached Thirteenth he realized that car No. 138 was running wild at a very high rate of speed towards the Hull street car, and thereupon reversed and quickly backed the front end of his car off the east-bound Main street track just far enough into Fourteenth street to get out of the way of car 138, which dashed by the front of the Hull street car, just missing it, running at 40 or 50 miles an hour, and ran into and struck the plaintiff, who was then about a car length east of the Hull street car and almost across the east-bound main street track, inflicting the injuries here complained of. The testimony as to whether the plaintiff and her companion looked west for approaching cars just before stepping on the track is conflicting.

Most of the assignments of error relate to the rulings of the trial court in granting or refusing instructions. They embody the principles of the case and the theory upon which the trial was had. It is unnecessary to quote these instructions, as the determination of the underlying principles will settle the propriety of the trial court's ruling thereon. As the relations of a carrier to a passenger are different from those of a carrier to a pedestrian crossing its tracks, it was important to

determine whether the relation between the defendant and the plaintiff was that of carrier and passenger or of carrier and pedestrian in the street; the plaintiff insisting that she was a passenger, and the defendant that she was not: (1) "Because she was attempting to transfer at a place which was not the transfer point"; and (2) because, at the time of the injury she was a mere pedestrian walking along the public street over which the defendant had no control." Of these two in their order.

[1] For nearly two years the plaintiff had been boarding the defendant's cars at the same point, transferring at Fourteenth and Main, and riding to the same destination, without question or objection on the part of any one. She had no notice, so far as the record disclosed, of any change in the regulations of the company, and, if the company had any intention of insisting on the change, the conductor (in the language of the division superintendent) "should have told her." Furthermore, from March 3, 1918, the date of the change, till the date of the injury, the plaintiff had been receiving and riding on such transfers without objection. If the plaintiff's transfer had been punched for First and Broad, and she had offered it for passage from Fourteenth and Main, and been refused, the rule laid down in *Va. & Southwestern R. Co. v. Hill*, 105 Va. 729, 54 S. E. 872, 6 L. R. A. (N. S.) 899, that as "between the passenger and conductor the terms of the ticket are conclusive" might have been applicable. But no such question is here involved, and we do not wish to be understood as holding that the rule applies to transfers issued by street railways. Notwithstanding the regulations of the defendant company, and the testimony of several of its witnesses, a number of witnesses, one of them a witness for the defendant, testify that Fourteenth and Main was a regular transfer point for passengers going west, and certainly the testimony of the plaintiff's witnesses shows that they regularly obtained such transfers. The testimony on the subject was conflicting and it was not error to refer to the jury the determination of the credibility of the witnesses and the weight to be given to their testimony.

[2] If the jury believed the witnesses for the plaintiff, she was in the same position as if Fourteenth and Main was a regular transfer point and her ticket duly punched. She asked for a transfer "at Fourteenth for west," and the conductor punched a transfer and handed it to her without objection or other indication that she could not use it. She had the right to assume that the conductor had complied with her request, and that she could use the transfer as she had theretofore done. *Memphis St. Ry. Co. v. Graves*, 110 Tenn. 232, 75 S. W. 729, 100 Am. St. Rep. 803; *Morrill v. Minneapolis St. Ry.*

Co., 103 Minn. 362, 115 N. W. 895, 123 Am. St. Rep. 341. Under the circumstances, we cannot say that "she was attempting to transfer at a place which was not the transfer point."

[3] The other question, the relation of the defendant to the plaintiff while walking along and across the public street from the car she had left towards the car she had expected to take, is one of more difficulty, and one upon which the cases are not in entire harmony. Here there is no dispute about the facts, except as to the contributory negligence of the plaintiff, which will be noticed later. The facts which determine the relation of the defendant to the plaintiff are not disputed. On this question nothing is left for the determination of the jury. The rights, duties, and liabilities of the respective parties present a pure question of law to be determined by the court, and the trial court erred in referring them to the jury. *W. S. Forbes Co. v. Southern Cotton Oil Co.* (Va.) 108 S. E. 15; *Dun v. Seaboard, etc., R. Co.*, 78 Va. 645, 658, 659, 49 Am. Rep. 388. In brief, the facts, so far as they need be stated on this subject, are that the plaintiff alighted from the Hull street car at the usual stopping place, which was 40 or 50 feet south of the south curb line of Main, and walked over to the eastern sidewalk on Fourteenth street and waited for her companions to join her. When they did so, they walked along the sidewalk of Fourteenth street 40 or 50 feet to the south curb of Main street, and then attempted to cross Main street to board a west-bound car on Main street at the usual stopping place of the latter car. While attempting to cross Main street, the plaintiff was struck by an Oakwood and Main car which had gotten from under control of the motorman, and was running wild on the east-bound track at a rate of 40 or 50 miles an hour or more. The car which struck the plaintiff was not the one from which she alighted, nor the one which she expected to take, and at the time the plaintiff was struck she was in the middle of Main street, and had not reached the point at which she was to take the Main street car west. She was not in a proper place to board any car, but was caught in the act of crossing the street while attempting to reach the point at which she could properly board her car. At the time she was struck she had her transfer in her hand. Was she a passenger?

[4] There have been many dicta, but comparatively few decisions, on the subject, and, while these dicta are entitled to respect, especially if supported by reason, we have always to bear in mind the oft-quoted statement of Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 399, 5 L. Ed. 257:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which

those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in the subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The propriety, if not the necessity, of this observation becomes apparent when we examine a number of the cases relied upon to uphold the view that the relation of passenger continues during a transfer from one street car to another in favor of one holding a transfer. *Keator v. Traction Co.*, 191 Pa. 102, 43 Atl. 86, 44 L. R. A. 546, 71 Am. St. Rep. 758, decided in 1899, is much relied on by the plaintiff and is regarded as a leading case on that subject, and is cited in nearly all of the subsequent cases in which the statement is made that the relation of passenger continues during the transfer, and yet the case does not decide that, but, on the contrary, just the opposite is stated in the opinion. In that case a passenger, with a transfer ticket, was at the proper place for boarding her car and was about to board the same when a piece of trolley pole of the car she was about to board fell on her head and inflicted the injury complained of. The decision was rested on the ground that she was at the proper place to board the car and was injured by the fall of the trolley of the very car she was to take. It is distinctly stated in the opinion that "she was not a passenger while on the sidewalk going from one point to the other."

In *Walger v. Jersey City R. Co.*, 71 N. J. Law, 356, 59 Atl. 14, the plaintiff was a passenger on one of the defendant's cars. He alighted from the car for the purpose of transferring to another, and a transfer ticket was given him. The place at which he alighted was a regular transfer point, but he had not yet had the opportunity to reach a place of safety after alighting before he was struck by the car which he had just left as it was going around what is described as "the loop." The rear end of this car struck him and knocked him down, and for this injury he brought his action. The accident is said to have been immediately after he got off the car and before he had taken a single step away from it. Under such circumstances he was held to be still a passenger. This holding accords with the decisions of this court and need not be further considered. *Virginia Trust Co. v. Raymond*, 120 Va. 674, 91 S. E. 613; *Houston v. Lynchburg Traction Co.*, 119 Va. 136, 89 S. E. 114; *Ellis v. Virginia Ry. & Power Co.* (Va.) 110 S. E. 382.

In *Whitt v. Public Service Corporation*

(1906) 76 N. J. Law, 729, 72 Atl. 420, 74 Atl. 568, a passenger obtained a transfer at a point where it was necessary for him to walk a city block before reaching the second car. In alighting from the first car he undertook to walk around the rear of the car, and in doing so fell into the fender on the rear of the car, which was down, though there was evidence from which the jury might properly infer that the usual practice of the company was to have the rear fenders fastened up against the end of the car. In the course of the opinion it was said:

"It is the rule in this state that in the ordinary case of a transfer from one car to another the traveler continues to be a passenger during the transfer. *Walger v. Jersey City, etc., R. Co.*, 71 N. J. Law, 356, 59 Atl. 14. * * * Whether the relation of passenger and carrier was suspended during any part of the time plaintiff was passing along Seventh street it is not necessary to decide, for the accident happened before plaintiff had reached the sidewalk, or passed from that part of the street where the defendant was operating its cars, and the injury was caused by contact with the very car he had left, and immediately thereafter. The defendant knew that it was necessary that the plaintiff cross the street in order to reach the second car by the usual and most direct route, and was bound to exercise toward him the care due to a passenger, at least until he reached a point sufficiently distant to avoid any danger resulting from negligent management or condition of defendant's appliances. We are therefore of opinion that when this accident happened plaintiff was still defendant's passenger, and entitled to have it exercise reasonable care, skill, and foresight in carrying him to his destination, and, if it failed to do so, it was negligent."

It will be observed on reading this case that, while it is stated that in the ordinary case of a transfer from one car to another the traveler continues to be a passenger during the transfer, yet it plainly appears that the decision was rested upon the ground that the defendant had not had an opportunity after leaving the car upon which he was first traveling to reach a place of safety before being injured.

In *Colorado Springs, etc., R. Co. v. Petit* (1906) 37 Colo. 326, 86 Pac. 121, plaintiff was a passenger for hire on an electric road. A section of 250 feet of track was out of repair and not in use, and passengers had to walk over this distance to other cars. It was dark and the way dimly lighted. About 2 a. m., when plaintiff was walking along the side of the track to make the connection, he stepped into an open hole made for a trolley pole and sustained the injury complained of. There was evidence sufficient to sustain the finding that the hole was dug by the defendant. The hole was dug the day before, and the defendant knew that the way would be traveled by its passengers in the darkness of the following night. Held:

"It was guilty of negligence in not using reasonable care to see that the way was reasonably safe before the night came on. * * * Further, the relation of carrier and passenger existed between plaintiff and defendant when he was passing from one car to the other, and it was the duty of defendant to use reasonable care to have the way over which the plaintiff was to pass in a reasonably safe condition. Chicago, etc., R. Co. v. Winters, 175 Ill. 293, 51 N. E. 901; St. Louis, etc., R. Co. v. Griffith, 12 Tex. Civ. App. 631, 35 S. W. 741; Balto. & O. R. Co. v. State, 60 Md. 449, 463."

It seems manifest from the degree of care it is said the carrier owed and from the cases cited that the court did not use the word "passenger" in a technical sense, but that it meant to hold the carrier bound for only ordinary care.

We have reviewed the foregoing cases at this point not only because they are relied on by the defendant in error, but because they are the only cases cited by the Supreme Court of Illinois in *Feldman v. Chicago Rys. Co.* (1919) 289 Ill. 25, 124 N. E. 334, 6 A. L. R. 1291, to support the statement that the weight of authority holds that a passenger on a continuous journey maintains his character as passenger while making the transfer from one car to another. The court also relies upon its own prior decisions to sustain the same view. This reliance is best answered by the following extract from the dissenting opinion of Chief Justice Dunn and Cartwright, Judge, which saves a review of these cases by this court:

"We do not agree with the conclusion that the plaintiff, as a matter of law, was a passenger while walking on the public street. The rule of law as to what will constitute the relation of passenger and carrier has been firmly established by text-books and decisions, which were carefully reviewed and considered in the case of *Chicago & Eastern Illinois Railroad Co. v. Jennings*, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827. Upon such review and consideration it was said to be uniformly held that the condition must be such that the passenger is under the care of the carrier and must be at some place under the control of the carrier provided for passengers, so that it may exercise the high degree of care exacted from it. The plaintiff, having safely alighted from the defendant's car, started to the place where he expected to take another car, and while walking on the street was not under the care of the defendant nor on any place provided for passengers or using any of the facilities furnished for passengers, but was exercising his right as one of the general public by crossing the street, as he lawfully might. In the *Jennings* Case the doctrine of the Massachusetts court, which is now abandoned, was indorsed and adopted. This court has never decided that the relation of carrier and passenger existed under the facts of this case. In *Chicago & Alton Railroad Co. v. Winters*, 175 Ill. 293, 51 N. E. 901, the plaintiff was accompanying his carload of sheep to Chicago, and at Bloomington the car was placed in an-

other train being made up for Chicago. The plaintiff was walking on the east side of the freight train toward the switchyards on the grounds of the railroad company, intending to continue his journey in the caboose of the new train. There is no resemblance between this case and that of *North Chicago Street Railroad Co. v. Kaspers*, 186 Ill. 246, 57 N. E. 849, except that the plaintiff had a transfer ticket. That ticket entitled him to ride on the cable car line to his destination, and he had got on the step at the front end of the car and was stepping up on the front platform when the speed * * * was increased, and he fell off and suffered the injury for which he sued. In *Chicago City Railway Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087, a trolley pole on the Wentworth avenue car from which the plaintiff had alighted or was alighting fell from that car and struck him on the head. He had not got away in safety from the car, as the plaintiff had in this case, in which the plaintiff was not within the care and control of the defendant or on a place provided for passengers, and therefore was not a passenger. *Illinois Central Railroad Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148, 61 Am. St. Rep. 68."

So far as the majority opinion in the *Feldman* Case is rested upon authority, it appears to have rather frail support. The case, however, is so confidently relied on by counsel for the defendant in error, that some further notice of it seems proper. *Feldman* and another, *Burke*, were passengers on a street car in the city of Chicago, from which they alighted at Cicero avenue and Twelfth street. That was the end of *Burke's* journey, but *Feldman* held a transfer which he intended to use on another car and thereby continue his journey. They had safely alighted from the car to the ground, and had just cleared the car when it moved forward, but the front wheels split the switch and caused the rear end of the car to sweep to one side and strike both of them and injure them. They had reached a point five or six feet from the side of the car from which they had just alighted when they were struck. *Feldman* claimed to be a passenger at the time he was injured, and that his injuries were caused by the negligence of the carrier. The case was tried on this theory, resulting in a verdict for the plaintiff. On appeal to the Appellate Court of Illinois (212 Ill. App. 484) that court reversed the case, holding that the plaintiff was not a passenger while transferring along the public street, over which the defendant had no control. The court delivered an elaborate opinion. That court, after a careful examination of the authorities, adopted the view of the Massachusetts court in *Niles v. Boston Electric Ry. Co.*, 225 Mass. 570, 114 N. E. 730, hereinafter more particularly mentioned, and also approved the Tennessee case of *Chattanooga Electric Ry. Co. v. Boddy*, 105 Tenn. 666, 58 S. W. 646, 51 L. R. A. 885, and reversed the judgment of the trial court. The case was then carried by certiorari to the Supreme

Court, which reversed the judgment of the Appellate Court. In the opinion of Judge Holdom of the Appellate Court it was said, among other things, that—

"To constitute a person a passenger it is necessary that such person should be under the control of the carrier in order to be entitled to its care. Such passenger must be at some place provided for passengers under the control of the carrier, so that it may exercise the high degree of care exacted from it under the law. * * *

"The fact that plaintiff had a transfer and intended to pursue his journey on another car did not make him a passenger after he had safely alighted from and cleared the car on which he had been riding. Such relationship did not continue during the time he was walking upon the public highway to the car for which he had a transfer. While the plaintiff was walking upon the public highway from the car from which he alighted to the car upon which he intended to continue his journey he was not a passenger, notwithstanding the fact that, if he had reached the car for which he had a transfer and had boarded it, the relation of passenger and carrier would then have been restored."

This holding accords with the Massachusetts doctrine in such cases, but probably goes further than was necessary. Under the decisions in this and other states the case might have been safely rested by the Supreme Court on the ground that Feldman and his companion had not had an opportunity of reaching a place of safety after alighting from the car, and under such circumstances that the company should be held liable, but the majority opinion in the Supreme Court did not take this view of the case, but held generally that the plaintiff was a passenger while transferring from one car to the other. It does not appear from the report of the case whether any suit was instituted by Burke or not, but, upon the theory of the Supreme Court that Feldman's right of recovery was based upon the fact that he held a transfer to another car, Burke would not be entitled to recover, although the only difference between his case and that of Feldman's was that Feldman held a transfer and he did not. Under the doctrine in this state and other states holding the same doctrine, each would have been entitled to recover, but the recovery would have been based upon the ground that they continued to be passengers until a reasonable opportunity had been afforded them to reach a place of safety. The grounds upon which the Supreme Court rested its conclusion and the fact that there were two dissenting judges in that court, and that the majority holding was opposed by the decision of the Appellate Court, detracted greatly from the weight to be given to the case.

In *Pins v. Conn. Co.* (1917) 92 Conn. 810, 102 Atl. 595, the plaintiff was under the immediate control and direction of the conduc-

tor of the car at the time she was injured. There was a break in the line, and it was necessary for passengers to get out of the car and walk past this break in order to reach another car and continue their journey. When the car on which Mrs. Pins was a passenger reached the break the conductor got off the car, saying, "This way, please," and led the way along the path which the passengers were to travel in order to reach the car they were to take. In making this journey under the direction of the conductor she fell and sustained the injury complained of. It was said in the course of the opinion that—

"The place at which she alighted was not the terminus of her trip. She did not alight because she had reached her destination, but in order that she might reach it. She alighted when she did because she could not proceed further as the defendant's passenger without doing so, and because she was directed by the defendant's agent to do so in order that it might be enabled to carry out its contract with her to transport her to New Haven. She traveled a path under the direction of the conductor and followed his leadership and guidance. When she fell she was doing just what she had been told to do to accomplish her trip, and was just where she had been invited and directed to be as incidental to her transportation."

It is plain from the foregoing statement that Mrs. Pins was acting under the immediate control and direction of the agent of the street car company, which was not the fact in the instant case.

Killmyer v. Wheeling Traction Co., 72 W. Va. 148, 77 S. E. 908, 48 L. R. A. (N. S.) 683, Ann. Cas. 1915C, 1220, is in some respects similar to the Connecticut case just reviewed, in that it appears that the passenger was acting under the direction of the servant of the defendant company. It is said by Judge Lynch in the course of his opinion:

"While there is conflict in the evidence in some respects, later noticed, it sufficiently appears that plaintiff, about midnight on the day of the injury, was a passenger on defendant's traction lines, and as such entitled to transportation from Moundsville to Wheeling, he having paid the necessary fare for the trip. On the arrival of the car at Bogg's Run, an intermediate point, those in charge thereof, finding the track submerged by reason of a freshet, directed plaintiff and other passengers to alight and to proceed on foot by a way designated by the employees to another of defendant's cars then, or soon to arrive, at a point on its lines beyond the obstruction, which would carry them to their destination without further charge. Finding the way so designated also obstructed, they returned to the first car, when, as the plaintiff seeks to prove and the defendant to deny, the employees directed them to follow another course likewise designated in order to reach the second car, and that in following the same that plaintiff fell from a high wall and received the injury for which he seeks

recovery. There is no denial that the employees directed the court first designated and abandoned."

The court further said:

"The evidence relating to directions by defendant, while not convincing beyond doubt, is nevertheless sufficiently clear to sustain the jury's finding in that respect."

It would seem from these quotations that this branch of the case is rested upon the fact that the plaintiff was acting under the immediate direction and control of the servants and employees of the street car company. The other ground upon which the decision was rested is founded upon a state of facts so essentially different from the instant case that it does not seem to require notice.

In *Wilson v. Detroit United Railways*, 167 Mich. 107, 132 N. W. 768, while containing general statements to the effect that a person is a passenger while transferring along a public street, the question of whether or not the plaintiff was a passenger of the company which injured him was not involved. In that case a blind man with a transfer was told by the conductor of the car from which he had alighted that the street was clear to the end of the line, and, acting upon this advice, he started across the street, but was struck by a car of a connecting line, and recovery was denied on the ground of his contributory negligence.

In *Clark v. Traction Co.*, 188 N. C. 77, 50 S. E. 518, 107 Am. St. Rep. 526, the plaintiff had a transfer from one car to another. He had one hand on the rail at the rear of the car he was to enter, and one foot on the rear step of the car, and he was injured by being thrown from the car by a sudden start without warning. This state of facts is clearly within the holdings of this court in *Va. Trust Co. v. Raymond*, 120 Va. 674, 91 S. E. 613, and in *Virginia, etc., Co. v. Arnold*, 121 Va. 204, 92 S. E. 925, the latter holding that a person standing at a proper place to board an approaching car and intending to board and pay his fare is entitled to the rights of the passenger even before boarding or attempting to board the car.

In *Loggins v. Southern Public Utility Co.*, 181 N. C. 221, 106 S. E. 823, a young boy holding a transfer alighted from the car at a regular transfer point. As soon as he alighted he discovered he had left a basket in the car and went back to get it. When he alighted from the car the second time and had taken only one step he was hit by a passing automobile. The company was held liable on the ground that it was the duty of the carrier to discharge the passenger in proper manner and at a proper time and place reasonably safe for the purpose. Two judges dissented. While the majority opinion contains expressions in accord with the views of the defendant in error in this case, it is distinctly held that whether a person under a given set of

facts should be considered in law a passenger while transferring from one street car to another although holding a transfer ticket, must be determined ultimately by the facts and circumstances attending the transfer in each particular case. In other words, in that particular case it was a question for the jury whether under all the circumstances the carrier had discharged the plaintiff in the proper manner and in a reasonably safe place. The question involved would really seem to be whether the plaintiff had been afforded a reasonable opportunity for reaching a safe place after alighting from the car.

It will be observed that practically all of the foregoing cases belong to one or the other of two classes: Where the passenger is boarding or about to board the car, or is alighting or has just alighted from the car, and has not had the opportunity of reaching a place of safety, and in either case is injured either by the car from which he has alighted or the one he is about to board. The other class is where the passenger is within the physical control of the carrier, or the latter has undertaken directly or indirectly to direct the movements of the passenger. There is still a third class of cases which we have not noticed: Injuries to passengers at the stations or on the platforms of commercial steam railroads. Such are *Balt. & O. R. Co. v. Hauer*, 60 Md. 449, and *Parsons v. New York, etc., R. Co.*, 113 N. Y. 355, 21 N. E. 145, 8 L. R. A. 683, 10 Am. St. Rep. 450. Such railroads own and have complete control over not only their roadbeds, but their station platforms, yards, and sidings, and for these reasons stand on a different footing in many respects from other railways in their relation to passengers.

[5] There seems to be good reason and also authority for holding that the relation of passenger is not sustained while a passenger with a transfer is outside of the direction and control of the carrier and walking along the public highway. The reason for the high degree of care required of carriers of persons is the tender regard the law has for human life and limbs, and the fact that the carrier has the selection, control, management, and operation of the whole instrumentalities of carriage, and a limited control over and direction of the conduct of the passenger. It may make and enforce reasonable rules for the protection of passengers, but, if the passenger may place himself outside of the pale of influence of the carrier, beyond its control and direction, and still retain his character as passenger, such rules would be wholly inoperative and useless, and the carrier would be without means to protect the passenger from injury, or itself from liability. A transfer ticket imposes no liability on the carrier to make the transfer. The passenger himself makes the

transfer, and generally without direction or suggestion from the carrier. The transfer ticket is simply an undertaking on the part of the carrier to continue the carriage further without additional charge if the passenger, in accordance with its terms, again presents himself at the proper place for carriage. It generally designates the point at which the journey is to be renewed, but contains no contract, express or implied, for safety in making the transfer. In the interim between leaving the car and offering himself as a passenger on another, the passenger is not under the care or custody of the carrier, nor subject to his direction or control, and may be far from the carrier's powers of observation. It would seem unreasonable, therefore, to hold the carrier liable to one as a passenger during such interval.

In *Niles v. Boston Electric Ry. Co.*, 225 Mass. 570, 114 N. E. 730, it appears that the plaintiff held a transfer from a Watertown car to a Newton car, and that when the car on which she was riding arrived at the place of transfer a number of passengers from the Watertown car went forward to take the Newton which was waiting. The Newton car was waiting about three car lengths further on a direct line. When the Watertown car stopped the conductor said, "All change here; all change; all change for Newton." The passengers then alighted, the plaintiff being the last one on the car, and leaving at the rear end. While she was walking along the street in the direction of the Newton car, but after she had been afforded a reasonable opportunity to reach a place of safety, the Watertown car from which she had alighted started, and, as it rounded the corner to enter the barn, struck her. The trial court left it to the jury to determine whether or not the plaintiff was a passenger, to which the defendant excepted. There was a verdict for the plaintiff, to which exceptions were alleged, which exceptions were sustained by the Supreme Judicial Court. It is said in the opinion:

"In her declaration the plaintiff alleged that while transferring from the Watertown to the Newton car she was a passenger. The presiding judge left it to the jury to decide whether, on the fact shown, she was such, and the defendant's exceptions to this part of the judge's charge presents the only question for decision.

"The plaintiff, when injured, was not on the defendant's premises, nor at a station or platform in use for the purpose of transferring passengers and within the control of the carrier; neither was she under its direction and within its care. She was upon a public highway where she was exposed to dangers not caused by the defendant. In passing from one car to the other she could go on either side of the car, she could choose her own way, and her movements were entirely under her own guidance. While so walking on a public highway and in transferring from one car to the

other, as matter of law, she was not a passenger.

"There may be cases where there is evidence to show that the carrier assumes to direct the movements of persons while upon the highway, or where such a duty rests upon it, and where the acts justify the finding that, although upon the highway, they are in the care of the carrier and the relation of passenger and carrier exists. But there are no such facts in the case at bar.

"In *Wakeley v. Boston Elevated Railway*, 217 Mass. 488, the passenger was injured while in the act of alighting from a car, by stepping into a depression. In *Powers v. Old Colony Street Railway*, 201 Mass. 66, the running of the defendant's cars was interrupted by the abolition of a grade crossing, and it was necessary for the passengers to leave the cars and go around the obstruction on foot, to take other cars in order to continue their travel. The defendant prepared a way over adjoining land for its patrons to pass. It pointed out this way to them, invited them to use it, and by so doing assumed an obligation to provide reasonably for their safety; it was held that the question of the defendant's care was for the jury. In the case of *Gurley v. Springfield Street Railway*, 206 Mass. 534, the plaintiff was upon the defendant's premises when injured. In *Tompkins v. Boston Elevated Railway*, 201 Mass. 114, the plaintiff stepped from the front vestibule of a crowded surface car to permit other passengers to alight, and was injured by the car starting when he had one foot on the step and was putting up the other foot. It was there held that he was a passenger.

"All these cases are to be distinguished from the one before us. In none of them was the injured person a traveler on a public street. In the case at bar there was no assumption of the duty of directing the movements of passengers, nor was there any holding itself out as a carrier of passengers in protecting the safety of those who were traveling from one car to the other.

"If the defendant was guilty of negligence, it was, of course, liable to the plaintiff; but it cannot be held to that high degree of care required of a carrier toward its passengers."

In *Finseth v. City & S. R. Co.*, 32 Or. 1, 51 Pac. 84, 39 L. R. A. 517, a woman was transferring from one car to another, on a regular transfer ticket, and was injured while using a temporary passageway erected by the company for the use of its passengers over some water in the street. It was held that, in making the transfer, there was an interruption of the relation of carrier and passenger from the moment of leaving one until the other was reached, and that the duty owing by the carrier as to the passageway was ordinary care.

Chicago, etc., v. Jennings, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827, was the case of a commercial steam railroad, which is required to provide safe stations and platforms for its passengers, and the question was whether the plaintiff had become a passenger. He had a commutation ticket in his pocket.

It was held that a person with a commutation ticket, crossing the track of a railroad along a street to take a train, but who has not yet reached the station or platform provided for boarding trains, is not a passenger.

In completing this review of the cases relied on by counsel on the one side or the other, we wish to acknowledge our indebtedness to counsel for their excellent briefs and critical examination of the cases which have greatly lightened our labors and which we have practically followed.

Massachusetts and the courts of a number of other states hold that the relation of carrier and passenger terminates as soon as the passenger alights in a public street and gets a firm foothold there. *Creamer v. West End Street Ry. Co.*, 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456; *Finseth v. Street, etc., Ry. Co.*, 32 Or. 1, 51 Pac. 84, 39 L. R. A. 517; *Chattanooga, etc., R. Co. v. Boddy*, 105 Tenn. 666, 58 S. W. 646, 51 L. R. A. 885; *Welsh v. Spokane, etc., R. Co.*, 91 Wash. 260, 157 Pac. 680, L. R. A. 1916F, 484; *Chesley v. Waterloo, etc., R. Co.*, 188 Iowa, 1004, 176 N. W. 961, 12 A. L. R. 1366. But that question is not involved in the instant case, as it sufficiently appears that the plaintiff had reached a place of safety after alighting from the car upon which she took passage. Nor is such holding at all essential to the view taken in the *Niles Case*. In the *Niles Case*, as in *Ellis v. Virginia Ry., etc., Co.*, supra, the plaintiff had been afforded reasonable opportunity to reach a place of safety, but had not availed herself of that opportunity. In the instant case the plaintiff had reached a place of safety on the sidewalk, and then continued of her own volition to approach the place of re-embarkation in any way she saw fit. She was not in any wise under the direction or control of the street car company. Nor was any invitation, directly or indirectly, extended to her as to what route she should take. In making the transfer she was exercising her own judgment, and was not at that time a passenger of the street railway company. She was simply a pedestrian in the street to whom the street car company owed the same duty that it owed to other pedestrians crossing its tracks, but no greater.

Certain ordinances of the city of Richmond relating to the operation of street cars were introduced in evidence over the objection of the defendant, and an instruction based thereon was given by the court, which was duly excepted to by the defendant. It is unnecessary to pass on the admissibility of these ordinances, as the trial court expressly limited their application to a case where the jury believed from the evidence that the plaintiff was a passenger, and this limitation cannot occur on another trial.

The verdict of the jury determined the fact that the plaintiff was not guilty of contributory negligence, and that the damage sustained by her amounted to \$7,500.

[8] This disposes of all the questions necessary to be decided in this cause, except the question of whether or not the defendant exercised ordinary care for the protection of the plaintiff as a pedestrian in the street, upon which the evidence was conflicting. The verdict of the jury will therefore be set aside, and the judgment of the trial court thereon reversed, and, in pursuance of section 6365 of the Code, the case will be remanded to the trial court, with direction to impanel a jury to determine the following question: Assuming that the plaintiff was a pedestrian in the street, and not a passenger, was free from negligence, and sustained damage by reason of the injury in the declaration mentioned to the amount of \$7,500, was such injury proximately caused by the negligence of the defendant? If this question shall be answered in the affirmative, the trial court shall enter judgment in favor of the plaintiff against the defendant for the sum of \$7,500, with legal interest thereon from May 14, 1920, till payment; if in the negative, it shall enter judgment for the defendant.

Reversed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 166)

CANADA et ux. v. C. H. BEASLEY & BROS.,
Inc.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Sales \Leftrightarrow 17—Creditor held not entitled to sue wife of bankrupt for goods supplied to business managed by bankrupt.

Defendant transferred his land and goods to his wife for a nominal consideration, but remained in control and possession. Plaintiff sold him goods on credit. Defendant's wife retransferred the land and goods to defendant, who selected and set apart the land as his homestead exemption and became a bankrupt. Plaintiff entered the bankruptcy proceedings and shared in the distribution. In a suit by him seeking to subject the homestead to his claim remaining unpaid, on the theory that the business at the time he supplied goods was owned by defendant's wife, and that the retransfer to defendant was in fraud of creditors, held that, under neither Code 1904, § 2414, relating to fraudulent transfers, nor section 2460a, pertaining to sales of merchandise in bulk, was the transfer by defendant's wife to him fraudulent as to plaintiff, since plaintiff had sold goods to the defendant while he was in control of the business, and not to his wife.

2. Estoppel \Rightarrow 91(1)—Creditor held estopped to claim that property belonged to bankrupt's wife and to sue her for goods supplied.

Where a creditor took part in the bankruptcy proceedings and did not object to the allowance of a homestead exemption to the bankrupt, he cannot thereafter claim that the property constituting the homestead at the time the creditor supplied goods to the bankrupt belonged to the bankrupt's wife, and subject the homestead to his claim on the theory that the debt to him was owed by the bankrupt's wife, to whom the bankrupt had transferred the business before plaintiff sold him the goods, and by whom it was re-transferred to the bankrupt.

3. Bankruptcy \Rightarrow 400(1)—Court of bankruptcy has jurisdiction to determine claim of bankrupt to his exemption.

Under U. S. Comp. St. § 9586, bankruptcy courts have jurisdiction to determine the claims of bankrupts to their exemption, and when the claims are determined the conclusion cannot be questioned in a collateral proceeding.

4. Bankruptcy \Rightarrow 400(1) — Bankruptcy court held to have no jurisdiction of specific liens or other claims against property of bankrupt paramount to the homestead.

Under U. S. Comp. St. § 9586, the court of bankruptcy has jurisdiction to determine claims of a bankrupt to exemption, but has nothing to do with the enforcement of specific liens or other claims against his property paramount to a homestead.

5. Bankruptcy \Rightarrow 400(4)—Creditor by failure to attack allowance of homestead exemption to bankrupt waives his right to attack it.

Where a creditor present in the bankruptcy proceedings made no attack on the allowance of a homestead exemption to the bankrupt, he lost his right to assail the exemption, and may not attack it in a collateral proceeding except for the enforcement of some prior lien or some claim paramount to the exemption.

Appeal from Circuit Court, Halifax County.

Suit by C. H. Beasley & Bros., Inc., against R. C. Canada and wife. From a decree for complainant, respondents appeal. Reversed.

James H. Guthrie, of South Boston, for appellants.

Frank L. Thomasson, of Lynchburg, and Jas. S. Easley, of Halifax, for appellee.

KELLY, P. In essentials, the case is this: On September 12, 1917, R. C. Canada, a merchant, conveyed to his wife, Annie C. Canada, for a consideration expressed in the deed as "\$10.00 cash in hand and the further consideration of love and affection," a certain lot on which was situated his storehouse and dwelling attached; and by the same conveyance he transferred to his wife his stock of goods and fixtures in the storehouse. This deed was duly recorded, either on its date or within a few days thereafter. There is a statement in the brief for appellee, and a

suggestion in a question in one of the depositions in the case, to the effect that the date of recordation was September 22d, but according to the copy of the deed in the transcript before us, it was recorded on the 12th day of September, the day of its execution. The deed contained a condition subsequent, upon the happening of which all the property thereby conveyed would revert to R. C. Canada. Simultaneously with, or immediately after, the execution of the deed, by written contract of that date, Annie C. Canada "contracts and agrees to sell to the said R. C. Canada all of the merchandise in said storehouse which was formerly owned by the said R. C. Canada for the sum of \$2,000.00, which sum is evidenced by a certain note of even date herewith drawn by the said R. C. Canada and payable to the said Annie Canada one year after date with interest after maturity." There was, in fact, no valuable consideration either for the conveyance of the lot and buildings and stock of goods, or for the resale of the goods; and there was no actual transfer of the possession of the goods from Canada to his wife and in turn from her to him. He was in possession at the time of the execution of the above-mentioned deed and contract, and so remained, continuing his business as a merchant until February 20, 1918. Subsequent to September 12, 1917, and before the end of that calendar year, he purchased of O. H. Beasley & Bros., Inc. (appellee), various bills of merchandise amounting in the aggregate to \$623.48, and during the same period purchased other like bills from other parties, the whole of which, including the Beasley Bros. bill, amounted to \$4,523.18. All of these purchases were made on credit extended solely to him in the regular course of trade, were evidenced by open accounts, and remained wholly unpaid when the petition in bankruptcy hereinafter referred to was filed.

On January 26, 1918, Annie C. Canada made a deed to R. C. Canada for an expressed consideration of "five dollars and other valuable considerations," whereby she (1) conveyed to him the lot and buildings aforesaid, and (2) recited the contemporaneous interchange between them of the title to the stock of goods as above set out, and then proceeded to "grant, release, and convey" to him "all of the stock of general merchandise and fixtures now on hand and contained in the storehouse aforesaid." This deed was duly recorded on January 28, 1918. On the 20th day of February, 1918, by a writing duly executed, R. C. Canada selected and set apart as his homestead exemption the aforesaid lot and buildings, valued in the homestead deed at \$1,800 and certain articles of personal property valued therein at \$184.75. This claim of homestead was recorded on February 21, 1918.

On the last-named date, February 21, 1918, R. C. Canada was adjudged a bankrupt upon a petition filed by him on the day before. In the schedule of assets filed in the bankrupt court he included the lot and buildings and personal property described in his homestead deed and all other property of every kind owned by him, but indicated in the schedule, conformably to the forms and practice in bankruptcy proceedings, his claim under the state law to the exemption already set apart by him under the homestead deed.

At the first meeting of the creditors, March 4, 1918, before the referee in bankruptcy, three appraisers were appointed for the estate, and William Leigh was named as trustee and took charge of the property. The appraisers subsequently valued the stock of goods at \$2,800, fixtures and furniture in the store at \$165.70, personal property in Canada's dwelling house \$226.70, and real estate (lot and buildings aforesaid) \$2,000—total \$5,192.40.

At the creditors' meeting on March 4th, mentioned above, C. H. Beasley & Bros., Inc., among others, appeared by counsel and filed its proof of claim for \$623.48.

On March 27th the trustee made his report in which he recited, among other things, the conveyance of September 12, 1917, from Canada to his wife, and her reconveyance to him of January 26, 1918, and then said:

"Under these circumstances the trustee has grave doubt as to whether the bankrupt's claim of exemption should be allowed. He has set apart the property in the foregoing schedule merely in the automatic performance of a ministerial duty. And he respectfully asks leave of the court to litigate the question of the bankrupt's right to said exemption, and to employ counsel to assist him in said litigation."

On April 8, 1918, Quinn-Marshall Company, one of the creditors represented by the same counsel as Beasley & Bros., excepted to the allowance of the homestead exemption. The exception, however, was not based upon the ground indicated in the trustee's report as his reason for questioning the exemption, but on the ground that the property claimed in the homestead deed amounted in the aggregate to more than \$2,000. The referee on July 31, 1918, passed upon this exception, the only one made by any creditor to the allowance of the exemption, as follows:

"I am therefore of the opinion and decide that the trustee's report setting apart the homestead exemption should be, and the same is hereby, approved and confirmed. It is therefore ordered that the trustee deliver the property in his hands if any there be, to the bankrupt in accordance with said report."

The stock of goods surrendered by the bankrupt, valued in his schedule at \$3,000, and appraised at \$2,800, was sold by the trustee for \$2,025.53; Beasley Bros. & Co.

claiming and being allowed its share therein as a general creditor of R. C. Canada.

[1] The decrees from which this appeal was taken were rendered in a suit instituted in September, 1918, after all of the foregoing events and proceedings had transpired, by C. H. Beasley & Bros., Inc., "on behalf of itself and on behalf of and for the benefit of all other creditors of Mrs. Annie C. Canada who may come into this cause and prove their claims and pay their proper share of the costs." After alleging the transactions between the husband and wife and the bankruptcy proceedings heretofore set out, and specifically showing that the complainant had proved its claim in the bankruptcy court and would share in the distribution of the proceeds of the estate to be therein distributed, the bill made the following allegations: That Mrs. Canada's attempted retransfer of the stock of goods to her husband on September 12, 1917, was void by virtue of the provisions of section 2414 of the Code of 1904; that the goods purchased as aforesaid by R. C. Canada after September 12, 1917, were purchased for Annie C. Canada and placed in the stock of goods owned by her, and therefore she became thereby liable to the creditors for the amount of said purchases; that her conveyance to him of the stock of goods by deed of January 26, 1918, was void because it was a transfer of merchandise in bulk without compliance with the terms of section 2460a, of the Code of 1904, and that therefore, under the statute, R. C. Canada became also personally liable along with his wife for the debt owed by the latter to the complainant amounting to \$623.48, which, as stated in the bill, would be "subject to the credit of the amounts to be received upon the distribution to creditors of the assets of the estate of R. C. Canada in bankruptcy as above set out"; that the complainant by reason of the above-alleged facts became a creditor of Mrs. Canada before she made the deed to her husband for the real and personal property therein described; and that the last-named deed was for a consideration not deemed valuable in law and was made to hinder, delay, and defraud her creditors. The bill makes no attack on the deed of September 12, 1917, from Canada to his wife, but expressly relies thereon and avers that it "created in Annie C. Canada a fee-simple title in the above-described house and lot," subject to the conditions therein named.

The prayer of the bill is that R. C. Canada and Annie C. Canada be made parties defendant; that the deed of January 26, 1918, be set aside and declared null and void as to the complainant and other creditors of Annie C. Canada; that the homestead deed of February 20, 1918, be likewise set aside and declared null and void as to the creditors of Annie C. Canada; that the property included in the homestead deed be sold or rented, and the proceeds be held by the court for the

benefit of complainant and other creditors of Annie C. Canada "subject to the terms and conditions of the said deed from Canada to his wife bearing date September 12, 1917."

To this bill R. C. Canada and his wife filed certain so-called exceptions, and also filed their separate demurrers and answers, and in addition thereto R. C. Canada filed a plea of *res judicata*; this plea being based upon the bankruptcy proceedings hereinbefore set out. Evidence was taken in the cause, and the court entered the several decrees appealed from, the effect of which was to overrule the "exceptions," demurrers, plea of *res judicata*, and all defenses set up in the answers, and hold that Annie C. Canada was the owner of the property embraced in the homestead deed, that both Canada and wife were liable to the plaintiff, and that the lot and buildings embraced in the homestead deed should be sold and subjected to the payment of the complainant's debt.

There is no real merit in the appellee's position. It has realized every cent it could have obtained on its debt if none of the transactions between Canada and wife upon which it relies had ever taken place. Its claim was merely that of a general creditor of R. O. Canada without lien of any kind and without waiver of exemption, and not only is it true that no effort is being made in the pending suit to reach the property on account of any personal liability of R. C. Canada (the suit resting entirely upon the alleged indebtedness of Mrs. Canada), but the homestead deed under the facts of this case cut off the appellee's right to subject the real estate. The exemption as above pointed out, had been claimed and duly perfected before any of the transfers involved in this suit had been attacked or challenged.

There is no substantial foundation for the contention that the transactions between Canada and wife operated to constitute Mrs. Canada a debtor as to purchases made by her husband after September 12, 1917. It is conceded that these purchases were made by Canada in his own name and solely on his own credit; and the evidence clearly shows that the so-called agreement to resell the stock of goods was made and accepted on September 12, 1917, and that R. C. Canada was then and thereafter continued in actual possession. Under these circumstances it would seem clear that neither section 2414 nor section 2460a, Code 1904, in any way affected the title which R. O. Canada took under the contract, and that the clause in the deed of January 26, 1918, with respect to the stock of goods amounted to no more than a surplus and wholly unnecessary confirmation of the contract. (The debt of the appellee and the debts of the other creditors for whose benefit the appellee claims to sue were not in existence on September 12, 1917, and there is no contention that section 2460a affected the resale as of that date.)

[2] Should there be any doubt, however, about the soundness of the above answer to the claim of liability against Mrs. Canada, a conclusive answer is found in the course pursued by the appellee. It certainly knew, when its claim was filed in the bankruptcy proceedings, of the deed of January 26, 1918, recorded January 28, 1918, and that deed expressly recited the former deed and contract between Canada and wife. Counsel representing appellee filed in the bankruptcy proceedings on behalf of another creditor a certain exception hereinbefore recited to the trustee's recognition of the homestead, and this exception was overruled by the referee, and no appeal from that ruling was taken. The trustee's report, calling specific attention to the deed of January 26, 1918, and expressing doubt arising from its terms as to the right of Canada to claim the exemption, was not excepted to on any ground by the complainant. Notwithstanding all this, the appellee with full knowledge of the facts, elected to treat the entire property, real and personal, as belonging to R. C. Canada, and to assert its debt against him alone. Under these circumstances we have no hesitancy in holding that this creditor cannot now assume a different attitude, and claim that the property belonged to Mrs. Canada, and that the debt was due from her.

"A party is forbidden to assume successive positions in the course of a suit or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other and mutually contradictory." *C. & O. R. Co. v. Rison*, 99 Va. 18, 31, 37 S. E. 820, 324.

The effort to hold Mrs. Canada as a creditor has therefore, in any view, entirely failed, and this is conclusive of the whole case. The complainant is not seeking to set aside the deed of September 12, 1917, from Canada to his wife, but expressly relies thereon, and the sole purpose of the suit is to set aside the deed of January 26, 1918, from her to him, basing this effort solely upon the theory that Mrs. Canada is a debtor of the complainant. As we have just seen, she is not such debtor, and this destroys the foundation of the suit. There is an averment in the bill to the effect that R. O. Canada, by reason of his purchase through the deed of January 26, 1918, of the goods in bulk, became indebted by virtue of the provisions of section 2460a, *supra*, for the debt upon which the complainant sues, but the only purpose of that allegation, as clearly shown by the context, was to justify the complainant's conduct in going into the bankruptcy case as a creditor of Canada and claiming its pro rata in the distribution of the fund realized from sale of the stock of goods which Canada had surrendered and which were being administered in that proceeding. The suit before us was aimed exclusively at Mrs. Canada and depended absolutely upon establishing a

liability against her. The effort to show such liability having failed, no case has been made against her, and an order dismissing the bill is the only order which can properly be entered in the cause.

[3] It is perfectly clear that in this proceeding, and under the allegations and facts above disclosed, the homestead exemption claimed and perfected by R. C. Canada and allowed to him in due course in the bankruptcy case cannot be disturbed. There can be no doubt about the proposition that a court of bankruptcy has jurisdiction to determine the claim of a bankrupt to his exemption. This is expressly declared in section 2, c. 2, 30 Stat. 546 (U. S. Comp. St. § 9586), wherein it is said that—

"Courts of bankruptcy * * * are hereby invested * * * with * * * jurisdiction at law and in equity * * * to * * * to determine all claims of bankrupts to their exemption."

There may be some doubt as to whether this an exclusive jurisdiction, but none as to the power of the court to determine the question, and when it is determined then it is settled once for all and cannot be questioned in a collateral proceeding. See *In re Allen* (D. C.) 134 Fed. 620; *McGahan v. Anderson*, 113 Fed. 115, 51 C. C. A. 92; 3 *Remington on Bankruptcy*, 2868.

[4] The jurisdiction of the bankruptcy courts, however, does not extend further than the determination and allowance of the exemption. It had nothing to do with the enforcement of specific liens or other claims against the property paramount to the homestead. *Newberry Shoe Co. v. Collier*, 111 Va. 288, 68 S. E. 974; *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. ed. 1061.

It is not necessary for us to go in this case as far as did the learned judge of the District Court for the Western District of Virginia in a very careful and instructive opinion in the case of *In re Allen*, supra, holding that section 191 of the present Constitution cannot be construed so as to invalidate a homestead exemption claimed in property fraudulently conveyed unless the conveyance of such property has been annulled by decree of court at the time the claim is asserted. It may be that the decisions of this court in *Dickenson v. Patton*, 110 Va. 5, 65 S. E. 529, and *Newberry Shoe Co. v. Collier*, supra, are in conflict with this holding of the District Court, although neither the *Dickenson* Case nor the *Newberry Shoe Co.* Case makes any reference to the *Allen* Case. But we have before us now a situation very different from that with which the courts were dealing in either of these three cases. In the instant case the transfers which are challenged had never been in any way questioned when the homestead exemption was claimed and set apart

in the manner allowed by law, and the exemption was thereafter duly allowed, without challenge by the complainant, in the bankruptcy proceedings.

[5] Under these circumstances we have no difficulty in holding that the complainant, if it ever had any right to assail the homestead, lost that right by its course in the bankruptcy court, and that the exempted property cannot now be successfully attacked except for the enforcement of some prior lien, or some claim paramount to the exemption.

For the reasons stated, we are of the opinion that the decrees complained of are erroneous, and should be reversed. An order will be entered in this court dismissing the complainant's bill.

Reversed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 215)

EWING v. HAAS, Circuit Judge.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Prohibition ~~60~~—Writ will be awarded to prevent disqualified trial judge from sitting.

Where a trial judge is in fact disqualified to sit in a case but, notwithstanding such disqualification, is allowed to sit therein, a writ of prohibition may be awarded, although the court over which respondent presides has jurisdiction of the cause.

2. Attorney and client ~~63~~—Contract of employment express or implied necessary to create relation.

To establish the relation of attorney and client, there must be a contract of employment, express or implied, between the attorney and the party for whom he appears, or some one authorized to represent him.

3. Judges ~~49(2)~~—Trial judge held not disqualified to sit because of aiding in preparation of brief on appeal.

Where a trial judge, after having decided that a cause before him was triable at law and not in equity, furnished data for appellee's brief on appeal, and the case was affirmed, a writ of prohibition to prevent him from sitting in the law case will be refused, there being a mere bias arising as to the conclusion on the purely legal question as to whether the case was triable at law or equity, which had previously been decided on appeal.

Petition by one Ewing against T. N. Haas, Judge of the Twenty-Fifth Judicial Circuit, for a writ of prohibition. Petition refused.

Ed. C. Martz, D. O. Dechert, and Jno. T. Harris, all of Harrisonburg, and Hugh A. White, of Lexington, for petitioner.

H. W. Bertram, Geo. S. Harnsberger, Geo. N. Conrad, all of Harrisonburg, for respondent.

PER CURIAM. This is an application for a writ of prohibition to prohibit Hon. T. N. Haas, judge of the Twenty-Fifth judicial circuit, from hearing an action of law pending in his court under the style of *Ewing v. Dutrow*.

The facts and circumstances leading up to the controversy are as follows: A suit in chancery had been brought by Ewing and others against the Dutrows, to recover damages for deceit alleged to have been practiced in the sale of certain corporate stock. There was a demurrer to the bill, and several grounds of demurrer were stated, but the chief ground of demurrer relied on, and the one upon which Judge Haas rested his decision, was that equity was without jurisdiction in the premises and that the complainants' remedy was at law. On this ground the complainants' bill was dismissed. An appeal was taken to this court (128 Va. 416, 104 S. E. 791), which affirmed the judgment of the trial court. Thereupon Ewing brought his action at law in said circuit court against the Dutrows. Before the latter case was called for hearing, Ewing applied to Judge Haas, by motion in open court, supported by his affidavit, to certify to the Governor that he was so situated, with reference to the case, as to render it improper in his judgment for him to sit, and to ask for the designation of another judge to sit in the case. This application was promptly denied. Thereupon the present petition for a writ of prohibition was filed in this court. The petition alleges, as the ground of the writ:

"That Hon. T. N. Haas, judge of this court, who passed upon the demurrer in said chancery suit, and entered said decree dismissing the same, wrote the greater portion of the brief for appellee upon said appeal; and as affiant believes, by reason thereof, is not now in the unbiased position which, under the law, a judge should occupy in presiding at the trial of this case; and as affiant believes, said Judge is not capable of presiding fairly at such trial."

Judge Haas and the Dutrows were made defendants to the petition and answered the same. Depositions were taken on each side, and the case is now before us for decision. Judge Haas, in his answer and also in his deposition, details fully his connection with the brief filed for the Dutrows in this court and denies any bias or other reason that would render it improper for him to sit in the case. In his answer he says:

"At the time of deciding the case in the circuit court, this respondent, prepared a written opinion containing his decision and the reasons for it, but this opinion was not present with the papers of the case when the decision was announced in court, having been left lying on a

basket on respondent's desk, in his study, at his home, when the papers in this case along with other cases were put into his bag and carried to court. The case was decided in January, 1919. Some time afterwards, how long respondent does not remember, the opinion which had been prepared as aforesaid was handed by respondent to counsel for defendants (appellees) in the case to make such use of as he might see fit on the hearing of the case in the Court of Appeals. The greater portion of this opinion was embodied in the brief of counsel for the appellees (the Dutrows), with matter of his own interspersed in it here and there. The portions of the opinion used (some of it not being pertinent to the matter of a brief) commences on page '5' of the printed brief and ends at the top of page '8,' and would aggregate, if all the parts of the opinion were brought together, about two pages. The opinion aforesaid is all the matter of which respondent was the author, that went into the brief of counsel. The printed brief contains 16 pages. This respondent knows nothing about the preparation of the brief or what it contained until a day or two before the argument of the case in the Court of Appeals, in September, 1920, when Mr. George N. Conrad, counsel for the appellees, handed him a copy of his brief, already printed and filed, and at the same time, as respondent believes, a copy of the reply brief for appellants, which also had already been printed and filed. As your Honors well know, it is not an uncommon thing for counsel to furnish copies of their briefs in the Court of Appeals to the judge of the lower court.

"In the opinion prepared by respondent when deciding the case in the circuit court, respondent had referred to the jurisdiction exercised by the court of chancery to decree an abatement of purchase money for a deficiency in the quantity of land sold, and said that was a different case from a demand for damages such as was made by the bill in the *Ewing* case—proceeding further to distinguish the two cases briefly. Counsel for appellants in their reply brief, commenting upon the chancery jurisdiction to abate or compensate for a deficiency in the quantity of land sold; and seeking to draw from it an argument to support the jurisdiction in chancery of a demand for damages for deceit, said: 'Appellees admit that equity has jurisdiction of a bill for an abatement of purchase money on a sale of land for a deficiency, and say, "But that is a different case from the one made by the bill in the case." They fail, however, to differentiate between them.' And further: 'The equitable jurisdiction being established to decree an abatement of purchase money, even in a case of mistake, not induced by fraud, how much more reason is there for the power, in equity, to restore to the injured party the loss occasioned by an actual fraud.'

"On reading the reply brief for appellants, respondent, who had made a more exhaustive examination of the question at the time of writing the opinion than was expressed in the opinion, told Mr. Conrad that he would give him an answer to the two paragraphs above quoted, and proceeded to elaborate in a pencil note the treatment of the question contained in the opinion, and gave it to Mr. Conrad, counsel for appellees, this note citing and quoting from the case of *Blessing's Adm'rs v. Beatty*, 1 Rob. (40 Va.) 287, 298, a case which respondent is sat-

ified he examined when the case was before him in the circuit court, though it was not cited in the opinion, probably because the reference was not immediately at hand when the opinion was written. What use Mr. Conrad made of this memorandum (which makes about a page and a half of typewritten matter) respondent did not know definitely until the 21st day of September, 1921, when he caused an examination to be made of the files of the case in the records of the clerk's office of the Supreme Court of Appeals, at Staunton, and, upon information obtained in that way, as well as from the recollection of Mr. Conrad, himself, respondent avers that the note furnished by respondent was never filed in the case at all, but the case of *Blessing's Adm'rs v. Beatty*, referred to in the note was cited by Mr. Conrad, with a statement of its purport, in a typewritten 'insert' comprising something less than nine lines, which was inserted in the paging of the brief, as respondent is informed, with the consent of counsel for the appellants.

"In the course of 15 years of service as judge of the Twenty-Fifth judicial circuit of Virginia, respondent has, on a number of occasions, given authorities and suggested arguments to counsel for use on appeal from his decisions, and sometimes has given written memorandums. He has given such authorities and suggestions to counsel for the appealing party, to combat his own decisions with, as well as to counsel who were for affirming his decisions. He does this sometimes from the bench, and sometimes in conversation with the counsel, together or separately, indifferently, as it may happen or as occasion may arise. His object has been to give such material as he had at hand, as the result of his study and research in reaching his own decisions, to the elucidation of the question involved. Respondent's interest is an intellectual and professional interest, not singular or unusual, and even involving little if any pride of opinion, though of course he desires to be right, and to be confirmed in his opinion that he is right by the approval of this honorable court.

"Respondent denies that he is in a position of bias or prejudice by reason of his action in the premises, or because of anything else, and submits that the cause assigned for this proceeding is without merit and an empty thing."

It appears from the testimony that the opinion of Judge Haas was not made a part of the record, nor filed with the papers in the cause in the clerk's office; that Mr. Conrad is a brother-in-law of Judge Haas; that counsel for Ewing had no knowledge or information about the delivery by Judge Haas to Mr. Conrad of the copy of his opinion, or the pencil memorandum in answer to appellants' reply brief, but that they recognized Judge Haas' style in the brief for the Dutrows, and brought it to his attention, when he admitted the giving of said opinion to Mr. Conrad, and in this way they learned for the first time what had been done. A number of lawyers of the Rockingham bar testified that they had never received from Judge Haas assistance such as he sets out in his

answer he had "on a number of occasions" given to counsel.

The parties waived all questions as to the jurisdiction of this court to award the writ and have asked us to decide the case on its merits. Any order we could make in the case, except to dismiss it, would be the assumption of jurisdiction, hence we must pass on the question. *Bragg v. Justus* (Va.) 106 S. E. 335.

In 23 Am. & Eng. Enc. of Law (2d Ed.) 223, it is said:

"A writ of prohibition will lie to restrain a judge from presiding in an action in which he is disqualified by reason of interest, although the court over which he presides may have jurisdiction of cause."

The following, among other cases, are cited to sustain the text: *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *Conolly v. Keyser*, 58 Cal. 828; *State v. Wear*, 129 Mo. 619, 81 S. W. 608; *State v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 40 L. R. A. 317, 67 Am. St. Rep. 706. But in *People v. Jerome*, 36 Misc. Rep. 256, 73 N. Y. Supp. 306, the writ was refused when sought, upon the ground that the judge was biased where no interest on the part of the judge was shown. It is also said in 32 Cyc. 607, that, where a judge is disqualified by reason of interest, prohibition will lie, although the court over which he presides has jurisdiction.

In *Coal Co. v. Doolittle*, 54 W. Va. 210, 46 S. E. 238, the above quotation from 23 Am. & Eng. Enc. of Law is cited with approval. In the latter case the disqualification was on account of interest in the subject-matter and not mere bias, and in paragraph 3 of the syllabus it is said:

"In order to disqualify, the interest of the judge must be in the subject matter of the cause, and not merely in a legal question involved in it."

But the text of the opinion hardly warrants the opinion.

[1] In the instant case the circuit court of Rockingham has jurisdiction of the case, but the allegation of the petition is that Judge Haas is disqualified to sit by reason of the fact that he "wrote the greater portion of the brief for the appellee" and "is not capable of presiding fairly at such trial." If Judge Haas is in fact disqualified to sit in the case, but, notwithstanding such disqualification, is about to sit therein, it is a proper case for awarding the writ, although the court over which he presides has jurisdiction thereof.

[2] The peculiar feature of this case is that the objection to the judge is not on account of interest in the subject-matter, nor of relationship, by consanguinity or affinity, to any of the parties, but on account of bias

on a purely legal question which has been settled and determined, and cannot again arise in the present controversy. Counsel for the petitioner seem to realize this, and have very earnestly argued before us that the position of Judge Haas is that of attorney for the Dutrows in the case, and that he has thereby incapacitated himself to sit as judge. In this view we cannot concur. In order to establish the relation of attorney and client there must be a contract of employment, express or implied, between the attorney and the party for whom he appears or some one authorized to represent him. 2 R. C. L. 953, § 25; 3 Cyc. 926; 3 Am. & Eng. Enc. of Law (2d Ed.) 316. The evidence falls far short of establishing the relation of attorney and client, and counsel for the petitioner distinctly disavow any intention of charging the judge with lack of integrity. The following cases have been cited by the petitioner on the subject of judicial conduct and the necessity for public confidence therein: *Boswell v. Flockheart*, 8 Leigh (35 Va.) 364; *Bowers' Adm'r v. Bowers*, 29 Grat. (70 Va.) 697; *Louisville & N. R. Co. v. Taylor*, 93 Va. 226, 24 S. E. 1013; also note 2 Va. Law Reg. 376; *Davis v. Beazley*, 75 Va. 491; *Bowden v. Parrish*, 86 Va. 67, 9 S. E. 616, 19 Am. St. Rep. 873; *Corey v. Moore*, 86 Va. 721, 11 S. E. 114; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 116; *Coal Co. v. Doolittle*, 54 W. Va. 210, 46 S. E. 238; *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370; *State v. Cottrell*, 45 W. Va. 839, 32 S. E. 162; *State v. Hocker*, 34 Fla. 25, 15 South. 581, 25 L. R. A. 117. There is also cited Constitution of Virginia, § 105; Code 1919, § 5975; *Berger v. U. S.*, 255 U. S. 22, 41 Sup. Ct. 230, 65 L. Ed. 481.

[3] In the view we take of the facts of the case it is unnecessary to review these or other cases on this subject. There is no charge here of proprietary interest in the subject-matter of the litigation, nor of relationship to the parties, nor of fraud or corruption, nor of lack of integrity on the part of the judge, but simply a charge of bias, or leaning of the mind of the judge to a certain conclusion upon a purely legal question which was decided at the trial of the first case, and which cannot again arise on the trial of the second case; and that the conduct of the judge in maintaining his view of the legal question had been such as to place him in the position of counsel for the Dutrows. As already stated, the evidence does not at all warrant the charge that the judge occupied such a position, but it does disclose conduct on his part that was indiscreet, unwise, and injudicious, as is manifested by the present controversy. If he did not care to make his written opinion a part of his judgment, but wished counsel to have the benefit of it in the preparation of a brief in maintenance of his views, he should have

filed it with the papers in the cause, so that it might have been accessible to counsel on both sides, and have refrained from further connection with the controversy which had passed from his jurisdiction and was then pending before this court. The record in this cause does not disclose any reflection upon the honesty, the uprightness, purity, or integrity of Judge Haas, and certainly we should not have suspected any, but only a bias on a purely legal question that had been decided on the trial of the first case. It does not disclose any prejudice against the petitioner. Such bias does not disqualify Judge Haas from sitting at the trial of the second case between the same parties. After a careful examination of the question of law involved and a decision thereof, of course Judge Haas was biased in favor of his opinion, as was this court after it affirmed his judgment, but that did not disqualify either from sitting in another suit between the same parties even if the same question was involved. Bias on a purely legal proposition, such as whether the jurisdiction of a case is at law or in equity, removed from prejudice against any of the parties, does not disqualify a judge from sitting in a case. Nor do we understand that counsel so contend, but their sole reliance is on the allegation that he acted as counsel for the Dutrows. This, we think, is plainly not sustained by the evidence.

The stability of our government is dependent upon the inflexible integrity of its courts, and the confidence of the public in the courage, the impartiality, and the wisdom of the judges in the prompt administration of even-handed justice to every litigant. This confidence cannot be betrayed with impunity, and ought not to be impaired by reasonable grounds of suspicion. The action of a pure and upright judge may, however, give rise to a suspicion of partiality or prejudice, when the surrounding facts and circumstances are unknown, but which vanishes in the light of their disclosure. So also counsel, in the heat of litigation and in their zeal in behalf of their clients, sometimes become so satisfied of the correctness of their conclusions that they cannot be convinced of their error, and often attribute an adverse view to bias or prejudice. But when the incident has passed, and reason has resumed her sway, they usually find that they have been hasty in their judgment, and that the judge has been as pure in his motives and as impartial in his administration of justice as they would have him be. When this occurs, there should be none more ready than they to admit their error, and to correct, as far as possible, the erroneous impressions they have created. The petition for the writ of prohibition will be refused.

Refused.

(132 Va. 795)

THANIEL v. COMMONWEALTH.(Supreme Court of Appeals of Virginia.
March 16, 1922.)**1. Homicide ⚡254—Evidence held to sustain conviction of second degree murder.**

Where the evidence showed that, after defendant had begun shooting, the deceased drew his pistol and began shooting, not at defendant but in the air, and that defendant suddenly turned and shot and killed deceased, while defendant denied shooting deceased, claiming he fired only into the air, a verdict of guilty of murder in the second degree was sustained by the evidence.

2. Homicide ⚡9—Intent to kill need not exist any length of time to constitute murder.

To constitute murder, even in the first degree, it is not necessary that the intent to kill should have existed for any particular length of time, so that the fact that no previous quarrel or grudge between accused and deceased was proved is not conclusive against murder.

3. Homicide ⚡223 — Testimony as witness summoned before coroner's inquest is not in defendant's behalf, though exculpatory.

Where defendant testified at the coroner's inquest before he was accused of the homicide but had been summoned as a witness and did not voluntarily appear, his testimony, even though it tended to exculpate him, was not in his behalf.

4. Witnesses ⚡379(9) — Accused testifying for himself can be cross-examined as to conflicting testimony at coroner's inquest.

Under the statute permitting accused to testify in his own behalf subject to cross-examination which, as incorporated in Code 1919, § 4778, was amended to provide that by so testifying he waived immunity, the provision of section 4781 that evidence shall not be given against accused of any testimony made by him as a witness upon a legal examination unless it was made when examined in his own behalf, which was intended to protect his immunity against compulsory testimony, does not prohibit the cross-examination of accused as to testimony given at the coroner's inquest, as he was not then testifying in his own behalf, especially where his testimony at the inquest was more favorable than his testimony at the trial, so that its only effect would be to impeach his credibility as a witness.

5. Criminal law ⚡1088(11)—Loss of requested instruction so that clerk could not certify it does not entitle accused to reversal.

The fact that an instruction requested by accused which was modified by the court had been lost, so that the clerk could not certify it in the record, does not entitle accused to a reversal, since instructions are not a part of the record until they are made so by bill of exceptions, and it was the duty of accused to see that it was duly embodied in the bill.

6. Criminal law ⚡1141(2)—Error not presumed.

On writ of error to a conviction, the appellate court will not presume error, but it must be affirmatively shown.

7. Criminal law ⚡1124(2)—Denial of new trial not reviewed where record does not show specific grounds of motion.

A judgment of conviction will not be reviewed because of the refusal to grant a motion for a new trial on the ground of after discovered evidence, where there was nothing in the record to show the specific grounds on which the motion was made.

8. Criminal law ⚡951(5)—New trial cannot be granted after expiration of the term.

The circuit court has no power to grant a motion for a new trial on the ground of newly discovered evidence, or of misconduct of the attorney who appeared for defendant at the trial, after the adjournment of the term at which the judgment was rendered.

Error to Circuit Court, Hanover County.

Boxley Thaniel was convicted of murder in the second degree, and he brings error. Affirmed.

McNeill & Bremner, of Richmond, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

KELLY, P. This is a writ of error to a judgment of the circuit court of Hanover county sentencing the defendant, Boxley Thaniel, to a term of 20 years in the penitentiary for murder in the second degree.

1. It is contended that the evidence was not sufficient to warrant a conviction of any higher offense than manslaughter. We are unable to adopt this view of the case.

[1] The evidence introduced by the commonwealth, though in conflict with that of the defendant in some particulars, was credited by the jury and showed, or tended to show, the following facts: The defendant and 40 or more other colored persons, men and women, were attending a dance at a schoolhouse. Some time during the evening, the defendant asked a certain girl whether she was going to dance with him. She answered in the negative, and he then caught hold of her hands, but she jerked away from him. Thereupon the defendant said: "You ain't going to dance with me, are you?" and, drawing his pistol, began shooting towards her and towards the side or end of the room. Immediately thereafter the deceased, William Shelton, began firing a pistol into the ceiling. These two persons appear to have been the only ones who did any shooting. Both moved towards the door, the defendant being just ahead as he reached the doorway, and at that point he whirled around and shot

Shelton, who fell and died almost instantly. It is argued that the evidence leaves a question as to who actually killed the deceased; but, if certain of the witnesses for the commonwealth told the truth, there is no room for doubt upon this point. The jury believed those witnesses, and their verdict concludes the question in this court.

There is nothing whatever in the evidence either for the commonwealth or for the defendant to show that the latter had any occasion or excuse for shooting the deceased, or that there was any altercation or exchange of shots between them. The defendant himself, in testifying at the trial as a witness on his own behalf, said that the shooting began behind him and that he turned and shot three times to protect himself, but he further stated in the next breath, "I didn't shoot anybody, but shot up in the air," and neither he nor any other witness stated that the deceased ever spoke to him, or shot at him, or made any hostile demonstration towards him.

The case of *Richardson v. Commonwealth*, 128 Va. 691, 695, 104 S. E. 788, 790, is cited and relied on for the prisoner. In that case we said:

"It has been long settled that where a homicide is committed in the course of a sudden quarrel, or mutual combat, or upon a sudden provocation and without any previous grudge, and the killing is from the sudden heat of passion growing solely out of the quarrel, or combat, or provocation, it is not murder, but is manslaughter only—voluntary manslaughter, if there be no further justification, and involuntary manslaughter if the killing be done in the commission of some lawful act, such as justifiable self defense."

This statement of the law manifestly has no application to the facts of the case in judgment. Here we have not even a claim of any sudden quarrel, or mutual combat, or provocation. The defendant testified that he did not shoot the deceased at all. The jury upon abundant evidence found that he did. The verdict binds us on this point, and the case as it comes here, therefore, is one in which the defendant, with a deadly weapon in his previous possession, killed the deceased without provocation or other extenuating circumstances. Upon these facts, even if he had been convicted of murder in the first degree, we could not interfere. *Hill's Case*, 2 Gratt. (43 Va.) 594, 606; *Howell's Case*, 26 Gratt. (67 Va.) 995; *Jones' Case*, 100 Va. 842, 855, 41 S. E. 951; *Thompson's Case*, 131 Va. —, 109 S. E. 447, 454.

[2] It is true that no previous quarrel or grudge between the accused and the deceased was proved, but in order to constitute murder even in the first degree it is not necessary that the intent to kill should have existed for any particular length of time. It may be formed at the very moment of the killing. *McDaniel's Case*, 77 Va. 281, 284; *Thompson's Case*, supra.

2. The next question to be considered is an interesting and important one, and arises upon the following state of facts:

[3] On the day after the homicide the coroner held an inquest at which the defendant testified as a witness. While the record is not entirely clear upon the point, we shall assume, in order to give the defendant the full benefit of his contention, that he was duly summoned and that he did not voluntarily offer himself as a witness. He was not under arrest at that time, nor, so far as the record shows, had he been charged with the crime. Upon this assumption and under these circumstances, even though his testimony at the coroner's inquest may have tended to exculpate him, he cannot be regarded as having been there in the capacity of a witness in his own behalf. *Mullins v. Commonwealth*, 113 Va. 787, 792, 75 S. E. 193; *Beale's Crim. Pl. & Pr.* p. 315. He was subsequently indicted, and at the trial he went on the stand and testified fully as a witness in his own behalf, stating, among other things, that he did some shooting but did not shoot the deceased. On cross-examination he was asked and required to answer, over objection by his counsel, whether he did not, while testifying at the coroner's inquest, make this statement:

"I didn't hear any shooting last night and I don't remember seeing any pistol laying beside the body. I did not do any shooting myself to my knowledge."

To this inquiry the defendant replied:

"Yes, I did make that statement."

He was then further asked and required to answer, subject to like objection by his counsel, the following question:

"You have then made two different statements about this shooting, the one which you made before the coroner's jury and the one which you have just made here; which is true?"

His answer was:

"The one that I have just made is true, I don't know why I made the other one."

[4] It is insisted by counsel for defendant that this cross-examination was in violation of section 4781 of the Code, which is to the following effect:

"In a criminal prosecution, other than for perjury, or in an action on a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, unless such statement was made when examined as a witness in his own behalf."

To support the contention that the cross-examination of the accused as above set out was in violation of the terms of this statute, we are referred to the case of *Kirby v. Commonwealth*, 77 Va. 681, 46 Am. Rep. 747, and *Mullins v. Commonwealth*, supra.

In Kirby v. Commonwealth there had been two trials, at the first of which the prisoner, Kirby, had gone on the witness stand in his own behalf. At the second trial he did not testify, but a third party was allowed to testify, over objection, that certain statements made by Kirby at the first trial were in conflict with the testimony of two of his witnesses at the second trial. The statute, Code 1873, c. 195, § 22 (subsequently amended and now appearing as section 4781 of the Code quoted above), in force at the time the Kirby Case was decided, was to the following effect:

"In a criminal prosecution other than for perjury, or an action on a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination."

The court, in an opinion by Judge Lewis, held that the testimony was improperly admitted, and reversed the judgment for that reason. The decision was in conformity with the terms of the statute as then in force; and it was doubtless to meet the effect of that decision that the statute was subsequently amended by adding the words, "unless such statement was made when examined as a witness in his own behalf." Under the statute as it was when the Kirby Case was decided, if the defendant himself had first testified in his own behalf and had then been asked on cross-examination whether he had not made certain statements at the former trial contrary to those he was making at the second trial, it is possible that this court would have held, notwithstanding the then existing terms of what is now section 4781, that he was compellable to answer on the ground that in becoming a witness he waived, at least as to his credibility and witness-character, the privilege which that statute was intended to protect. Some of the cases on the subject have in principle and effect gone thus far. See 3 Wigmore on Evidence, § 2276 (a), p. 3151, Jones on Evidence, § 887, and numerous other authorities cited later on in this opinion. But we need not speculate as to what this court would have done in the Kirby Case under the circumstances here suggested. The fact remains that the accused did not testify on the second trial, and that the provisions of sections 4778 and 4781 were at that time vitally different from what they were when the instant case was tried, and the two cases are therefore readily distinguishable. It is clear, at any rate, that the previous statements of the accused which were excluded in the Kirby Case would be admissible now, because those statements had been made by him "as a witness in his own behalf."

In Mullins v. Commonwealth, supra, while the opinion does not state the facts fully, it appears from the record therein, which we have examined, that a witness was permitted, over the objection of the accused, to testify

that the latter as a witness at the coroner's inquest had stated that a certain other person had made threats against the deceased. Judge Buchanan, in delivering the opinion of the court in that case, quoted section 3901 of the Code of 1887, which is identical with section 4781 of the Code of 1919, and then said:

"The introduction of the evidence in question was forbidden by the section of the Code quoted, and the objection of the accused ought to have been sustained"—citing Kirby's Case, supra.

In the Mullins Case the former statements of the accused which the court said were improperly admitted had not been made as a witness in his own behalf, but at a coroner's inquest, and were testified to by a third party as a witness in chief for the commonwealth. The case would therefore be in point here as authority for the accused but for the fact that there is (contrary to his contention) a clear distinction between a case in which the commonwealth undertakes to prove by evidence in chief statements made by an accused person upon a former legal examination (not as a witness for himself), and a case in which the commonwealth merely seeks to bring out, or to lay the foundation for bringing out, such statement by cross-examination of the prisoner himself when he takes the stand in his own behalf.

When the statute (now section 4778, Code 1919) making a person charged with crime competent to testify first made its appearance as a part of the law of this state, the prototype of what is now section 4781 of the Code had long been in force in Virginia. The original terms of the latter section were as follows:

"It shall not be lawful in any criminal prosecution, other than a prosecution for perjury, or an action upon a penal statute, to give in evidence against the accused any confession or statement which he may have made in the course of his legal examination as a witness before any competent tribunal." Acts 1847-48, c. 21, § 48, p. 153.

Since the act of January 21, 1886 (Acts 1885-86, p. 31) and until the adoption of the Code of 1919, the statute law in this state respecting the right of an accused person to testify in his own behalf remained as follows:

"In any case of felony or misdemeanor the accused may be sworn and examined in his own behalf, and be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by the prosecuting attorney." Code 1887, § 3897.

The Virginia decisions which have dealt with this statute have not involved the exact question now under consideration and throw very little light upon it. See Watson

v. Commonwealth, 87 Va. 608, 613, 13 S. E. 22; Litton v. Commonwealth, 101 Va. 833, 844, 44 S. E. 923.

A significant change was made in the phraseology of the statute by the Code of 1919, and the section (in effect when the instant case was tried) now reads as follows:

"In any case of felony or misdemeanor, the accused may be sworn and examined in his own behalf, and if so sworn and examined, he shall be deemed to have waived his privilege of not giving evidence against himself, and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by the prosecuting attorney." Code 1919, § 4778. (Italics added to indicate amendment.)

To this section the Revisors appended the following very pertinent note:

"Under this section as it stood before the revision, some doubt was expressed as to the meaning of the phrase 'subject to cross-examination as any other witness.' This doubt was as to whether the accused waives his privilege of not testifying against himself and may stop at any stage when a question is asked which would tend to incriminate him. While the revisors did not concur in this doubt, they thought it well to put the language of the section in such form as would settle the question, expressly declaring that if the accused be 'so sworn and examined, he shall be deemed to have waived his privilege of not giving evidence against himself.'"

Having in mind the history, purpose, and present terms of the two statutes, sections 4778 and 4781, we have no difficulty in deciding that the action of the trial court in requiring the defendant to answer as to the statements made by him at the coroner's inquest was not in any sense a violation of section 4781. The "evidence against the accused" contemplated by that section in its inception necessarily referred to evidence by third parties, for, as we have seen, persons accused of crime could not testify when that act was passed, nor for a long time after its passage. No such "evidence against the accused" has been offered or allowed in the case at bar. Section 4778 permits the accused himself to testify, but to do so he must accept all of the terms of that section, and (1) "be deemed to have waived his privilege of not giving evidence against himself," and (2) "be subject to cross-examination as any other witness."

The privilege the accused thus waived in going on the stand for himself was the very privilege which section 4781 was intended to protect, and the cross-examination to which he thus voluntarily exposed himself further cut off his right to rely upon the protection of that section. The right to cross-examine him "as any other witness" implied the right to impeach his credibility by the same rules as those applicable to other witnesses. To

discredit the witness, if there be reason to doubt his truthfulness, is one of the legitimate and leading objects of cross-examination. 1 Thompson on Trials, § 405; 1 Greenleaf on Evidence, § 446.

The language of the Virginia statute seems to us conclusive of the question under consideration. It may be observed that in this particular case there is no effort to do more than impeach the witness, because the statement which he made at the coroner's inquest, instead of incriminating him, distinctly exculpated him from any connection with the homicide. It was only because he was making a different statement and thus contradicting himself that he was cross-examined by the attorney for the Commonwealth at the trial. In other words, the evidence which was brought out with respect to the statements of the accused before the coroner merely affected his character as a witness, and not his guilt or innocence. The testimony elicited affected only his "witness-character," and did not affect his "accused-character." An interesting discussion of the difference between these two capacities of an accused person on the witness stand, which might be pertinent and important under enabling statutes differing in terms from ours, will be found in 3 Wigmore on Evidence, § 2277. The Virginia statute, however, as already pointed out, seems to go the full length of requiring the accused person to absolutely and in all respects waive his privilege against self-incrimination, as well as to subject himself to cross-examination as other witnesses. Under our statute, therefore, there is no real occasion for going into a discussion of just how far the right of cross-examination "as any other witness" entitles the commonwealth to bring out on cross-examination facts relating to the guilt or innocence of the accused, as distinguished from facts which might be used in impeaching his credibility.

Even in those states, however, in which the enabling statute merely gives the accused the right to testify, without requiring any waiver of privilege, and without expressly giving the right of cross-examination by the state, it has generally been held that no difference was intended "between the witness-character of the accused and that of any other witness." 1 Thompson on Trials, § 642; 2 Wigmore on Evidence, § 890; Hicks v. State, 99 Ala. 169, 13 South. 375; Smith v. State, 137 Ala. 22, 34 South. 396; Commonwealth v. Tolliver, 119 Mass. 312; Harrold v. Territory, 18 Okl. 395, 89 Pac. 202, 10 L. R. A. (N. S.) 604, 11 Ann. Cas. 818; Fitzpatrick v. U. S., 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078; Sawyer v. U. S., 202 U. S. 150, 165, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269; note to People v. Tice, 131 N. Y. 651, 30 N. E. 494, 15 L. R. A. 669.

In Commonwealth v. Tolliver, supra, the

court refused to permit the introduction of evidence of certain statements, in the nature of confessions, made by the accused, on the ground that the same were unduly and improperly influenced by promises or threats. Afterwards the accused offered himself as a witness in his own behalf, and the court held that upon cross-examination he could be fully interrogated by the prosecuting attorney in regard to such statements and confessions, as affecting his credit. In that case the Massachusetts Supreme Court said:

"By availing himself of the right to take the stand as a witness, the defendant became a general witness in the case, subject to the same tests of truthfulness, and the same rules as to examination and cross-examination as are applicable to all other witnesses. Being sworn to tell the truth, the whole truth, and nothing but the truth, he waived all right to keep anything back, even in the case of questions, the answers to which would tend to criminate himself. * * * Among the modes of impeachment, he, like any other witness may be cross-examined as to a conflicting account of the matter given by him on some other occasion. Such an inquiry may be gone into, not for the purpose of proving the truth of the former account, but as an impeachment of his credit as a witness. * * * He would still be at liberty to testify that his alleged confession was not true, and to offer such explanation as to the inducements and circumstances under which he gave it as he may see fit."

In *Hicks v. State*, supra, the Alabama Supreme Court held that, when a defendant in a criminal case elects to testify in his own behalf, he becomes subject to cross-examination like any other witness and may be impeached by proof of contradictory statements previously made by him, even though such statements consist of declarations or admissions on his part which have first been offered by the state as evidence against him and excluded because not shown to have been voluntarily made.

The syllabus to the report of the *Hicks Case* refers to Alabama Code, § 4473, as the provision under which the accused was given the right to testify in his own behalf; but the text of that section does not appear in the report of the case. We assume that the Alabama statute is silent as to the right to cross-examine; but whether so or not the case is directly in point.

In *Harrold v. Territory of Oklahoma*, 18 Okl. 395, 89 Pac. 202, 10 L. R. A. (N. S.) 604, 11 Ann. Cas. 818, it was held that, when a prisoner on trial voluntarily takes the stand in his own behalf, he waives all privilege which he is entitled to by remaining silent, and subjects himself to the same rules of cross-examination as any other witness, and that he may be asked whether he has not theretofore made certain statements, admissions, or confessions inconsistent with his testimony at the trial; that, if he admits making

such statements, he may explain, or show the circumstances or conditions under which they were made; that, if he denies making such statements, then the state on rebuttal may prove the admissions or confessions made by him; and that this may be done even though the admissions or confessions would not have been admissible if he had remained silent.

In that case the court in the course of the opinion said:

"The most serious question presented is: Did the court err in permitting the prosecution on cross-examination, to ask the prisoner if he had not made certain statements and admissions inconsistent with his testimony, and which were asked for the purpose of impeachment if denied, and to show his criminality if admitted? These same admissions and confessions had been excluded by the court as not having been voluntarily made when offered by the prosecution in support of its case in chief. When the rule prevailed that a prisoner on trial for a crime was not permitted to speak or be heard in his own defense, the rule was established that no confession made by the prisoner should be introduced against him if the same was induced by fear, under duress, or through promise of leniency or immunity. A confession or admission made by the prisoner in order to be admissible against him must have been made voluntarily and freely. The strongest reason for the strictness of this rule was that the prisoner was not permitted to deny or explain the statements attributed to him, or to offer any explanation of the circumstances under which he was induced to make them. He was required to keep silent, and hence no evidence of admission, confession, or inculpatory statements was allowed to be given in evidence against him, until it was made to appear to the court that the same were freely and voluntarily made. Now, the prisoner is permitted to testify the same as any other witness, if he voluntarily offers himself. So long as he remains silent the reason for the rule of excluding confessions not voluntarily made, remains, but when he waives his privilege and becomes a witness for himself, the reason for the former rule ceases and he has the privilege and the opportunity to deny or admit any statement or admission attributed to him, and if he admits making any, he has the right to explain all the conditions and circumstances under which the same were given; and the jury can judge of the truthfulness of this class of testimony the same as of any other. We see no sound reason why a prisoner charged with a crime and who voluntarily becomes a witness in his own behalf should any longer be entitled to any special privileges which are not allowed to every other witness. If any other witness has made statements out of court inconsistent with or contrary to his testimony given in court, he may be asked if he has not made such statements, and if he admit then he may explain the conversation and the circumstances and the inducements under which the statements were made. If he deny having made the statements, then he may be impeached by showing that he did make them. This being the rule to which every other witness subjects himself when he

becomes a witness, we see no sound or plausible reason why the same rule shall not apply to the witness who is charged with a crime and who testifies in his own behalf. He must weigh the consequences and determine the results before he goes upon the stand; he must be conscious of his vulnerable parts, and if he is unable to withstand the attacks to which every other witness for or against him must subject himself, he should maintain his silence and retain all his privileges.

"In a well-considered and lengthy opinion by Mr. Justice White, containing voluminous citations of authorities and a review of the history of the law relating to the admissibility of confessions, delivered in the case of *Bram v. United States*, 168 U. S. 532, 42 L. Ed. 568 [18 Sup. Ct. Rep. 183], it was said: 'In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the 5th Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself." * * * * *'

Again, in the *Harrold Case*, the Oklahoma court said:

"If it be true then, and in the light of the holding of the highest court in the nation it cannot be doubted, that the rejection of involuntary confessions is because of the constitutional rights of the accused not to be compelled to be a witness against himself, then by the decisions of the same high court when the prisoner voluntarily becomes a witness in his own behalf he waives this constitutional privilege and subjects himself to the same rules as to the examination of witnesses as any other witness. It seems that it must necessarily result that it is violative of no constitutional right or of the principles of civil liberty, to require a prisoner while testifying as a witness in his own behalf, to answer any question, the answer to which might tend to impeach or discredit him."

In the note to the *Harrold Case*, 10 L. R. A. (N. S.) 605, it is said:

"But the courts are not in harmony as to the right to cross-examine the accused as to confessions which would not be admissible as original evidence against him, although the weight of authority seems to be against the doctrine of *Harrold v. Territory*."

This comment in the note is not supported by the authorities cited therein, and judging from the numerous decisions referred to in the Massachusetts and Alabama cases, *supra*, the comment seems to be unsupported by the authorities generally. The only cases cited to support it are *Shepard v. State*, 88 Wis. 185, 59 N. W. 449, and several Texas cases.

The *Harrold Case*, it is true, was reversed by the United States Circuit Court of Appeals, Eighth Circuit (169 Fed. 47, 94 C. C. A. 415, 17 Ann. Cas. 868), in an opinion by Judge Sanborn, for whom we entertain the highest respect; but we are unable to concur in the fundamental proposition upon which that opinion seems to be rested, namely, that "involuntary confessions of accused persons are inadmissible to impeach them as witnesses, on the same ground that hearsay and all other incompetent evidence is inadmissible to im-

peach other witnesses, because they are unworthy of belief." The controlling reason, as we think, why involuntary confessions are generally inadmissible, is that their introduction would violate the constitutional guaranty which protects an accused person from being required to give evidence against himself. See opinion of Chief Justice White in *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, cited by the Supreme Court of Oklahoma in the *Harrold Case*. Furthermore, it seems reasonably clear from Judge Sanborn's opinion that, if he had been dealing with a statute containing the provisions of section 4778 of the Code of 1919, he would have affirmed the Oklahoma court.

In so far as our examination has gone, we think the weight of authority supports the conclusion that there was no error in requiring the defendant in this case to answer the questions relating to his testimony before the coroner, and we are entirely satisfied, particularly in view of the terms of our statute, that the better reason is in accord with this conclusion.

[5] 3. It appears from the record that an instruction tendered by the defendant and refused by the court has been lost, the clerk certifying with respect thereto as follows:

"I have not been able to find the instruction referred to in Bill of Exception No. 8, which instruction was modified by the court, and hence I am unable to certify the same in the record."

It is contended that the accused, without any fault of his own, is thus prevented from presenting to this court the question arising with respect to this instruction, and that therefore the judgment should be reversed.

[8] Instructions are not a part of the record until they are made so by bill of exceptions, and it is the duty of the party seeking to avail himself of an alleged error, as to an instruction to see that the same is duly embodied in a bill of exceptions, and presented to the trial court for certification. An instruction offered and refused is no more a part of the record than a motion made and overruled, or testimony admitted or excluded, until it has been incorporated in the record by bill of exceptions. The duty of making up the record so far as bills of exceptions are concerned rests primarily upon the party seeking relief. This court will not presume error. It must be affirmatively shown. There is no merit in this assignment, and the same is overruled.

[7, 8] 4. After the term at which the defendant was convicted had ended, he made a motion for a new trial on the ground of after discovered evidence. Even if the trial court had the power to grant a new trial after the sentence of conviction had become final by the adjournment of the court for the term, we would be unable to reverse the judgment in this case for refusal to grant the motion, because there is nothing in the

record to show the specific grounds upon which the motion was made. But the question is concluded by the Virginia decisions on the subject. The circuit court had no power to grant the motion. *Allen v. Commonwealth*, 114 Va. 826, 77 S. E. 66, *Harley v. Commonwealth*, 131 Va. —, 108 S. E. 648.

For the same reasons, and upon the same authority, we must overrule the assignment based upon the refusal of the court to grant a new trial for alleged misconduct of counsel who appeared for the prisoner in the lower court.

We find no error in the record, and the judgment is affirmed.

Affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 139)

AMERICAN RY. EXPRESS CO. v. DOWNING.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Corporations §590(3)—Corporation taking over all tangible property of another liable for its debts.

A corporation which took over the entire business of another corporation as a going concern and all of the tangible property of the latter theretofore used in its business, paying therefor only in capital stock, must pay any existing liabilities of the corporation taken over of which it had actual or constructive knowledge, at least to the extent of the property acquired.

2. Corporations §591—Creditor of constituent corporation may sue at law consolidated corporation under implied promise to pay.

Where the law implies a promise on the part of a consolidated corporation to pay the liabilities of the constituent companies, the situation is precisely the same in principle as if such promise were an express promise, and creditors of the constituent companies may recover on it by action at law against the promisor.

3. Corporations §590(3)—Merging corporation liable to creditors, though it does not receive all of property of merged corporation.

It is not essential to the existence of liability of a merging corporation for obligations of the merged corporation that the former should have received all of the property of the merged corporation, being liable to the extent of the property received; and the quantity of the property transferred, as compared with that retained, is material only on question whether remedy of creditors is substantially unimpaired.

4. Corporations §590(3)—Merged corporation need not cease to exist to make merging corporation liable to creditors.

It is not essential to a merging corporation being considered as a consolidated company, nor to its liability to creditors of the merged corporation, that the merged corporation should cease to exist de jure; it being sufficient that it ceases the actual transaction of business as a going concern, and it may continue in existence for the purpose of winding up its affairs.

5. Carriers §134—Finding of delivery of shipment to carrier sustained.

In action against express company for value of part of shipment lost, evidence held sufficient to support a finding that the shipment was delivered to defendant's predecessor.

Error to Circuit Court, Accomac County.

Action by J. W. Downing against the American Railway Express Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action brought by the defendant in error, J. W. Downing, against the plaintiff in error, the American Railway Express Company, to recover certain alleged damages occasioned by the loss, in transit, of 840 pounds of Paris green, a portion of a shipment of that commodity which, it is alleged, the Adams Express Company, on the — day of June, 1918, received at Kensington, Ill., as the property of and undertook to transport to the said Downing at a certain station, in Virginia, on the New York, Philadelphia & Norfolk Railroad.

The respective parties to the action will be hereinafter referred to as plaintiff and defendant in accordance with their positions in the trial court.

The Adams Express Company was engaged in the express transportation business, as a common carrier, from said place of shipment in Illinois to said place of destination in Virginia, at the time of said shipment and up to June 30, 1918, inclusive. On the last-named day the Adams Express Company terminated its said business, not only between said points, but also throughout Virginia and the United States; and the defendant, on and after July 1, 1918, undertook, as a common carrier, to carry on, throughout the United States, the express transportation business theretofore transacted by the Adams Express Company, the American Express Company, the Wells-Fargo Express Company, and the Southern Express Company.

The defendant, the American Railway Express Company, is a corporation, incorporated under the laws of the state of Delaware on June 22, 1918, and as such authorized to engage in and carry on throughout the states, territories, and possessions of the United States and in the District of Columbia and in adjacent foreign countries, the express transportation business, as a common carrier; the authorized capital stock of the defendant being \$40,000,000 divided into 400,000 shares of the par value of \$100 each, the minimum capital stock with which the corporation was authorized to commence business being \$33,000,000.

The undertaking aforesaid, on the part of the defendant, the American Railway Express Company, on and after July 1, 1918, to carry on throughout the United States the transportation business theretofore transacted by the Adams, the American, the Wells-

Fargo, and the Southern Express Companies, was entered into in pursuance of an agreement between the four companies last mentioned and the defendant. That agreement was entered into some time in June, 1918, prior to July 1, 1918. There is no copy of such agreement in the record of the case before us, and what are or are not some of its provisions may be said to be left in some doubt. At any rate, one of the subjects of controversy in the instant case is whether such agreement on the part of the defendant expressly stipulated that it would be liable for and would pay all of the unsecured indebtedness of the Adams Express Company existing on July 1, 1918.

There are other provisions of said agreement and certain facts attending the organization and the beginning of the business of the defendant on July 1, 1918, and the passing into its hands on that day of certain property of the Adams Express Company, about which, however, there is no controversy in the case and which appear from the record before us. These are as follows:

The defendant began its business aforesaid on July 1, 1918. Prior to that date it owned no property whatever. On that date, in pursuance of said agreement between it and the four other express companies aforesaid, the defendant took over from such four other express companies certain property theretofore belonging to such other companies, at a valuation of \$30,000,000, to be paid for by the issuance of capital stock of the defendant of the par value of that amount and delivery of such stock to such four other express companies. The property of the Adams Express Company which was thus acquired by the defendant was the whole of the tangible property then owned and used by the Adams Express Company in its express business aforesaid throughout the United States, including all of such property in Virginia, which was considerable in quantity; and this property was taken over, as aforesaid, at its book value, i. e., its value as carried at the time on the books of the Adams Express Company. What this precise value was, or what was the precise amount of the stock of the defendant which was given therefor to the Adams Express Company, does not appear from the record before us; but it does appear from the record that this value and stock amounted to a great many millions of dollars—far more than sufficient to pay the plaintiff's claim.

At the time the property aforesaid of the Adams Express Company was taken over as aforesaid, on July 1, 1918, and the defendant agreed to issue its stock therefor as aforesaid, the defendant knew that an indefinite number and amount of unliquidated claims against and unsecured obligations of the Adams Express Company, of the character of the claim of the plaintiff, were in existence, outstanding and unsatisfied.

At the time of the trial the defendant, as

a matter of fact, had issued and delivered to the Adams Express Company only about 75 per cent. of the stock which was to be issued to it as aforesaid, in payment for the property of the Adams Express Company taken over by the defendant as aforesaid.

After June 30, 1918, the Adams Express Company had no agent in Virginia on whom process could be served so as to commence a suit or action in Virginia against it; nor any property in Virginia which could be attached. It appears that on and after July 1, 1918, the Adams Express Company did own some property, located elsewhere than in Virginia, and other than that which was turned over to the defendant as aforesaid; but what was the character or value of such other property, or just where it was or is located, does not appear.

So far as appears from the record, the Adams Express Company, on and after July 1, 1918, has engaged in no business, other than that of winding up its affairs, including the liquidation of its outstanding liabilities and obligations; and for that purpose has had an office in New York City, with its official organization intact, consisting of its president, secretary, treasurer, general counsel, and its claim departments.

Other material circumstances are referred to in the opinion of the court.

Stewart K. Powell, of Onancock, for plaintiff in error.

S. James Turlington, of Accomac, for defendant in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

The following is the chief question presented for our decision by the assignments of error, namely:

[1] 1. Is the defendant answerable to the plaintiff for the liability of the Adams Express Company to the plaintiff which existed at the time the defendant took over the entire business of the Adams Express Company as a going concern and all of the tangible property of the latter theretofore used in its business, because of the circumstances that the entire existence of the Adams Express Company as a going concern was consolidated or merged in the defendant; that the liability existed at the time of such consolidation or merger, and was actually or constructively known to the defendant to so exist; that the property so taken over was more than sufficient to pay the liability; and that the defendant did not undertake to pay anything for the property except its own capital stock?

This question must be answered in the affirmative.

As said in 6 Am. & Eng. Enc. Law (2d Ed.) p. 818, § 4:

"When two or more corporations are consolidated into a new corporation with a new name, and the constituent corporations go out of existence, if no arrangements are made re-

specting their property and liabilities, the consolidated corporation will be answerable for their liabilities, at least to the extent of the property acquired from the constituent corporations whose liability is sought to be enforced against the consolidated corporation."

As pointed out, however, in the valuable work just quoted, the essential elements of the liability of the new corporation in such case, and the basic reasons therefor, are: first, that only by a transfer for value can the property of a corporation or other debtor be transferred, so as to defeat the claims of creditors (*Id.*, pp. 819, 822); and, secondly, that the new corporation does not occupy the relation of a purchaser for value of the property of the old company, where it gives nothing for the property but its own capital stock.

If, indeed, the property of the old company is acquired by the new corporation by actual bona fide purchase for value, it is well settled that the new corporation is not liable for claims against the old company which do not constitute liens upon the property purchased. *Id.*, p. 819.

Concerning a similar situation to that under consideration in the case in judgment, this is said in *Young v. The Steamboat Key City*, 14 Wall. 653, 20 L. Ed. 896:

"* * * Neither the stockholders of" (the old company) "nor of the new corporation have ever parted with or paid any money or other thing of value for" (the property), "otherwise than by this consolidation of the companies into one; and it is not apparent, nor even a reasonable presumption, that if the new company has to pay the libellant's debt in this case, they will be the losers, but it is nearly certain the loss will fall where it should, on the stockholders coming in through the" (old company).

As said in 5 *Thomp. on Corp.* (2d. Ed.) § 6083:

"* * * The consolidated corporation as a rule, even in the absence of statute, or agreement, assumes all the liabilities of the constituent companies, and they may be enforced by a direct action against it as it is presumed to have notice of the rights of creditors."

As said in *Jennings, Neff & Co. v. Crystal Ice Co.*, etc., 128 Tenn. 236, 159 S. W. 1089, 47 L. R. A. (N. S.) 1061:

"The doctrine that corporate assets are a trust fund, at least to the extent that creditors are entitled in equity to payment of their debts before any distribution of corporate property is made among stockholders, is fully established in Tennessee, and creditors have a right to follow its assets or property into the hands of any one who is not a holder in good faith in the ordinary course of business. *Vance v. McNabb, etc., Co.*, 92 Tenn. 47, 20 S. W. 424; *Pom. Eq. Jur.* § 1046.

"There is abundant authority likewise for the proposition that where one corporation, for its own stock and bonds, purchases all the assets of another, without provision for the debts of the latter, the transaction is out of

the ordinary course of business, and the very circumstances of the case imply full knowledge on the part of the purchasing corporation of all facts necessary to charge the property in its hands with the debts of the selling corporation. [Citing authorities.] * * *

"It follows that when the purchasing corporation took over in exchange for its own stock and bonds the assets of the other, and permitted these securities which had been substituted for the visible, tangible property of the selling corporation to be distributed among the shareholders of the latter, without provision for the creditors of the latter, it thereby became a party, with full notice, to the diversion of a trust fund. As such, the purchasing corporation holds the property so acquired impressed with the same trust with which said property was originally charged, and the purchasing corporation is liable to the creditors of the selling corporation to the extent of the value of the property thus obtained.

"Creditors of the old corporation cannot be required to look alone to the stock and bonds which were substituted for the real, tangible assets of that corporation. The value of securities so substituted is more or less problematical and creditors should not be forced to surrender their claim against available, visible assets, and transfer such claim to new securities. Their remedy cannot thus be hindered and impaired for the benefit of stockholders. * * *

"We are aware that there is some conflict in the cases as to the rights of creditors under circumstances such as these, but we think the views we have expressed are sustained by the weight of authority. We have no hesitation in announcing our belief that such views are correct, and they are in harmony with the following cases: *Altoona v. Richardson Gas & Oil Co.*, 81 Kan. 717, 106 Pac. 1025, 26 L. R. A. (N. S.) 651; *Grenell v. Detroit Gas Co.*, 112 Mich. 70, 70 N. W. 413; *Hurd v. New York, etc., Steam Laundry Co.*, 167 N. Y. 89, 60 N. E. 327; *McIver v. Young Hardware Co.*, 144 N. C. 478, 57 S. E. 169, 119 Am. St. Rep. 970; *Ft. Payne Bank v. Alabama Sanitarium*, 103 Ala. 353, 15 So. 618; *Chattanooga R. & C. R. Co. v. Evans*, 66 Fed. 809, 14 C. C. A. 116, 31 U. S. App. 432; *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.* (C. C.) [4 *McCrary*, 432] 13 Fed. 516; *Vicksburg & Y. City Teleph. Co. v. Citizens' Teleph. Co.*, 79 Miss. 341, 30 So. 725, 89 Am. St. Rep. 656.

See, also, to same effect, notes in 47 L. R. A. (N. S.) 1058, 1059, 11 L. R. A. (N. S.) 1119-1132; and cases cited.

Many of the authorities, in the absence of statute fixing the liability (which is the situation touching the case in judgment), regard the liabilities of the consolidated corporation for the unsecured debts of its constituent companies as in truth resting upon the agreement, express or implied, of the consolidated corporation to pay such debts; and this we think, upon principle, is, in such case, the true ground on which the obligation rests.

In *Morrison v. American Snuff Co.*, 79 Miss. 330, 30 South. 723, 89 Am. St. Rep. 598, this is said:

"The foundation of the liability of a consolidated corporation may rest on a statute or on an agreement either expressed or implied. If the statute does not provide that the new company shall assume the debts and liabilities of the constituent companies, and there is no expressed agreement respecting the same, the debts of the original companies follow as an incident of the consolidation, and become by implication the obligations of the new corporation"—citing authorities.

The consolidated company has in its hands property which in equity and good conscience belongs to the plaintiff to the extent of having his claim satisfied thereby; and, wherever property or money is so held, "the law operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded." *Brewer v. Dyer*, 7 Cush. (Mass.) 339. See, to same effect *Moses v. Macferlan*, 2 Burrow, 1012; *Clark on Contracts*, § 314, p. 757; *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820; 2 R. C. L. § 9, pp. 749, 750.

[2] Where the circumstances are such that the law implies the promise on the part of the consolidated corporation to pay the liabilities of the constituent companies, the situation is precisely the same in principle, as if such promise were an express promise; and the plaintiff for whose benefit such promise exists may recover upon it by action at law against the promisor, upon either of the principles aforesaid. *Langhorne v. Richmond R. Co.*, 91 Va. 369, 22 S. E. 159; and *Cosmopolitan Life Ins. Co. v. Koegel*, 104 Va. 619, 629-631, 52 S. E. 166.

As said in *Langhorne v. Richmond R. Co.*, supra:

"Where two * * * companies unite, or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities, of those out of which it is created. *Tomlinson v. Branch*, 15 Wall. 460, and *Tennessee v. Whitworth*, 117 U. S. 139, 147. The corporation which is created by such consolidation * * * is ordinarily deemed the same as each of the corporations which formed it for the purpose of answering for the liabilities of the old corporations, and may be sued under its new name * * * for their debts as if no change had been made in the name, or in the organization of the original corporations. *Jones on Railroad Securities*, § 415; 1 *Thompson's Com. on Corp.* §§ 372, 373, 395; 1 *Beach on Private Corp.* §§ 343, 344; 1 *Morawetz on Corp.* § 955; *Taylor on Corp.* § 666; 4 *Am. & Eng. Enc. Law*, 272n."

And as held in *Cosmopolitan Life Ins. Co. v. Koegel*:

The plaintiff's right of action exists in "those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person

receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, by his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors. See note 1 Chitty on Pl. p. 5, where a number of cases are cited as belonging to a class in which it is said, 'the law (in such cases) creates the privity and implies the promise'"—citing, also, numerous other authorities to the same effect.

[3] It is not essential to the existence of the liability of the new corporation which we have been considering that such corporation should have received "all" of the property of its constituent companies. As said in 5 *Thomp. on Corp.* (2d Ed.) § 6085:

"Consolidated companies receiving most of the property of the old companies are held to be liable for the debts of such uniting companies to the extent of the property received by them."

See, to same effect, *Berthold v. Holladay-Klotz Land & Lumber Co.*, 91 Mo. App. 233; *Hurd v. New York, etc., Steam Laundry Co.*, 167 N. Y. 89, 60 N. E. 327.

In truth, the quantity of the property transferred, as compared with that retained, is material only to this extent: If there is not sufficient property retained by the constituent company, within the jurisdiction of the courts of the state, to satisfy the obligation of such company to the plaintiff, so that the remedy of the plaintiff is substantially impaired, and the other aforesaid requisite circumstances exist, the liability we have been considering will arise; if, on the other hand, there is sufficient property so retained as to leave the remedy of the plaintiff substantially unimpaired, even if the aforesaid other circumstances do exist, the liability will not arise.

[4] Again: It is not essential to the new corporation being considered as a "consolidated company," within the meaning of those terms as used in the authorities above cited and quoted from, nor to the liability of the new corporation above referred to, that the constituent companies should cease to exist de jure on the organization of the new corporation. The going "out of existence" of the constituent companies (to which the quotation above made from 6 *Am. & Eng. Enc. Law*, § 4, p. 818, and other authorities on the same subject, refer) is the cessation of all actual transaction of business as a going concern—the de facto cessation of all business—the abandonment of all life and operation according to the design of the charter of the constituent companies. The continued existence de jure of the constituent companies for the purpose of winding up their affairs or other purposes is immaterial. *Berthold v. Holladay-Klotz Land & Lumber Co.*, 91 Mo. App. 233; *Montgomery, etc., R.*

Co. v. Branch Sons & Co., 59 Ala. 139; 5 Thomp. on Corp. (2d Ed.) § 8041.

As said by the authority last cited:

"The termination of the existence of the constituent companies is not necessary to either the accomplishment or validity of the consolidation. * * *

The defendant relies upon McAlister v. American Railway Express Co., 179 N. C. 558, 103 S. E. 129, 15 A. L. R. 1090, and it must be said that the holding in that case is directly contrary to our holding above. But such holding is, as we think, also directly contrary to the great weight of authority and to the true principles involved, and for those reasons we cannot follow it.

The other cases relied on by the defendant are the following: Seaboard Air Line Ry. Co. v. Leader, 115 Ga. 702, 42 S. E. 38; Whiting v. Malden, etc., R. Co., 202 Mass. 298, 88 N. E. 907, 132 Am. St. Rep. 493; Austin v. Tecumseh Nat. Bank, 49 Neb. 412, 68 N. W. 623, 35 L. R. A. 444, 59 Am. St. Rep. 543; Colorado, etc., R. Co. v. Albrecht, 22 Colo. App. 201, 123 Pac. 957; Bruffet v. Great Western R. R. Co., 25 Ill. 353; Hallidie Machinery Co. v. Washington Brick, etc., Co., 70 Wash. 80, 126 Pac. 96. These cases are not inconsistent with our holding above. They hold merely that, in the absence of statute imposing the liability, for the new corporation to be liable for the unsecured debts of its predecessor it must appear, either that the new corporation expressly assumed the liabilities of its predecessor, or that the circumstances are such that the law charges the new corporation with such liability; that, in the absence of a statutory provision on the subject, the mere fact that the property of a company is acquired by another company or individual does not of itself make the new holder of the property liable for the debts of the seller of it; for, non constat, the new holder may have been a bona fide purchaser of the property for value in the ordinary course of business, in which case such holder would not be liable for debts which were not liens on the property. All of this is in entire accord with true principles and with our views upon the subject.

Much of the argument before us has concerned the question of fact whether there was an express agreement in the case in judgment on the part of the defendant to pay the unsecured debts and liabilities of the Adams Express Company existing at the time of the consolidation aforesaid; but our view being, as aforesaid, that under the circumstances of this case the law will imply such agreement, it is, of course, unnecessary for us to deal with such question of fact.

There is but one other question presented by the assignments of error for our decision, and that is this:

[5] 2. Was there sufficient evidence before

the jury to support their finding to the effect that the Adams Express Company, in June, 1918, received, at Kensington, Ill., the quantity of the goods in question for transportation to the plaintiff, as alleged?

This question must be answered in the affirmative.

A witness for the plaintiff, who was the depot agent of the defendant at the place of destination of the goods in Virginia, was permitted by the trial court, over the objection of the defendant, to testify as to what a certain entry in the delivery record book of the Adams Express Company showed was the shortage on a shipment of said goods to the plaintiff from Kensington, Ill., on May 18, 1921, which was a different shipment from that on which the action was based. The defendant contends that such testimony as to such book entry was improperly admitted in evidence for several reasons (which need not be set forth here), and hence that the case should be considered as if such testimony were not in the record; and that if such testimony were stricken out of the record there would be no testimony left to support the verdict in the particular in question. This position of the defendant overlooks the fact that the plaintiff himself testified, without objection thereto on the part of the defendant, that prior to the trial he received a receipt from "the agent at Kensington, Ill., * * * showing the shipment" in question, which receipt, other testimony for plaintiff before the jury showed, was turned over to counsel for the defendant prior to the trial. The agent at Kensington, Ill., was agent for the defendant at the time he sent the plaintiff the receipt mentioned. There was therefore ample evidence before the jury to support the finding in question.

The case will be:

Affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 671)

FOY v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Criminal law §1120(3)—Sustaining objection to question not reviewed where expected answer does not appear.

Refusal to allow a witness to answer the question, "What is your religious faith?" will not be considered on appeal, unless the record shows what answer was expected, though defendant claims that his object was to show that the witness was not properly sworn.

2. Criminal law §261(1)—Arraignment or plea not necessary in misdemeanor cases.

Under Code 1919, § 4889, no arraignment or plea of the accused is necessary in a misdemeanor case.

Error to Hastings Court of Portsmouth.

O. V. Foy was convicted of violation of the prohibition law, and he brings error. Affirmed.

The accused was tried by jury, convicted of violating the prohibition law of the state, and the judgment under review was entered accordingly.

There are but two assignments of error.

Frank L. Wilson, of Portsmouth, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazille, Second Asst. Atty. Gen., for the Commonwealth.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The first assignment of error is that the trial court refused to allow a witness for the commonwealth to be asked on cross-examination the question, "What is your religious faith?"

It is urged in argument for the accused that the object of the question "was to show that if the witness was of a certain religious faith, he was not properly sworn, and therefore was not under oath, and that his testimony was not evidence."

[1] The record does not disclose how the witness was sworn; nor does it show what answer the witness would have made; nor that there was any avowal of what answer he was expected to make to the question.

It is well settled that an assignment of error to the refusal of the trial court to allow a witness to answer a question will not be considered on appeal, unless the record shows what answer was expected. *Washington, etc., Co. v. Goodrich*, 110 Va. 692, 66 S. E. 977, and a number of other Virginia cases on the subject which might be cited.

[2] 2. The remaining assignment of error is that the trial court should have set aside the verdict because it does not appear from the record that the accused was arraigned upon or pleaded to the charges contained in the indictment; the record showing merely that the accused was present when his case was called, and announced that he was ready for trial, whereupon, the commonwealth having made the like announcement, the jury were sworn, and the trial proceeded to the verdict and judgment.

This is a misdemeanor case. It is well settled that under the statute (section 4889, Code 1919), no arraignment or plea of the accused was necessary. *Bare v. Commonwealth*, 122 Va. 783, 94 S. E. 168.

The case will be affirmed.

This case was argued before Judge WEST took his seat on the court.

RUDD v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

(132 Va. 733)

1. Criminal law §914—Denial of new trial for refusal to change venue on ground that impartial jury could not be obtained not error, where impartial jury was in fact obtained.

Denial of motion for new trial for refusal to change venue, under Code 1919, § 4663, on the ground that a fair and impartial jury could not be obtained, held not error, where an impartial jury was in fact obtained.

2. Criminal law §126(1)—Jury §7—Proper remedy for difficulty in obtaining impartial jury in city or county where trial is had is motion for jury to be summoned from other city or county.

Where the sole difficulty to be overcome in order to secure an impartial trial consists in the difficulty in obtaining a jury from the city or county where the trial is had, the proper remedy is by motion for a jury to be summoned from some other city or county under the statute providing therefor, and not a motion for a change of venue.

3. Criminal law §956(4)—That impartial jury was obtained without motion for jury to be summoned elsewhere is not conclusive against defendant's right to change of venue for prejudice in community.

The fact that an impartial jury was obtained from the city in which the trial is had, and that no motion was made for a jury to be summoned from another city, is not conclusive on motion for new trial against the defendant's right to a change of venue on the ground that the case could not be impartially tried in such city because of prejudice existing against defendant.

4. Criminal law §1150—Trial court allowed wide discretion in matter of ordering change of venue.

The trial court is allowed a wide discretion in the matter of ordering a change of venue, and its ruling will not be disturbed, unless it plainly appears that the discretion has been impartially exercised.

5. Criminal law §134(1)—Defendant's belief that he cannot secure a fair trial not sufficient ground for change.

The mere apprehension of the accused that he cannot secure a fair trial in the city or county in which he is indicted, is not sufficient to support a motion for a change of venue, but he must establish by independent and disinterested testimony such facts as make it appear probable that his fears and beliefs are well founded.

6. Criminal law §134(1)—Evidence held to justify refusal to grant change of venue on ground of prejudice against accused.

In prosecution for selling ardent spirits, refusal to change the place of trial from the city in which defendant was indicted on the ground that defendant could not be accorded

a fair and impartial trial therein because of prejudice against him, held proper under the evidence.

7. Criminal law §126(2)—Change not granted merely because prominent citizens have raised fund and employed counsel to aid in prosecution.

The mere fact that prominent citizens have raised a fund by private subscriptions and have employed counsel to aid in prosecution of accused, charged with selling ardent spirits, is not in itself sufficient ground for a change of venue.

8. Jury §70(1)—Jurors summoned on second venire facias necessary for felony case may be used for misdemeanor case.

Where a second venire facias was necessary to complete the panel for the trial of a felony case, the jurors summoned thereby could be used in the trial of a misdemeanor case, though there were a sufficient number of jurors summoned by virtue of the first venire facias for all the misdemeanor cases to be tried at the term under Code 1919, § 4896.

9. Criminal law §1129(1) — Objections to method of summoning jury not covered by assignments of error not considered.

Objections to procedure by which jury was obtained, not covered by assignments of error, will not be considered.

10. Criminal law §1120(3)—Refusal to permit certain questions to be answered not considered, in absence of record showing what answers would have been.

The refusal of the court to allow certain questions to be asked and to allow witness to answer such questions will not be considered, where the answers which the witnesses would have given is not shown by the record.

Error to Hustings Court of Portsmouth.

M. C. Rudd was convicted of selling ardent spirits, and he brings error. Affirmed.

There was in this case a trial by jury, resulting in a verdict finding the accused guilty of selling ardent spirits as charged in the indictment, and fixing his punishment at six months in jail and a fine of \$500. The judgment under review was entered accordingly.

There is no assignment of error which challenges the sufficiency of the evidence to support the verdict. There is an assignment of error that the court erred in refusing to set aside the verdict and grant the accused a new trial, but that assignment is based upon the following grounds: (1) The refusal of the court to grant a change of venue; (2) the court's refusal to quash the venire; (3) the court's action in disallowing certain questions to be asked of certain witnesses by counsel for the accused; and (4) the granting of a certain instruction at the request of the commonwealth. These grounds are also made the basis of separate assignments of

error. In the oral argument for the accused the assignment of error relating to the instruction was abandoned.

The case being thus presented upon the appeal, no statement of the evidence, or of the facts, touching the merits of the case, is necessary.

The facts, and the evidence for the accused and for the commonwealth touching certain matters in controversy, upon the motion of the accused for a change of venue, may be summarized as follows:

The uncontroverted facts are that at the time the accused was arrested, charged with the offense of which he was subsequently convicted, there was an association of a group of citizens of the city of Portsmouth, called the Council of Christian Citizens, made up of pastors and laymen of the Protestant churches of the city, who employed detectives to investigate conditions in the city, with a view of ascertaining whether violations of law existed, and, if so, what violations. This association raised a fund to defray the expenses of such investigation, by soliciting and obtaining voluntary private subscriptions from a large number of the citizens of the city, but what proportion of the citizens does not appear from the evidence. And the accused was arrested and charged with the offense aforesaid as the result of the investigation and testimony of two of the detectives employed as aforesaid.

The testimony for the accused is to the effect that, at the time of the motion for the change of venue, there was street talk, a street rumor, heard frequently on the streets of Portsmouth, to the effect that any and all persons charged with crime as a result of the investigation aforesaid could not get a fair trial by a jury from Portsmouth. It appears, however, from this very testimony for the accused that this street talk or rumor did not correctly reflect public opinion of the city. Indeed the accused himself testified to the effect that he was of the opinion that there was no serious difficulty in the way of obtaining a jury from the city of Portsmouth who would observe their oaths and give him a fair and impartial trial; and in this opinion all of the witnesses for the accused substantially concurred.

It appears from the testimony of the accused that what he feared was that he would not get a fair trial by a jury selected from the jurors in attendance upon the court during the term at which he was tried. He stated that there were specific men among them who, as he thought, would not give him a fair and impartial trial.

The testimony for the commonwealth is to the effect that at the time of the motion for the change of venue there was in the city of Portsmouth a very decided public interest

in law enforcement, including the prohibition law, and a determination on the part of many of the good citizens of the city that the law should be enforced against those guilty of violating it; but that this did not go to the extent of the desire on the part of any one that there should be any conviction not warranted by the evidence in the particular case. And the testimony for the commonwealth is to the effect that the accused could obtain a fair and impartial trial in the city of Portsmouth before a jury obtained from that city.

From the jurors who had been regularly summoned, and were in attendance upon the court for the trial of felony cases, the court impaneled the jury for the trial of the case in judgment obtaining from that source the requisite number of jurors who were found, upon examination on their voir dire, to the free from exception.

S. M. Brandt and R. T. Thorp, both of Norfolk, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The questions presented by the assignments of error, and not abandoned upon the oral argument, will be disposed of in their order as stated below.

[1, 2] 1. Did the trial court err in overruling the motion of the accused for a change of venue, pursuant to section 4663 of the Code, on the ground that the case could not be fairly or impartially tried in, or by a jury from the city of Portsmouth, because of the hostile public feeling and prejudice existing in such city against the accused?

This question must be answered in the negative.

In so far as the motion for change of venue rests on the ground that a fair and impartial jury to try the case could not be obtained from the city, it was properly overruled, for two reasons: First, because an impartial jury, in contemplation of law, was in fact obtained from the city (Bowles' Case, 103 Va. 823, 48 S. E. 527, and cases cited); and, secondly, because, where the sole difficulty to be overcome in order to secure a fair and impartial trial consists in the difficulty in obtaining a jury from the city or county where the trial is had, the proper remedy is by motion for a jury to be summoned from some other city or county, under the statute in such case made and provided (Wright's Case, 33 Grat. [74 Va.] 880; Joyce's Case, 78 Va. 287; Uzzle's Case, 107 Va. 926, 60 S. E. 52).

As said in Bowles' Case:

"The law has provided the test as to the fitness of a person to sit upon a jury in the trial of criminal cases, and if, by applying this test, an impartial jury was in fact secured in the county where the trial was to take place, a conclusive presumption arises that the motion for a change of venue was unfounded."

As said in Uzzle's Case:

"It is well settled that, where an application for a change of venue is based simply on the ground of difficulty in obtaining jurors in the county or corporation free from exception, it must be preceded by an application to summon jurors beyond such county. Wright's Case, 33 Grat. 880; Joyce's Case, 78 Va. 287."

[3] It is true, however, that in so far as the motion for change of venue rests on the ground that the case could not be fairly or impartially tried in the city of Portsmouth, because of the hostile public feeling and prejudice existing in such city against the accused, the facts that an impartial jury in contemplation of law was obtained from that city, and that no motion was made for a jury to be summoned from elsewhere, are not conclusive against the right of the accused to a change of venue. Uzzle's Case, 107 Va. 919, 60 S. E. 52.

[4, 5] In this connection it must be borne in mind, however, that it is well settled that the trial court is allowed a wide discretion in the matter of ordering a change of venue, and its ruling will not be disturbed unless it plainly appears that the discretion has been improperly exercised. Looney's Case, 115 Va. 921, 78 S. E. 625; Thompson's Case, 131 Va. —, 109 S. E. 447. The mere apprehension of the accused, or his belief, that he cannot secure a fair trial in the city or county in which he is indicted, is not sufficient to support a motion for a change of venue. As said in Thompson's Case, supra:

"He must establish by 'independent and disinterested testimony such facts as make it appear probable, at least, that his fears and belief are well founded.'" quoting from Wormeley's Case, 10 Grat. (51 Va.) 653.

Moreover, while the fact that a jury, free from exception upon their examination on their voir dire, has been obtained from the city or county in which the trial is had, is not conclusive against the motion for a change of venue, it is a circumstance to be considered along with all the other evidence bearing upon the issue presented by the motion.

[6] Coming now to the specific consideration of the issue last mentioned, we find that the precise question presented for our decision to be this:

2. Was the evidence such that it should have convinced the trial court that the hostile public feeling and prejudice against the accused in the city of Portsmouth was so

great that, in the trial of the accused at that place by any jury, it was likely that the jury would be so influenced by the popular feeling, as to render it probable, at least, that the accused would not have a fair trial?

There was no evidence before the trial court tending to show that such a result was to be apprehended, other than a mere rumor heard on the streets by certain witnesses. As appears from their testimony, these very witnesses were not convinced that the rumor had any foundation in fact. On the contrary their personal opinion was that it had no such foundation. Such too was the opinion of the accused himself. He, as his testimony shows, had no apprehension of the existence of any such hostile public sentiment at the place of trial as would influence a jury to his prejudice when once properly selected. What he feared was that an impartial jury would not be selected in the first instance from the jurors in attendance upon the court.

Such being the situation as made to appear by the evidence on the motion for change of venue, any further detailed consideration of the special circumstances of the case becomes unnecessary; and we have no hesitancy in holding that the trial court was plainly right in refusing to change the venue.

[7] The proper weight to be given, upon a motion for a change of venue, to the circumstances that influential citizens have raised a fund by private subscription, and have employed counsel, to aid in the prosecution of the accused, is dealt with in *Wormeley's Case*, supra, 10 Grat. (51 Va.) at pages 672-674. As there held, such circumstances do not of themselves furnish sufficient ground for a change of venue.

3. Did the court err in refusing to quash the second venire facias by which certain of the jurors were summoned who were in attendance upon the term of court at which the accused was tried, by which venire facias such jurors were summoned to complete the panel for the trial of a certain felony case, one of which jurors was used as one of the jury who tried the accused?

This question must be answered in the negative.

As provided in sections 4895 and 4896 of the Code, jurors summoned and in attendance upon any term of court for the trial of felony cases, whether summoned by the first or a subsequent venire facias issued for such jurors, may be used for the trial of all misdemeanor, as well as felony, cases, to be tried at such term.

Section 4893 contains the following provision, namely:

"At one term of the court only one jury shall be summoned, unless the court or judge thereof otherwise direct."

111 S.E.—18

And section 4893, so far as material, provides as follows:

"In any case of felony, where a sufficient number of jurors to constitute a panel of twenty free from exception cannot be had from those summoned and in attendance, * * * or when the venire facias, or panel, has been quashed for any cause, the court may direct another venire facias, and cause to be summoned * * * so many persons as may be deemed necessary to obtain a panel of twenty free from exception. * * *"

It appears from the record before us that at the term of court in question the first venire facias was awarded by order of court entered on March 1st, commanding the sergeant of the city of Portsmouth to summon and cause to come before the court on the 3d day of March at 10 o'clock a. m. 20 persons of that city to be taken from a list of 24 persons to be furnished by the clerk of the court, for the trial of Joe Foster, qualified in all respects to serve as jurors to recognize on their oaths whether the said Joe Foster be guilty of the felony whereof he stands accused.

Nineteen persons only were summoned by the sergeant under said scire facias.

So far as the record discloses, the Joe Foster Case was not tried as expected.

It further appears from the record before us that at the same term of court, on March 4th, the second venire facias was awarded by order of court commanding the sergeant to summon and cause to come before the court on that day at 3 o'clock p. m. 13 persons of that city, to be taken from a list to be furnished by the court "to complete the panel of jurors for the trial of E. A. Martin" qualified, etc., to recognize on their oaths whether the said E. A. Martin be guilty of the felony whereof he stands accused. All of these 13 persons were accordingly summoned.

On the 7th day of March, at the same term of court, the misdemeanor case of the accused, which we have under review, was called for trial. Thereupon, after the motion of the accused aforesaid for a change of venue had been overruled, the accused pleaded not guilty, to which plea the commonwealth replied generally, and issue was joined thereon. Thereupon the accused moved the court to quash the said second venire facias, which motion the court overruled, and thereupon, from those jurors who had been summoned at that term for the trial of Joe Foster and E. A. Martin, charged with felonies, the court proceeded to impanel a jury for the trial of the misdemeanor case under review, and seven men, after examination upon their voir dire, having been obtained free from exception, the commonwealth having erased one and the accused one, the remaining five constituted the jury for the trial of the accused.

It does not appear from the record before us how many of the 19 persons summoned as aforesaid under the first venire facias or how many of the 13 summoned under the second venire facias attended court in accordance with their summons, or were still in attendance upon the court on March 7th, when the jury was selected in the case in judgment. It appears from the record, however, that 4 of the 5 composing the latter jury, as finally constituted, were among the 19 summoned by the first venire facias, and the fifth juror was one of those summoned by the second venire facias.

The position taken in the assignment of error which raises the question under consideration is this: That, under section 4896, aforesaid, the court had no authority to award the second venire facias "while there were sufficient jurors summoned by virtue of the first venire."

If this statement is intended to mean, as we suppose it does, that there were, of the jurors who had been summoned by virtue of the first venire, a sufficient number in attendance upon the court to try all misdemeanor cases which were to be tried at that term, including the case in judgment, the statement assumes a fact which does not appear from the record which the accused has brought before us. For this reason, if there were no other, we would be compelled to hold the position taken to be untenable.

[8] But the authority of the court, under section 4896, to award the second venire facias, did not depend upon whether the jurors already in attendance were sufficient for the trial of the misdemeanor cases which were to be tried. That was immaterial. By the express terms of the statute, if any felony case required the issuance of the second venire facias in order to secure a jury for its trial as therein provided, the court had the authority conferred upon it of awarding the second venire facias, in which case, also by the express terms of the statute, the jurors so summoned thereby might be used for the trial of all misdemeanor cases. And it appears from the record, as it is certified to us, that the E. A. Martin felony case required the issuance of the second venire facias in order to complete the panel for its trial. This, in any aspect of the case, is decisive of the question under consideration adversely to the accused.

We do not, of course mean to say that the last-named fact could not have been questioned in the court below, issue taken upon it and the contrary fact, if it was a fact, have been made to appear. But that was not done.

[9] There are a number of other positions taken in the brief for the accused, which were also urged in oral argument, challeng-

ing the validity of the procedure by which the jury in the instant case was obtained. But as the positions were not presented in the assignments of error, no further reference need be made to them.

[10] 4. The only matters which remain for our consideration, which are sought to be presented by the assignments of error, concern the refusal of the trial court to allow certain questions to be asked of certain witnesses by counsel for the accused.

This action of the court was the same in substance as refusing to allow the witnesses to answer such questions.

The record does not show what the answers of these witnesses would have been to these questions, nor that there was any avowal of what answers were expected. It is well settled that in such cases the assignments of error will not be considered on appeal. *Washington, etc., Co. v. Goodrich*, 110 Va. 692, 66 S. E. 977; *Foy v. Commonwealth*, decided at this term of court (Va.) 111 S. E. 269.

The case will be affirmed.

This case was argued before Judge WEST took his seat on the court.

(122 Va. 819)

WALKER v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Criminal law §134(1)—Denial of motion on ground of prejudice not supported by evidence held not error.

Where defendant did not introduce evidence in support of his motion for a change of venue on the ground of prejudice against him in the city in which he had been indicted, but contented himself merely with an oral argument, the court did not err in denying motion.

2. Intoxicating liquors §236(4)—Evidence held to show that the defendant had authorized employee to sell whisky.

In prosecution for selling ardent spirits, evidence held to warrant the jury in finding that the sale of whisky by defendant's employee was within the scope of his employment, and had been authorized by the defendant.

3. Intoxicating liquors §168—Employer who authorized employee to sell whisky guilty of selling ardent spirits.

Where restaurant employee with authority from employer sold whisky, the employer was guilty of selling ardent spirits, being responsible for the criminal act of his employee.

4. Criminal law §1173(5)—Modification of defendant's requested instruction as to testimony of paid detectives held not prejudicial to defendant.

In prosecution for selling ardent spirits, modification of defendant's requested instruction, requiring testimony of paid detectives,

which invites the commission of crime, to be closely scrutinized, *held* not prejudicial to defendant, being more favorable than the original request.

Error to Hastings Court of Portsmouth.

William R. Walker was convicted of selling ardent spirits, and he brings error. Affirmed.

There was in this case a trial by jury, resulting in a verdict finding the accused guilty of selling ardent spirits as charged in the indictment, and fixing his punishment at six months in jail and a fine of \$500. The judgment under review was entered accordingly.

There is no assignment of error which challenges the sufficiency of the evidence to support the verdict. Therefore no statement of the facts touching the merits of the case is deemed necessary.

S. M. Brandt and R. T. Thorp, both of Norfolk, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

This case was argued orally before us along with the case of *Rudd v. Commonwealth*, 111 S. E. 270, decided at this term of court.

The first and second assignments of error in the case in judgment are in precisely the same language, and allege the same errors, as are alleged in the first and second assignments of error in the case of *Rudd v. Commonwealth*; the first assignment concerning the refusal of the court to change the venue, and the second assignment concerning the refusal of the court to quash the *venire facias*. There are only the following differences between the two cases in so far as these subjects are concerned, namely:

1. In the *Rudd Case* evidence was introduced by the accused to sustain the motion for a change of venue, and the commonwealth introduced evidence combatting the motion. In the case now before us no evidence was introduced by the accused or the commonwealth upon such motion; the accused contenting himself with presenting to the court below merely the argument of his counsel on the subject.

[1] Reference is here made to the *Rudd Case* for the ground on which the motion for change of venue was there based, and for our views upon the subject, even if there were evidence in the instant case such as there was in the *Rudd Case*. The court in the instant case did not decline to hear evidence on the motion. It merely acted upon the motion as presented without evidence to support it. A fortiori, we are clearly of opinion that

the court did not err in the instant case in refusing to change the venue.

2. In the instant case, as in the *Rudd Case*, jurors summoned and in attendance upon the court for the trial of felony cases were used to try the misdemeanor case in question. The assignment of error in the instant case, with respect to the action of the court in refusing to quash the *venire facias*, is, however, a total misfit when applied to the facts of this case. The assignment of error just mentioned is to the refusal of the court to quash the second *venire facias*. This was applicable in the *Rudd Case*, but is totally inapplicable in the instant case, because in the latter case there was no second *venire facias*. There was but one *venire facias*, which was the same as the first *venire facias* involved in the *Rudd Case*. The jurors in the instant case were all obtained from those in attendance upon the court who had been summoned by such first *venire facias*. It is obvious, therefore, that there is no merit in this assignment of error in the instant case.

There are two assignments of error which pertain to the individual case, and which will be dealt with in their order as stated below.

3. It is assigned as error that the trial court admitted in evidence the testimony of one Cohen, to the effect that, on December 31, 1920, the said Cohen, in the place of business of the accused, to wit, a restaurant, known as "Walker's Cafe" bought a bottle of corn whisky, which was delivered to Cohen by one John Daley, a waiter employed by the accused in said restaurant business, on the ground that such purchase occurred in the absence of the accused, and that there is no evidence in the case to show that the sale was within the scope of Daley's employment, so as to render the accused responsible for the criminal act of Daley.

There was other testimony for the commonwealth, however, which was to the effect that, the next day after the purchase of the liquor just mentioned, the accused, in a conversation with Cohen and another witness, who was with Cohen when the latter bought the whisky, made the following statement:

"I hear you were down to my place last night; how did you like the corn whisky you got?"

And in this same conversation, the accused, according to the testimony for the commonwealth, also said that he was keeping away from his restaurant because "there was trouble in town at the time;" that his restaurant was being watched; and the accused in that conversation stated also "that Daley worked for him."

[2, 3] We are of opinion that this testimony was sufficient evidence to warrant the jury in finding that the sale of the whisky by Daley was not only within the scope of

his employment as the servant of the accused, but was in fact authorized by the accused. That being true, the accused was, of course, responsible for such criminal act. Hence we find no merit in the assignment of error under consideration.

[4] 4. The accused requested the court to give the following instruction:

"The court instructs the jury that the testimony of a paid detective, which invites the commission of crime in order to detect the commission thereof, is always to be received with the greatest caution."

The court refused to give the instruction as asked, but amended it and gave the instruction in the following form:

"The court instructs the jury that the testimony of a paid detective, who invites the commission of crime in order to detect the commission thereof, is of a kind with that of a person in interest, and should be scrutinized closely and received with great caution."

It is urged in behalf of the accused that the modification of the instruction "tended to make the same involved and difficult to understand." We do not so regard the modification. Without entering upon a consideration of the subject of what may be all of the reasons for the rule enunciated by the instruction as offered, we deem it sufficient to say that the instruction, as given, seems to us to be very clear in its meaning, and rather more favorable to the accused than in the form in which it was offered. Certainly, we perceive nothing harmful to the accused in the modification made.

The case will be affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 674)

GRAY v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Jury §70(1)—Jurors summoned to try felony case may be used in trial of misdemeanor case, notwithstanding method of impaneling jury for trial of misdemeanor cases provided for by statute.

Under Code 1919, § 4895, jurors summoned to try a felony and in attendance upon the courts may be used in the trial of a misdemeanor case, tried at the same term, notwithstanding sections 5992 and 5993, providing method for impaneling jurors for trial of misdemeanor cases.

2. Criminal law §338(3)—Testimony that witness bought liquor at certain place admissible against defendant with other evidence that defendant was real owner thereof.

In prosecution for selling ardent spirits, testimony that witness bought liquor at a certain restaurant purporting to be in charge of a person other than the defendant, *held* admissi-

ble as against defendant, in view of other testimony showing that the defendant was the real owner of the restaurant, and that name of such other person as manager thereof was a blind.

Error to Hustings Court of Portsmouth.

L. L. Gray was convicted of selling ardent spirits, and he brings error. Affirmed.

There was in this case a trial by jury, resulting in a verdict finding the accused guilty of selling ardent spirits as charged in the indictment, and fixing his punishment at six months in jail and a fine of \$500. The judgment under review was entered accordingly.

There is no assignment of error which challenges the sufficiency of the evidence to support the verdict. Therefore no statement of the facts touching the merits of the case is deemed necessary.

S. M. Brandt and R. T. Thorp, both of Norfolk, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

This case was argued orally before us along with the cases of *Rudd v. Commonwealth*, 111 S. E. 270, and *Walker v. Commonwealth*, 111 S. E. 274, decided at this term of court.

1. The first and fourth assignments of error in the instant case (the first concerning the motion for a change of venue and the fourth concerning an instruction asked by the accused and refused but modified and given by the court as modified), are precisely the same as the first and fourth assignments of error dealt with in the case last mentioned, of *Walker v. Commonwealth*, and we here refer to what is said in the opinion of the court in that case for the details of our holding in this upon such first and fourth assignments of error. It is sufficient to say here that we find no merit in either of such assignments.

2. The second assignment of error in the instant case concerns the refusal of the court to quash the venire facias by which the jurors were summoned to try the felony case of Joe Foster.

This is the same venire facias which is involved in the *Rudd Case*, as the first venire facias awarded therein, and is the same venire facias as that which is involved in the *Walker Case*. In the instant case, as in the *Walker Case*, the jurors were all obtained from those in attendance upon the court who had been summoned by the venire facias to try the felony case of Joe Foster.

The assignment of error now under con-

sideration is that the court erred in refusing to quash the *venire facias* last mentioned "for the reason that the said *venire facias* was not issued in accordance with sections 5992 and 5993 of the Code of Virginia, in that a greater number of talesmen were summoned than provided by section 5992."

It will be observed that this is a different assignment of error from those in the Rudd and Walker Cases, on the subject of the *venire*, but it is equally without merit, although for a somewhat different reason.

[1] Sections 5992 and 5993 of the Code do provide a method for the empaneling of juries for the trial of misdemeanor cases, but that is not the only method provided by statute for that purpose. As pointed out in the opinion in the Rudd Case, by the express terms of section 4895, jurors summoned to try a felony case, and in attendance upon the courts are authorized to be used to constitute the jury to try any misdemeanor case to be tried at the same term of court. Thus another method of obtaining juries for the trial of misdemeanor cases is provided for by statute. Either method may be used by the trial courts. The latter method was used in the instant case, as it was in the Walker Case.

[2] There remains but one other assignment of error for our consideration in the instant case, and that is this:

3. It is alleged that the court erred in admitting in evidence the testimony of one Cohen, to the effect that, on December 31, 1920, in a certain restaurant known as "Hoghead Station," in charge of one O. V. Foy, the said Cohen bought a drink of liquor; such testimony being inadmissible in evidence for the reason, as it is claimed, that the testimony did not tend to connect the accused with the alleged sale of liquor, and did not show that the sale was made by a duly authorized agent of the accused or with his knowledge or consent.

There was other testimony for the commonwealth, however, bearing on this subject. That testimony was given by this same witness Cohen, and was to the following effect: Cohen testified that, on January, 1921, the very next day after the purchase of the drink of liquor by him of Foy in the restaurant above mentioned, as stated in his testimony objected to, he (Cohen) came again to the same restaurant and found the accused there and acting as if he were the proprietor of the business; that witness engaged the accused in conversation, and during the conversation the witness saw whisky being sold; that witness asked the accused if witness "could have a bottle of corn whisky," and the accused "called O. V. Foy, and Foy came over and brought the bottle of whisky for him," and witness paid Foy \$4 for it, in the presence of the accused; that the accused told witness that he (the accused) "was the

owner of the place, and that the name of O. V. Foy was just a blind. * * *

Such being the evidence, it is plain that the assignment of error under consideration has no merit in it.

The case will be affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 297)

NORFOLK & W. RY. CO. v. HENDERSON.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Railroads ~~§~~401(7)—Instruction on duty to child on track approved.

In an action for the death of a child struck by a railroad train, where defendant's engineer testified he saw the child in time to have stopped, but did not recognize it as a child, an instruction that, if the defendant's servants used reasonable care to prevent the accident as soon as they discovered, or by ordinary care would have discovered, the object to be a child, would more accurately define the defendant's duty if the word "probably" was inserted before the words "a child."

2. Trial ~~§~~228(1), 230—Numerous and lengthy instructions should be avoided unless necessary.

Concise and clear instructions submitting the particular issue to the jury are to be commended, since instructions which are numerous and lengthy are often not comprehended by the jurors, and are not useful to them, and should be avoided unless they are necessary by reason of the number of issues involved or the varied aspects of the case.

3. Railroads ~~§~~401(7)—Amendment to instruction on care to discover child on track held properly refused.

Where the court instructed the jury that, if defendant's engineer saw an object upon the track which by the exercise of ordinary care he could and would have discovered to be a child in time to have avoided striking it, and failed to do so, the defendant was liable, it was not error to refuse an amendment to the instruction that defendant was not liable for an error of judgment in the engineer in failing to identify the object as a child.

4. Trial ~~§~~260(8)—Refusal of amendment of plaintiff's instruction covered by defendant's instructions held not prejudicial.

The refusal of the court to amend an instruction for plaintiff by adding that the defendant was not liable for an error of judgment by its engineer was not prejudicial to defendant, where an instruction given for it stated there could be no recovery if the engineer in the exercise of ordinary care failed to discover the child in time to avoid the injury.

5. Railroads ~~§~~356(1)—Ordinary care required at place used by public.

The employees of a railroad company owe the duty of keeping a lookout for persons on the

track at a point which was known to them to be frequently used by men, women, and children as a walkway, so that it was not error to modify an instruction requested by defendant that it would not be liable if its engineer did not recognize the object on the track to be a child in time to have stopped his train by inserting the words "or by the exercise of ordinary care would have discovered."

6. Trial ⚡252(9)—Instruction on negligence of infant's father not proper where there was no evidence of such negligence.

In an action by a father as the administrator of his child to recover for the death of the child while playing on a railroad track, a requested instruction that plaintiff could not recover if he was negligent in permitting the child to go upon the track was properly refused, where there was no evidence of negligence in that respect.

7. Railroads ⚡382(1)—Child licensee sitting on track not a trespasser.

A child who went upon a railroad track at a place which was customarily used by men, women, and children as a walkway does not lose her right as a licensee and become a mere trespasser by sitting down upon the track to play.

8. Appeal and error ⚡1050(1)—Expert testimony by plaintiff's witness fixing distance necessary to stop train held harmless.

Error, if any, in permitting a witness for plaintiff to testify as an expert as to the distance in which a train could have been stopped under the circumstances in controversy was not prejudicial to defendant where defendant's engineer testified he could have stopped the train within the same distance stated by plaintiff's witness.

9. Evidence ⚡150—Difference between vision of person on track and in engine held not to render experiments incompetent.

In an action for the death of a child playing upon a railroad track, evidence of experiments as to the distance at which a child similarly dressed and situated could have been recognized as a child was not incompetent, because the experiments were made by persons standing on the track, and not by the engineer of a moving train, especially where there was expert testimony that the engineer would have a better opportunity to recognize the object as a child than would the person on the track.

10. Evidence ⚡150—Fact that persons making experiments as to distance object could be seen knew what they were looking for did not make evidence incompetent.

Experiments to determine the distance at which an object on a track could be recognized as a child are not rendered incompetent as evidence merely because the persons making the experiment knew they were looking for a child, whereas the engineer would not have such knowledge, especially where the child was at a point on the track used by the public as a walkway, so that the engineer owed the duty to keep a lookout for persons on the track and had reason to suspect the object was a child.

11. Evidence ⚡568(5)—Testimony of engineer as to distance at which he could recognize object as a child is not conclusive.

In an action for the death of a child struck by a train, where the engineer testified he saw an object on the track in time to have stopped, but did not recognize it as a child until too close to stop, his testimony as to the distance at which he was first able to recognize the object as a child is not conclusive upon the jury, in view of the tendency of a person charged with responsibility to excuse himself.

12. Evidence ⚡58 — Railroad engineer presumed to have eyes as good as the average.

Railroad engineers must be presumed to have eyes at least as good as those of the average person.

13. Evidence ⚡150—Essential conditions must be substantially similar to render experiments admissible.

To render evidence of experiments admissible, the essential conditions at the time of the experiments must be substantially similar to those existing at the time of the occurrence under investigation, but it is not necessary that the conditions be identical in every particular.

14. Appeal and error ⚡970(2)—Discretion of trial judge as to relevancy of evidence is entitled to much consideration.

The question of admissibility of experiments is one of relevancy as to which in debatable instances the discretion of the trial judge is entitled to much consideration.

15. Trial ⚡139(1)—Weight of evidence of experiments is for the jury.

The weight to be given to evidence of experiments is a question for the jury, and varies according to the circumstances of similarity existing between the experiments made and the actual occurrence under investigation.

Error to Circuit Court, Campbell County.

Action by Frank A. Henderson, as administrator of the estate of Marian Henderson, deceased, against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

F. Markoe Rivinus, of Philadelphia, Pa., and Howard & Burks, for plaintiff in error.

John L. Lee, of Lynchburg, and M. B. Booker, of Halifax, for defendant in error.

KELLY, P. This action was brought to recover damages for the death of the plaintiff's intestate, Marian Henderson, a child 28 months old, who was run over and killed by one of the defendant's trains. There was a verdict and judgment for the plaintiff, and the defendant assigns error.

The accident occurred about 9 o'clock a. m. on a clear day within the corporate limits of the town of Brookneal in Campbell county. For many years the railway tracks at that point had, with the knowledge of the railway company and its employees, been used as a

walkway by men, women, and children. Marian Henderson had wandered away from the home of her parents, about 100 yards from the railroad, and was sitting down on or beside the rail. She wore a light-colored dress with a stocking net cap over her head, and was stooping or bending over, with her hands down, as if trying to pick something up from the track. For a distance of nearly 1,200 feet in the direction from which the train was approaching the track was perfectly straight. In the engine at the time were the engineer, fireman, and two brakemen, and they all testify that they saw the child as soon as the engine reached the straight track, but thought the object was a piece of paper, or, as one of the brakemen said, either a piece of paper or a big white chicken. According to their testimony, they kept their eyes on this object, but did not discover its identity until they were within about 350 feet of the point at which the child was struck. It was then too late to stop the train, but the engineer blew his whistle, applied his brakes in emergency, and did all he could towards saving the child's life.

The speed of the train was about 25 miles an hour, and with prompt action could have been stopped within a distance of about 600 feet. It is thus apparent that there was ample opportunity to stop after the object was first seen and before it was struck, but no chance of doing so after the engineer and others in the engine first discovered the character of the object.

Of course, it is not contended, nor is it to be imagined, that the defendant's employees intentionally ran over the child. Furthermore, it is clear that, if the jury were bound to accept the testimony of these employees as conclusive, the verdict was wrong, and the judgment ought to be reversed. If, as claimed by them, they saw the object as soon as they could see it, and at that time had no reason from its appearance to believe it was a human being, and, in the exercise of the diligence required of them at a place regularly used by men, women, and children, had no reason to believe sooner than they did that it probably was a child, and, after making the discovery, used every reasonable means to avoid the injury, the defendant was not liable. All of these conditions of nonliability were established, if the evidence given by the only persons who could see the situation from the engine was conclusively binding upon the jury. Was it conclusive? The answer to this inquiry must precede the determination of the final and decisive question in the case, which is whether they discovered or ought to have discovered that the object was probably a child in peril before it was too late to take effective measures for its safety.

The law of the case is stated so succinctly and with such approximate accuracy in the

instructions given by the court to the jury that they may appropriately be set forth at this point. The instructions as given were as follows:

First, on behalf of the plaintiff:

"The court instructs the jury that, if they believe from the evidence that the engineer in charge of the defendant's train which struck and killed the deceased saw some object upon the track, which, by the exercise of ordinary care, he could and would have discovered was a child in time to have avoided striking it, and failed to do so, the defendant is liable, and the jury should find for the plaintiff."

This instruction could with propriety have been made a shade more favorable for the plaintiff by inserting the word "probably" before the words "a child."

Second, on behalf of the defendant:

"The court instructs the jury that if they believe from the evidence that while the plaintiff's intestate was lying or sitting on the track she was seen by those in charge of the defendant's train and was thought to be some inanimate object as a bundle or piece of paper; that they continued to look at said object and as soon as they discovered, *or by the exercise of ordinary care would have discovered*, it to be a child, used reasonable care to prevent injuring her, they must find a verdict for the defendant." (Italics added for purposes of comment indicated infra.)

[1] The insertion of the word "probably" just before the words "a child" would have more accurately defined the duty.

These two instructions, in our opinion, presented to the jury in a clear and helpful manner the theory upon which the plaintiff was entitled to recover if the evidence warranted a recovery, and the theory upon which the defendant was entitled to a verdict if the evidence warranted such a verdict.

[2] We have so often had occasion to comment upon the unwisdom of prolixity and repetition in the giving of instructions that we wish to commend the counsel on both sides for the care which was evidently bestowed upon the preparation of the instructions requested, and to commend the court for the conciseness and clearness with which it submitted the issue to the jury. Instructions of this kind are of real service to the jury in reaching a correct conclusion. As we have said in other cases, it is, of course, sometimes necessary, by reason of the number of issues involved or the varied aspects of the case, to give a number of instructions, but this is not ordinarily true, and ought to be avoided whenever possible, for it must be a matter of common knowledge and experience with the profession that, where the instructions are numerous and lengthy, they are often not digested or comprehended by the jurors, and therefore as often not useful to them.

1. It is somewhat out of the order in which the assignments are dealt with in the petition, but while we are on this subject of instructions we may as well dispose of the errors complained of in that respect.

[3] With reference to the plaintiff's instruction first above recited, the defendant asked the court to add this amendment:

"But the court instructs the jury that the defendant is not liable for an error of judgment in the engineer in failing to identify as a child stooping on the track and practically motionless an object which he took to be a piece of paper before he actually ascertained it to be a child."

The court refused to make this amendment, and the defendant insists that this refusal was erroneous. The amendment might perhaps have been added without impropriety, though even as to this we do not feel entirely confident, and in any event there was certainly no error in refusing it. The plaintiff's right to recover depended upon the failure of the engineer to exercise ordinary care, and this principle was embodied in the instruction.

[4] Furthermore, the second instruction, given for the defendant, said that there could be no recovery if those in charge of the train, in the exercise of ordinary care, failed to discover the child in time to avoid the injury. This, in effect, told the jury that an error in judgment, provided the defendant's employees based their judgment upon the situation as it would have appeared to men in the exercise of ordinary care, would not entitle the plaintiff to a recovery. The amendment in question might have unduly emphasized the defense, which was otherwise fully covered by the instruction as given.

[5] With respect to the instruction as offered on behalf of the defendant, complaint is made because the court, before giving the same, added the words "or by the exercise of ordinary care would have discovered," italicized in the instruction as above set forth. The amendment was clearly proper. The place at which the accident occurred was known to be frequently used by men, women, and children as a walkway, and the employees of the company were under the duty of keeping a lookout for the express purpose of discovering and avoiding injury to persons at that point. *Southern Ry. Co. v. Wiley* (case of a child 2½ years old, on its hands and knees), 112 Va. 183, 184, 189, 70 S. E. 510. Even in the case of a trespasser this court has held that, after discovering an unknown object on or near the track, though the employees of the company believe it to be inanimate, they have no right to disregard its presence, but must keep a lookout until its character is determined. *Washington & O. D. R. Co. v. Jackson's Admr.*, 117 Va. 636, 640, 85 S. E. 496. This simply means that

they must exercise ordinary care to discover the identity of the object and this is all that the court told the jury by the amendment.

[6] Complaint is made of the refusal to instruct that, if the plaintiff, who was the child's father, was guilty of negligence in permitting her to stray away from home, such negligence would prevent a recovery in the case for his benefit. Of this it is sufficient to say that there was no evidence in the case which would have justified the giving of such an instruction.

[7] The defendant asked for an instruction as follows:

"The court instructs the jury under no use of the defendant's track by the public as a walkway, as testified to in this case, can any license be implied on the defendant's part that Marian Henderson should use its tracks in the manner employed at the time of her death. She was therefore not a licensee if she were asleep or sitting down at the time of her death, but a trespasser to whom the only duty owing by the defendant was to use reasonable care not to injure her after her position of danger was actually discovered by those in charge of the train."

There was no error in refusing this instruction. The case of *Va. Ry. & P. Co. v. Winstead*, 119 Va. 326, 89 S. E. 83, relied upon by the defendant, is not in point. That was a case in which a drunken man, in the nighttime, was lying dangerously near a street railway track in the city of Norfolk, and was struck and killed by a street car. His administrator sought to recover partly upon the theory that the defendant had not equipped its car with a sufficient headlight. The facts showed that the headlight would have disclosed a pedestrian using the street in an ordinary way, and we held that the railway company did not have to assume that men would lie down on the track, and did not have to equip their cars with electric lights so arranged as to operate as a searchlight for persons in this position. In the instant case, however, the accident occurred in broad daylight, and, furthermore, the place was one frequented not only by men and women, but by children, whose playful habits and lack of discretion are matters of common knowledge; and, when this object was discovered on the track, there was a positive duty on the railway company's employees to exercise reasonable care to discover its identity. There was nothing at all to hinder the making of this discovery except the intervening distance, and this distance was being constantly reduced by the approach of the train. The child was a licensee, and could not at its age lose these rights by its own negligence in sitting down on the track. *Southern Ry. Co. v. Wiley*, supra. Its position did not abrogate the defendant's duty of lookout, but was, of course, a circumstance for the jury to consider in determining whether that duty was performed.

We find no error with respect to the instructions.

[8] 2. A witness named Harvey, 62 years old, an experienced locomotive engineer, but one who for a number of years had not been engaged in railroad work, was asked within what distance he thought the train which struck the child could, under the conditions prevailing at that time, have been stopped. His answer was that it could have been stopped in 200 yards. This testimony was admitted over the objection of the defendant, and constitutes the basis of one of the assignments of error. If there was any error in admitting this testimony, it was plainly harmless, because the engineer in charge of the train testified that he could have stopped, and in fact did stop, in 600 feet, the exact distance named in Harvey's estimate.

3. The leading assignment of error, presented to us with marked earnestness and ability, is that the court permitted certain witnesses to testify as to several tests or experiments which they made for the purpose of determining the distance up the track from which they could recognize a child as such when it was sitting on the rail at the point of the accident. There were two or more of these experiments made by sundry persons, some when the day was perfectly clear, and others in dark and cloudy weather. A child about the size of the one who was killed, and similarly dressed, was placed at the same place and in substantially the same position, and the witnesses in question then went up the track to see how far away they could recognize the object as a child. The result of the testimony was that, when the day was clear, they could recognize the child at a distance of something like 1,100 feet away, and that on a dark or cloudy day they could identify it at a distance of 900 feet. These witnesses, of course, knew from the outset what the object was, but they were very positive in their testimony that under weather conditions as above indicated they could clearly and unquestionably recognize the child as such at the respective distances stated.

The contention of the defendant is that these tests were inadmissible because the conditions under which they were made were not substantially the same as those by which the engineer was surrounded.

[9] One of the differences pointed out is that the engineer was on an engine, the motion and vibration of which would interfere with clear vision, while the witnesses who were making the tests were on the ground. This particular difference in the situation of the parties, however, is shown by the evidence to have been unsubstantial. The witness, Harvey, an old engineer, testified that he had participated in one of the tests, and that, in his opinion, a man in the engine moving as this one was would have been in a

more favorable position for making the discovery than a man on the track. Nobody testified to the contrary. Moreover, and perhaps even more to the point, the engineer in charge of the engine, after saying that he did not think these tests were fair, upon being asked to specify the reason why he did not think they were fair, said:

"Knowing a thing is there and having your mind to help you out makes a great deal of difference."

This was a pointed, sensible, and comprehensive answer; and it is this difference, very appropriately called in the petition for the writ of error "the difference in the mental attitude of the parties," which the defendant chiefly relies upon, and, in view of the testimony, must solely rely upon, is a reason why the evidence should not have been admitted.

[10] We may say, therefore, that the real question as to the admissibility of these tests is whether the fact that the witnesses making them knew from the outset that a child had been placed on the track constituted such a difference between their situation and that of the engineer and others with him in the engine as to render the tests incompetent as evidence. The position of the defendant in this respect does not seem to us to be well taken. We do not mean to say that this difference is of no consequence, but we think that its effect upon the value of the tests as proof was a question to be determined by the jury.

[11, 12] It is a simple proposition, but important to keep in mind here, that there was necessarily some point at which men of average vision could, from an approaching engine, be certain that the object was a child. Some allowance is properly to be made for the fact that the men in the engine did not have, as an aid to their sight or vision, knowledge in advance that a child was in fact on the track at that point. But we cannot think it would do to say that the jury in such a case must accept as conclusive the statement of the engineer as to the distance from which he could, in the exercise of ordinary care, make the discovery. Certainly railroad engineers must be presumed to have at least as good eyes as the average person (*So. Ry. Co. v. Wiley, supra*), and there are limits within which the reach and certainty of their vision cannot be credibly denied. If, for example, the engineer in this case had said that he was in 50 feet of the object before he could recognize it as a child, the common knowledge of the jury, without any rebuttal evidence, would have justified them in finding that his statement was not true. There would be more and more difference of opinion in regard to his ability to recognize the object as the distance therefrom increased, and he was perhaps within the bounds of credibility when he said that he was in 350 feet of

the child before he could discover its identity. But the inquiry naturally arises: How in a case like this, where the physical facts make the question doubtful, are the jury to fairly determine where the engineer is telling the truth? We know that the engineer in this case did not intend to run over a child, but, when a deplorable accident of this kind has occurred, men charged with causing it are always prone to excuse themselves from blame, and they will sometimes make inaccurate and untrue statements as to the circumstances when they would have been very far from intending to bring about the calamity. The plaintiff could not be expected to obtain the use of a freight train in order to make an experiment, and, as the real question was one of eyesight, he was entitled to have intelligent and disinterested parties observe the situation under substantially similar conditions and then let the jury pass upon the reliability of the tests. Its admissibility was a question for the court, and its weight and effect was a question for the jury. See the authorities cited *infra*. Proper allowance should be, and of course would be, made for the difference in the mental attitude of the parties, but there was a very wide margin between the point 1,100 feet away from the place at which, on a clear day, the witnesses said they could positively identify the object as a child and the point 350 feet away, at which, on a like clear day, the engineer and others with him said they had arrived before they could make such identification.

[13] The rule, to be sure, is well settled that tests and experiments must be made under substantially the same conditions as those prevailing at the time and place of the occurrence under investigation, but this rule cannot be carried to the extent for which the defendant contends in this case, nor do the decisions, either in Virginia or elsewhere, relied upon by the defendant go thus far.

In *Rudd's Adm'r v. R. & D. R. Co.*, 80 Va. 546, a boy 12 years of age was sent by his parents to mind cows in a field along the railway. He fell asleep on the track and was run over by a freight train and killed. The majority opinion recites that—

"An experiment made with a boy about 12 years of age, and of the size of the deceased, showed that an object of that size could be seen on the road at the distance of 1,118 yards from the curve or turn in the road."

No question of the identity of the object was involved. In discussing the probative value of the experiment, the court said:

"The experiment made by plaintiff's witness of placing a boy 12 years of age, and of about the size of the deceased, in position on the track, and then being able to see him from a point of observation 1,118 yards off, when they knew that he was thus placed there, and their undertaking was to see him, does not prove

that the deceased, lying down flat on the track, may not have escaped the observation of the engineer, even when he was at his post and on the lookout, at that great distance, and while the train was running rapidly along."

Upon all the facts in that case, the correctness of the decision does not seem entirely free from doubt, and it is to be noted that Judges Lewis and Richardson dissented. But the case is distinguishable from the one at bar with respect to the experiment. Rudd was on the track, as shown by the opinion, at a point where the defendant "had a right not to expect or apprehend any person to be," and the purpose of the experiment was to show, not how far away the engineer could have recognized the object as a human being, but how far away he could have seen if he had been looking. It is true the engineer said he had been looking out, but was under no obligation to be keeping, and did not say that he was keeping, the vigilant lookout which he would have been expected and required to observe at a place constantly used by adults and children. The court very plausibly said, therefore, that the experiment did not prove that the boy "may not have escaped the observation of the engineer." The question was not how far he could have seen and recognized Rudd if he had been looking out for him, for he owed no duty of lookout, but whether, after seeing him, he did all he could to save him; and it was clear that after seeing the boy it was impossible to prevent the injury.

In the present case the engineer had every reason to expect children to be on or near the tracks, and was bound to look out for and discover them. This distinction between the two cases is of very material import in connection with the tests in question here. The mental attitude of the persons making the tests in the instant case cannot, after all, be regarded as very different from that with which the engineer ought to have regarded the object. He did not actually know that the object was a child, but, in view of the known use of the track at that point, he ought to have been very alert to discover its character. He could not lawfully proceed on the assumption that there would be no child in danger at that place.

The case of *Richards v. Commonwealth*, 107 Va. 881, 59 S. E. 1104, is relied upon by the defendant. In that case there was a question about the identity of certain tracks made by the accused, and a witness was allowed to testify that during the trial he had gone to the scene of the shooting and made tracks with his own and with the shoes of another, and found that the tracks in each case were shorter than the shoes which made the tracks. The court, dealing very briefly with the question, simply said that the evidence did not clearly show that the conditions under which these experimental tracks

were made "were the same or substantially similar" to those prevailing at the time the tracks alleged to have been those of the accused were made; and, as the case had to be reversed on other grounds, the court said it would not pass upon the question at that time, but that, upon another trial, evidence of such experiments should not be admitted unless it satisfactorily appeared that the tracks were made under conditions the same as, or substantially similar to, those surrounding the shooting of the deceased. This was merely the affirmation of a general and well-settled rule, and one which was not violated by the admission of the evidence complained of here. The conditions of the experiments in this case were substantially similar to those confronting the engineer, and such dissimilarity as existed was clearly and emphatically brought to the attention of the jury and was a matter for them to weigh and appraise.

In the case of *Norfolk & Western Railway Co. v. Sollenberger*, 110 Va. 615, 66 S. E. 726, cited and relied upon by the defendant, an employee of the company was sent with a flag to protect a work train. It was claimed that from exhaustion he lay down and went to sleep on the track. While in that position he was run over and killed by a backing train. The following is taken from the opinion of the court:

"Some time after the accident a test train was made up to correspond with the wrecking train used at the time Sollenberger was killed. Counsel for plaintiff and defendant were present, and numerous tests were made, and no doubt with the utmost fairness and integrity of purpose. But after all it is impossible to reproduce conditions as they actually existed. If it were possible to reproduce all the physical conditions, as may be done in theory, but not in practice, the mental attitude of those engaged in the tests is necessarily wholly different. Every man engaged in the test knew from the beginning that in the actual occurrence there was a man upon the track exposed to imminent danger. The positions of the actors at a particular moment of time could not be determined with precision; and upon the whole it seems to us that the case must, after all, be determined upon the evidence adduced before the jury by witnesses who were present upon the occasion of the accident, and who testified to what they saw and heard of the actual occurrence. It is oftentimes instructive to take a jury to the scene of an accident, in order to enable them more intelligently to appreciate the evidence adduced before them; but that is altogether different from what was done in this case."

This expression of the court, upon a casual reading, gives color to the contention of the defendant, but upon analysis will not be found to afford substantial support therefor. The experiment in the *Sollenberger* Case was of a more complicated character than the test in the instant case, because it involved not merely a question of human vision, but co-or-

dinate action in emergency by two men placed in proper relative position, and the quick manipulation of machinery by one of them. In such a case to be forewarned was to be forearmed, and foreknowledge was an exceedingly important circumstance. There was no immediate emergency in the instant case. The engineer, like the persons making the experiments on the track, had time for deliberate observation. His train was drifting down grade at 20 or 25 miles an hour, and all he had to do was to use his eyes. The statement by the court in the *Sollenberger* Case that "it was impossible to reproduce conditions as they actually existed" must be read in the light of the facts of that case, and cannot be given a literal meaning for use in all cases, because that statement would be true, to a greater or less extent, of every experiment or test of this character, and it may be confidently asserted that the court did not mean to say that tests and experiments can never be used in evidence unless it is possible "to reproduce conditions as they actually existed." The use of such evidence is too common and too fully supported by authority to admit of any such construction of the *Sollenberger* Case. Substantially the same thing may be said of the reference in the opinion to the "mental attitude of those engaged in the tests." Foreknowledge that quick emergency stop was to be made with the "test train" was an unusually important factor in that instance, and constituted a material and probably vital difference between the conditions under which the test was made and those under which the injury to Sollenberger occurred. But foreknowledge cannot be allowed to exclude evidence of every experiment, for this would virtually exclude them all. Persons who experiment with a situation for the purpose of ascertaining what would happen or be true under a given state of facts usually know in advance what they are attempting to demonstrate. As a rule, such foreknowledge does not render their testimony as to the result of their experiments incompetent, although it may often very properly affect its weight and value.

In *Goings v. N. & W. Ry. Co.*, 119 Va. 543, 89 S. E. 914, another case relied on by the defendant, this court held that the trial court was right in excluding proof of a test made, but placed the decision, primarily, upon the ground that the evidence was immaterial for reasons theretofore stated, and, secondly, upon the ground that conditions were different. And it is to be noted that, although the court in that case specifically pointed out the difference in conditions, no importance was attached or reference made to the fact that much the same difference in mental attitude relied on in this case accompanied the test there.

The cases of *Richmond Passenger & Power Co. v. Racks*, 101 Va. 487, 44 S. E. 709, and *Wise Terminal Co. v. McCormick*, 104 Va.

400, 51 S. E. 731, cited by the defendant, are not in point. Those cases relate to expert testimony, and not to experimental tests. The principle announced therein would, however, apply here, if we could say, as we cannot, that the conditions accompanying the tests were so dissimilar to those confronting the engineer as to render proof of the former inadmissible.

Coming now to the cases outside of Virginia, cited by the defendant, the first is *Chicago & Alton R. Co. v. Logue*, 47 Ill. App. 292. No facts as to the circumstances of the experiment are shown in the report of the case except such as appear from the following sentence in the opinion:

"There was also error in the admission of evidence as to placing an object on the track and proof as to the distance it could be seen and distinguished, where the circumstances and surroundings were *wholly different* from those attendant on the engineer in the discharge of his duties." (Italics added.)

In the absence of any statement of the "circumstances and surroundings," the value of the case as authority here cannot be determined. Certainly it does not in terms reject the experiment as evidence on the ground that the person who placed the object on the track knew in advance of its presence there and of the purpose to be accomplished in making the observations.

In *Alabama G. S. R. Co. v. Burgess*, 114 Ala. 587, 22 South. 169, the following ruling (quoted from 8 Decennial Digest, 717) appears, and is cited by the defendant:

"Whether children on a railroad track, and the fact that they were children, could have been discovered by the engineer in time to stop the train before reaching them, by the exercise of due care, cannot be shown by an experiment made a month after the accident, by placing children on the track and noting the distance at which they were distinguishable by witnesses, looking from the direction from which the train had come."

This quotation, it must be conceded, appears to support very strongly the position of the defendant. We have examined the report of the case, however, and find that the opinion as a whole cannot be given the full effect claimed for it here. The point was not made, and the court did not hold, that the evidence was objectionable because the persons making the experiment knew in advance that the children had been placed on the track. The objection specified was that the evidence "was irrelevant, and the experiment made out of court, when defendant was not present, and because conditions were not shown to be the same as on the occasion of the accident." The court, in holding that the evidence was improper, merely said, "The conditions are too variant."

In *Chicago City Ry. Co. v. Brecher*, 112 Ill. App. 103, 108, the action was to recover

damages sustained by the plaintiff while riding on the footboard of an engine. While going over a crossing on the track the engine sank down by reason of the unsafe condition of the track, and the plaintiff was thus injured. The next day the same engine, equipped with a new footboard, not shown to have been the same height as the old one, and without any cars attached, was run over the crossing. The speed of the engine on the two occasions was not the same. Some repairs had in the meantime been made at and near the crossing. The court said:

"In spite of this dissimilarity of conditions and over the repeated objections and exceptions of appellant, the results of this experiment were submitted to the jury. This action of the trial court is reversible error. Unless it be shown that all the essential conditions of the experiment are identical with those existing at the time of the accident, the results of that experiment have no legitimate bearing upon the issues before the jury, since, instead of enlightening the jury, their tendency is to confuse and to mislead them."

The decision does not seem to involve in any way the question of "mental attitude," and appears to rest upon the general and well-settled rule of evidence applicable to cases of its kind. Of course, the court did not mean to lay down the rule that all the conditions must be identical, but merely that all the conditions essential to a fair test must be the same. Even as thus explained, the word "identical," if taken literally, is a stronger term than the rule, as generally approved and expressed, would justify. It is only necessary that the essential conditions should be substantially similar.

The other two cases relied on by the defendant, *Chicago & E. I. R. Co. v. Crose*, 113 Ill. App. 548, and *Zimmer v. Fox River, etc., Co.*, 123 Wis. 643, 101 N. W. 1099, do not deal, directly or indirectly, with the question of "mental attitude," and merely follow the general rule that attending conditions must be sufficiently similar to fairly illustrate the point at issue.

Counsel for the defendant concede that upon the question under consideration the authorities are not uniform. We have shown that those relied upon for their contention do not adequately support it. No case has been found, in this state or elsewhere, which holds that a mere difference in the mental attitude of the parties, as that expression is used in this case, is a sufficient difference to exclude the tests; and we think the weight of authority and the better reason is to the contrary.

In *Panhandle & S. F. Ry. Co. v. Haywood* (Tex. Civ. App., December 15, 1920) 227 S. W. 347, the action was to recover damages for the death of a child 20 months old who was killed on the track. The court said:

"Several witnesses who made experiments under similar conditions, except that they were

not looking out of the cab of a moving engine, but were on foot, testified that they could see a child slightly larger than this one at a distance varying from 1,700 feet to 2,700 feet, and one witness testified that he could tell that there was some object on the track, though unable to identify it as a child, for a distance of 3,000 feet. The engineer testified that he could see an object as large as a child for a distance of 800 feet. This evidence, we think, makes an issue for the jury, and warrants their finding that, if the engineer had been keeping a look-out, as he said he was, he would have discovered the child when the engine was farther away from it than a distance of 300 feet." (Italics added.)

In *Burg v. Chicago, R. I. & P. Ry. Co.*, 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419, children were placed on the track by the defendant railway company for the express purpose of making certain tests to determine: First, the distance at which the children on the track at the time of the accident involved could have been seen by the engineer of the approaching train; and, second, the possibility of stopping the train, so as to prevent the accident, after the situation was or should have been known. Some of the tests were made with the same train in use when the injury occurred, and the others with a substantially similar train. To that extent (although, as already pointed out, this particular distinction between the cases is immaterial here) the conditions were more like those attending the accident than in the instant case; but it is to be observed, and we refer to the case for that reason, that there was the precise difference in the mental attitude of the persons engaged in making the tests which is relied upon by defendant as decisive here, and the court said:

"It is true [the conditions] were not identically the same, but they were essentially so. * * * In fact, we do not discover a difference as to conditions in any substantial particular. We think these tests were proper, and, if fairly made, the facts thereby disclosed would be of great value in reaching a conclusion."

In *Harrison v. So. Ry. Co.*, 93 Miss. 41, 46 South. 409, the following facts appear in the statement preceding the opinion:

"The theory of appellant is that the engineer on the train could have seen and should have seen the child in time to stop the engine, and that between the place the engineer sounded the alarm by blowing his whistle and the place the child was struck the engineer could then have put on emergency brakes and stopped the engine before reaching the child. In support of this contention he offered evidence of experiments made at that place, at the same time of day and under similar climatic conditions, attempting to show by witnesses the distance at which a child the same size as the one killed could be seen on the track."

It does not affirmatively so appear from the statement of the above case, but the clear

inference is that the observations were made by the witnesses from the ground, and not from an engine; and it is perfectly manifest that they made these observations with foreknowledge that a child was on the track. The Mississippi Supreme Court, in the opinion, said:

"The court also erred in excluding the testimony of the witnesses of the appellant with respect to the experiments made as to how far the baby could be seen from the direction from which the train came. This testimony was clearly competent. The purpose of the inquiry was to show whether the engineer saw, or ought to have seen, the child in order to have avoided the catastrophe, and it was directly relevant to that inquiry. The experiments were made on the same kind of a day as that on which the injury occurred, at the same hour of the day, and under like conditions in every respect, and we fail to see any sound reason which can support the exclusion of the testimony taken under circumstances identical, or nearly identical, with those obtaining on the day the injury was inflicted."

In *St. Louis, I. M. & S. Ry. Co. v. McMichael*, 115 Ark. 101, 171 S. W. 115, the defendant at the trial proved certain experiments made by it, one with the same engine and the same number of cars as those in use when the accident happened, and another with a similar engine and the same engineer. In rebuttal, the plaintiff was allowed to prove by a number of witnesses that, after a man had placed himself in the position in which the injured man was at the time of the accident, they walked up the track and made their observations. Their testimony is fairly illustrated by the following quotation from the evidence of one of these witnesses.

"The man was sitting on the edge of the platform facing the track, in about this position (indicating). We walked up as far as the trestle, 383 steps. I turned around to see if I could see anything on the platform. I could tell very readily that it was a man. I could see his hand—that is, the hand next to me—very clearly."

This evidence was admitted over the objection of the defendant, and, in passing upon this action by the trial court, the Supreme Court of Arkansas said:

"We are of the opinion that the court did not err in holding that the conditions under which the experiments were made by the witnesses on behalf of the appellee were substantially the same. It is true that the witnesses who made these observations were not on an engine moving at a speed of 35 or 40 miles an hour, but there was testimony of expert passenger engineers to the effect that one accustomed to the movements of an engine could see a man as plainly from an engine going 35 or 40 miles per hour as one standing or walking on the track. This testimony, although contradicted by expert passenger engineers testifying for appellant, was nevertheless sufficient to render the testimony of the witnesses for appel-

lee competent, so far as the essential similarity of viewpoints was concerned."

In the instant case, as we have seen, an engineer of many years' experience testified that a man in a moving engine could in his opinion, see and identify an object ahead on the track more easily than if he were down on the level of the track; and, moreover, the defendant's engineer seemed to concede in his testimony that the foreknowledge of the presence of the child on the track constituted the only advantage in favor of the observations made by the man on the ground. Exactly that advantage, it will be observed, was enjoyed by all the persons making the tests mentioned in the McMichael Case, *supra*, and they were all held to be properly admitted in evidence.

Without quoting further from the decisions in point, we refer to the following cases, each of which will be found satisfactory authority for the proposition that the mere foreknowledge of the position and identity of the object on the track cannot be made the test for excluding evidence of experiments like those here under consideration: *Gulf, C. & S. F. Ry. Co. v. Whitfield* (Tex. Civ. App.) 208 S. W. 381; *Young v. Clark et al.*, 16 Utah, 42, 50 Pac. 832; *Atlanta & W. P. R. Co. v. Hudson*, 2 Ga. App. 352, 58 S. E. 500; *Griggs v. Dunham* (Mo. App.) 204 S. W. 574; *Byers v. Railway Co.*, 94 Tenn. 345, 29 S. W. 128.

[14, 15] After all, the question is one of relevancy, as to which, in debatable instances, the discretion of the trial judge is entitled to much consideration. 1 Jones on Evidence, § 164; 1 Wigmore on Evidence, § 444; *Riverside Cotton Mills v. Waugh*, 117 Va. 386, 393, 84 S. E. 658. Where the conditions are substantially similar in essential particulars, the evidence is admissible, and its weight is to be determined by the jury. As said in 22 Corpus Juris, p. 759:

"The weight to be attached to evidence of experiments is for the jury, and varies according to the circumstances of similarity existing between the experiments made and the actual occurrence, the facts of which are under investigation."

See further, in support of this paragraph, *Byers v. Railway Co.*, *supra*; *Panhandle & S. F. Ry. Co. v. Haywood*, *supra*; *Illinois Cent. R. Co. v. Burns*, 32 Ill. App. 196; *Clark v. State*, 38 Tex. Cr. R., 30, 40 S. W. 992; *Augusta, etc., Co. v. Arthur*, 3 Ga. App. 513, 60 S. E. 213.

It would, perhaps, be improper to conclude this opinion without referring to the cases *Seaboard, etc., Co. v. Joyner's Adm'r*, 92 Va. 354, 23 S. E. 773, *Tucker's Adm'r v. N. & W. R. Co.*, 92 Va. 549, 24 S. E. 229, and *N. & W. R. Co. v. Dunnaway's Adm'r*, 93 Va. 29, 24 S. E. 698, cited by the defendant to support

the general proposition that there is no liability in this case. Joyner, Tucker, and Dunnaway were all persons to whom the defendant owed no duty of discovery, and there was nothing in either of the cases to put the engineer on notice of the danger to a human being until too late to avoid the accident. In the instant case it was the engineer's duty to exercise reasonable care to discover the plaintiff's decedent, and there was evidence, by persons who had made the tests, tending very strongly to show that the child's identity ought to have been discovered in ample time to prevent the injury.

For the reasons stated we are of opinion that the issue in this case was one to be tried by the jury, that there was no error in the admission of testimony or in respect to the instructions, and that we cannot properly interfere with the verdict.

The judgment is accordingly affirmed.

Affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 173)

DEARING et al. v. DEARING et al.

(Supreme Court of Appeals of Virginia.
March 16, 1922. Rehearing Denied April 3, 1922.)

1. Trial \Leftarrow 139(1)—If jury might have found against party demurring to evidence, judgment must be against him.

If the evidence to which a party demurs is such that a jury might have found a verdict for the opposite party, the court must give judgment for the opposite party.

2. Wills \Leftarrow 303(6)—Denial of forgery of first page of will corroborates attesting witness' testimony of execution.

Where contestants claimed the executor had substituted a forged first page to the will for the original first page, the denial of the forgery should be considered in corroboration of the testimony of the sole surviving attesting witness to the will, who testified he did not read the will when he attested it and did not know what it contained.

3. Wills \Leftarrow 111(1), 119, 123(1)—Need not be signed or witnessed on every sheet.

Where a will is written on more than one sheet of paper, it is not necessary that the testator sign each sheet, nor that the attesting witnesses sign each sheet or acquaint themselves with the contents of the will before signing it, though it is the better practice to have each sheet signed.

4. Wills \Leftarrow 303(6)—Testimony of surviving witness as corroborated held to show paper was will as written.

Testimony by the sole surviving witness to a will as to its execution, with denial by the executor that he had substituted the first page

of the will, and other evidence as to the making of the will and testator's declarations as to disposition of his property, of which the executor received only one-tenth, held to show beyond doubt that the paper introduced as the will of testator was the will as actually written by him.

5. Wills §166(12)—Evidence held not to support finding of undue influence.

In proceedings to contest a will, evidence that the testator had been taken to the home of one of the devisees while he was sick, and that, under the physician's orders, he had been denied visitors, together with the circumstances of the execution of the will and the fact that other relatives received the same share in the estate as those with whom testator was living, held not to sustain a verdict finding undue influence.

6. Wills §155(1)—Undue influence must overcome the will of testator.

Undue influence which is a ground for setting aside a will must be sufficient to destroy the free agency of the testator, and amount to coercion.

7. Wills §166(12), 302(2)—Forgery, undue influence, and fraud cannot be inferred from circumstances consistent with innocence.

Forgery, undue influence, and fraud in obtaining the testator's signature to a different instrument from that which he intended to sign are offenses too grave to be inferred from circumstances capable of innocent construction.

8. Wills §166(11), 305—Declarations of testator before making will of little weight on undue influence and forgery.

Declarations by testator before he made his will to the effect that the law made a better will than he could are of little weight in determining the issue of undue influence in procuring a will which the contestants admitted was made, but which they claimed was procured by undue influence or had the first page thereof substituted.

Appeal from Circuit Court Rappahannock County.

Suit to contest a will by R. Alvin Dearing and others against J. A. Dearing and others. Decree establishing the will, and contestants appeal. Affirmed.

Volney E. Howard and H. C. Featherston, both of Lynchburg, and Chas. H. Keyser, of Washington, Va., for plaintiffs in error.

Aubrey G. Weaver, of Front Royal, for defendants in error.

WEST, J. This suit involves a contest over the will of Alfred Wilks Dearing, who died in Rappahannock county, Va., on September 9, 1916, in his eighty-ninth year, unmarried and without issue, leaving an estate valued at more than a half million dollars.

His heirs at law are the contestants, R. Alvin Dearing, William A. Dearing, and

Janie E. Dearing, nephews and niece, and Robert Scott Dearing, a grandnephew, and his five nephews and five nieces, to wit, Eugenia Dearing, Alice Dearing, Eva Calloway, and John Dearing, of Georgia, Alfred E. Dearing, of Tennessee, Eugenia Cox, of Amherst, Va., J. A. Dearing, of Shenandoah Junction, W. Va., and W. G. Dearing, Eastham Dearing, and Annie M. Dearing, of Rappahannock county, Va., the last ten of whom are named as sole devisees in the will.

On September 11, 1916, J. Alfred Dearing, a nephew and the executor named in the will, produced the same in Rappahannock circuit court, and, being proved by the testimony of Miss P. M. Dearing, one of the subscribing witnesses thereto, who also proved the due attestation of said will by J. C. Walter, the other subscribing witness thereto (the said J. C. Walter being unable to attend court and testify on account of sickness), the said paper writing was ordered to be recorded as and for the last will and testament of the said A. W. Dearing, deceased; and the said J. Alfred Dearing qualified as executor and took possession of the estate.

Subsequently the contestants instituted a suit in chancery attacking the validity of this will, and an issue devisavit vel non was directed therein, in which the defendants in the chancery suit were made plaintiffs, and the plaintiffs therein (the contestants) were made defendants. There were three trials of this issue before three separate juries. Each of the first two trials resulted in a hung jury, and on the third trial the plaintiffs (the propounders of the will) demurred to the evidence, and the jury found against the will, subject to the decision of the court on the demurrer to the evidence. The court sustained the demurrer to the evidence and entered judgment accordingly, and also entered a decree establishing said paper writing as the last true will and testament of the said A. W. Dearing; and this is the judgment and decree complained of.

On the trial of the issue of devisavit vel non, the contestants filed the following grounds of defense:

(1) They deny that the typewritten instrument, bearing date on May 29, 1916, signed with the name of A. W. Dearing and admitted to probate in the circuit court of Rappahannock county on September 11, 1916, is the true last will and testament of the said A. W. Dearing, and they require strict proof thereof.

(2) The said alleged will was not properly and legally executed and attested.

(3) The said alleged will was procured by fraud and undue influence on the part of J. A. Dearing, named in said instrument as executor, aided by members of the household wherein the said A. W. Dearing died.

[1] The evidence will be considered under

the rule applicable to a demurrer to the evidence, this rule being that, if the evidence be such that a jury *might* have found a verdict for the demurree, the court *must* give judgment in his favor. Burks' Pl. & Pr. p. 495, § 263.

Has the will been proven in the manner prescribed by law?

J. C. Walter, one of the attesting witnesses, testified substantially as follows: That he resided at Huntley and was not related to A. W. Dearing; that he was informed by J. A. Dearing that A. W. Dearing wished to see him in his room; that when he entered the room A. W. Dearing was standing on the floor with the paper in his hand and said, "This is my will and I want you and Cousin Pat (Miss P. M. Dearing) to sign it;" that A. W. Dearing signed the will in the presence of both witnesses, and they signed it as witnesses in his presence, all three being present together at the same time; that testator directed witnesses where to sign, and was of sound mind at the time; that the will was written on two sheets of paper, and that the will shown witness in court was the same paper testator said was his will; that witness did not read the will or know what it contained; that P. M. Dearing, the other subscribing witness, was dead.

[2] While it is generally true that a will cannot be established upon the uncorroborated testimony of a nonattesting witness, yet in the instant case, the will having been proven by one of the attesting witnesses, the testimony of J. Alfred Dearing in denial of the charge that he had supplied the first sheet of the will, after it was signed by the testator, should be considered in corroboration of the testimony of such attesting witness, and in determining the genuineness of the will.

The circuit court had before it the will, the same being also filed with the record here, which is written upon two sheets of paper fastened together by two clamps, a small one made of thin brass and the other of steel. The uncontradicted evidence of J. A. Dearing is that the latter was put on by Mr. Weaver in the office of Downing & Weaver at the time the will was sent to them for inspection, that the first sheet was attached to the second when the testator signed the will, and that the will was afterwards returned to the testator and remained in his possession for several weeks.

[3] While it is the better practice where a will is written on more than one sheet of paper to have the testator sign each sheet, yet this is not necessary to the validity of the will. Nor does the law require attesting witnesses to sign each sheet or acquaint themselves with the contents of a will before signing the same.

[4] The testimony of the witness Walter bears the impress of truth, and, when consid-

ered with the other facts shown in evidence, as above stated, and with the record of the probating of the will before the circuit court, upon the testimony of Miss P. M. Dearing, the other subscribing witness, leaves no room for doubt that the paper writing shown the witness is, in all respects, the paper writing signed by the testator and by said Walter and P. M. Dearing as attesting witnesses, and that the proponents, in the absence of evidence to the contrary, were entitled to have the said writing admitted to record as and for the last true will and testament of A. W. Dearing, deceased.

In *Palmer v. Owen*, 229 Ill. 115, 82 N. E. 275, it is said that it is well established that a will may be made up of several sheets of paper, and they need not be fastened together. *Wikoff's Appeals*, 15 Pa. 291, 53 Am. Dec. 597; *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *Ela v. Edwards*, 16 Gray (Mass.) 91; *Harp v. Parr*, 168 Ill. 469, 48 N. E. 113.

In *Young v. Barner*, 27 Grat. (68 Va.) at page 106, this court said:

"If the witnesses to the will are dead, or if there is a failure of recollection on their part, the court will often presume (the will being in other respects regular) that the requirements of the statute have been complied with in the formal execution of the instrument. Such presumptions are absolutely essential to the protection of property and the security of titles. Were it otherwise, the most important and solemn instruments would often fail to take effect by the death, or from the mere failure of attesting witnesses—real or assumed—to recall each and every formality presented for the execution of testamentary papers."

In *Palmer v. Owen*, *supra*, it is also said:

"Counsel for appellants say the sheets upon which the will was written were not all uniform in texture and finish, and from these circumstances, and the further fact that the witnesses to the will were unable to identify every sheet of it as being the same paper the testator signed and they witnessed as his will, it is contended probate should have been denied, because they say the proof does not show that the instrument sought to be probated is the whole instrument acknowledged and executed by the testator as his will. It is true, as counsel contend, that it is possible, where a will is written on separate sheets of paper, loosely fastened together, that one or more sheets might be removed and others substituted, but the possibility of this being done is not sufficient to justify denying the admission of a will to probate. It is not necessary to the validity of a will that it should be all written on one sheet of paper. All that is required is that the whole will shall be in the presence of the witnesses when attested by them. *Harp v. Parr*, 168 Ill. 459 [48 N. E. 113]. Neither is it required that the witnesses to a will should read it or examine it with such care as to be able, upon an application to admit it to probate, to say that all the pages or clauses of the proposed will were the pages and clauses signed by the testator and attested by them."

In Page on Wills, at section 372, the author says:

"In view of the principles already laid down, it is evident that the forgetfulness of the accessible subscribing witness, as to certain necessary facts of execution, does not avoid a prima facie case made out by proof of the genuineness of the signature of the testator and the subscribing witnesses. So, where the subscribing witnesses identify their signatures, but have no recollection of having attested the instrument, or the circumstances of execution, the presumption that it was properly executed will uphold it in the absence of clear and satisfactory proof to the contrary."

In 40 Cyc. 1093, it is said:

"A will need not be written entirely on one sheet of paper, but may be written on several sheets, provided that the sheets are so connected together that they may be identified as parts of the same will. Connection by the meaning and coherence of the subject-matter is sufficient, as physical attachment by mechanical, chemical, or other means, is not required, although sufficient when made."

[6] The proponents having made out a prima facie case, the contestants seek to defeat the will by proving it was procured by fraud and undue influence. They offer no direct evidence, but rely solely upon circumstances, inferences, and presumptions. Among the circumstances on which they rely may be mentioned the following:

(a) That the testator was taken to Huntley and denied visitors.

A. W. Dearing was never married and lived alone in Rappahannock county, and the Huntley home was the only other Dearing home in the county. When he was taken with his final illness, his friend, Joseph Reid, advised him to go to Huntley, and he finally consented and went.

His attending physician, Dr. Kipps, gave instructions to keep him quiet and not allow him to have company and says he is responsible for the action of the nurse in refusing admittance to visitors. While these instructions were in force several of his friends called, but were not permitted to see him. Later, when his condition was improved, several of them were allowed to see him. There was nothing unusual in the course pursued by the attending physician in his case.

(b) That the will was privately executed and witnessed by members of the Huntley household.

A. W. Dearing had accumulated a very large estate, and, like most successful business men, preferred to keep his business, as far as possible, from the public, and executed his will in the presence of a few friends, as most people do. When it was suggested that one Mattox be called to witness his will, he objected, stating that he did not want the impression to get out that he was about to die. It is a tribute to the honesty and in-

tegrity of the members of the household at Huntley, against whom the charge of fraud has been hurled by the contestants, that not one of them will receive, under the terms of the will, one dollar more than their cousins in Georgia. In fact, the heirs of John Dearing residing in Georgia and Tennessee receive exactly one-half of the entire estate, while J. A. Dearing and his two sisters receive less than one-third.

(c) That no lawyer wrote the will, or was consulted about it, and that J. A. Dearing was the draftsman, beneficiary, and executor.

Comparatively few people employ lawyers to write their wills, and it is not surprising that a man of A. W. Dearing's business sagacity and disposition to economize should have pursued this course. He did, however, after it was executed, submit the will to Downing & Weaver for their approval.

John H. Jennings, a disinterested witness, testified that he had known the testator for a long time and had transacted much business with him; that in 1915 he spent the night in his home, and something was said about Downing & Weaver, and the witness said, "I reckon they will settle up your estate after you are gone; they know a good deal about your business," and he said, "No; there is a man who knows a good deal more about it than they do," and he said it was his nephew, and witness asked which one, and he said, "The one that was at Shenandoah Junction, that gentleman over there at your right."

John M. Johnson, who has no interest in this suit, testified that Mr. Dearing was an old friend of his and spent the night at his home about two years before his death, as he often did, and he got to quizzing him as to who would be his administrator, and said to him, "Mr. Downing and Mr. Weaver will administer your estate," and he said, "No; I think there is brains enough in the Dearing family to administer it," and indicated that he preferred Mr. Alfred Dearing, on account of his health, as he was delicate and was competent.

It is true that J. Alfred Dearing is a beneficiary under the will, but if, as charged by the contestants, he has perpetrated a fraud on his testator by supplying the first sheet of paper constituting the will, after it was signed by the testator, it seems strange indeed that he did not make a larger provision for himself and sisters instead of providing that they receive one-tenth each, the same received by each of the other devisees. The contestants admit the genuineness of the second sheet, and it is on this that he is named as executor. It is unbelievable that a man would commit a forgery when no advantage could thereby accrue to him, or his people.

The case of Coffin v. Coffin, 23 N. Y. 9, 80

Am. Dec. 235, is parallel with the case at bar. At page 13 of 23 N. Y., at page 238 of 90 Am. Dec., the court says:

"The circumstance that the nephew who prepared the will was appointed one of the executors and is also a legatee has been urged upon our consideration. Facts of this kind may, and do often, very justly excite the suspicion of courts, when fraud and undue influence are alleged. But it is not a rule or principle in the law of testaments that the draftsman of a will cannot be an executor, or cannot take a benefit under it. As men quite generally appoint some of their kindred to be their executors, the choice in the instance before us does not seem to be an unnatural one. Indeed, there would be some difficulty in suggesting a different choice, in the actual circumstances and relations of the testator. * * * In respect to the legacy or portion given to A. H. Coffin, the draftsman of this will, we find it so moderate in amount, and in such just proportion to the sums given to the nine other persons standing in the same relation to the testator, as to afford no ground for invalidating the instrument or any part of it. As I have observed, there is no rule of law which prevents a person who prepares a will from taking a legacy under it. In the language of Baron Parke, in *Butlin v. Barry*, 1 Curt. Ecc. 637: 'All that can be truly said is that, if a person, whether an attorney or not, prepare a will with a legacy to himself, it is, at most, a suspicious circumstance, of more or less weight according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances; for instance, the quantum of the legacy, the proportion it bears to the property disposed of, and numerous other contingencies.'

The testamentary capacity of the testator being shown by the uncontradicted testimony of a number of witnesses, including three physicians, the inquiry is as to his mental make-up. Was he easily influenced by others? On this point the witnesses, with one accord, testified that he was a man of strong purpose of mind, did his own thinking, and was not easily susceptible to influence from others.

[8] The law as to what constitutes undue influence has been very clearly stated in *Wood v. Wood*, 109 Va. 470, 63 S. E. 994, where Harrison, J., speaking for this court, says:

"Before undue influence can be made the ground for setting aside a deed or will, it must be sufficient to destroy free agency on the part of the grantor or the testator; it must amount to coercion—practically duress. It must be shown to the satisfaction of the court that the party had no free will, but stood in vinculis; and the burden of proof in such a case, as in a case where fraud is charged, is always on him who charges undue influence."

On the question of undue influence, Schouler on Wills (5th Ed.) § 239, reads as follows:

"As to undue influence in the usual and less offensive sense, the burden of proving affirm-

atively that it operated upon the will in question lies still on the party who alleges it, either by direct proof or circumstances inconsistent with fair dealing. * * * 'In order to set aside the will of a person of sound mind,' observes Lord Cranworth, 'it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis.'

"Hence it is that isolated and disconnected circumstances are not permitted to outweigh the usual presumption that a person of intelligence and capacity who executes a will does so without imposition or undue influence. Thus the simple fact that the later will modifies an earlier one in favor of one who drew it up is held insufficient to overcome such a presumption, or generally that the testator's draftsman, or one whose advice was sought by him, was made executor or receives a legacy under the will."

[7] It is accepted as the law in all jurisdictions that forgery, undue influence, and fraud in obtaining the testator's signature to a different instrument from that which he intended to sign are offenses too grave to be lightly inferred from circumstances which are capable of innocent construction.

There was introduced in evidence a paper writing designated as the "pencil will," dated January 14, 1914, written and signed by A. W. Dearing, in pencil, whereby all of his bonds, notes, and evidences of money due him were assigned to A. E. Dearing and J. A. Dearing, trustees, for the purpose of an equal distribution "between my five nieces and my five nephews."

The uncontradicted testimony of J. A. Dearing is to the effect that A. W. Dearing asked him to come to his home, witness thought to look over some bonds. When he arrived A. W. Dearing showed him the pencil written will and said that was the way he wanted his property to go, but he was going to eliminate Alfred E. Dearing as executor, because he had shown himself unfit to handle his own money, and he could not handle his; and testator handed him the pencil will and said, "Put it in type." J. A. Dearing took the pencil will home with him and returned later with the will he had prepared, which is the will dated May 29, 1916, which was signed by the testator. When this will was executed, A. W. Dearing destroyed the pencil paper, handing the fragments to J. A. Dearing rather than throwing them on the floor. The latter advised him not to destroy the pencil paper, as it was his own handwriting and showed his desire in the distribution of his estate. J. A. Dearing kept the fragments, and later pasted them together on another piece of paper. The witness is under the impression that the pencil paper included the real estate, and from an inspection of this paper it appears there is ample vacant space caused by the missing pieces of paper to in-

clude the word "lands." This paper shows that it was A. W. Dearing's intention to give all his property to his five nieces and five nephews. And Mrs. Eva Calloway, daughter of John Dearing, deceased, of Athens, Ga., testified that she visited her uncle, A. W. Dearing, in 1908, and he told her that W. A. Dearing, of Amherst, the father of the contestants, was the only one of his relatives who had ever "used profanity towards him," adding that his children would never receive any of his property. Mrs. Calloway also testified that she visited A. W. Dearing about one month before his death, and says:

"He told me he had spent considerable thought upon the disposition of his land; that he at first considered leaving the land to his five nieces and nephews who live in Virginia, and making up—of course, I don't remember his exact words—making up the difference in the value of the land to the Georgia Dearings in money, or giving the value of the land to the Georgia Dearings in money; then he said, 'But I finally decided to divide the land equally between my ten nieces and nephews, and then you can do as you please with it.'"

She also testified that he said to her:

"I have divided my property equally among my ten nieces and nephews; when you go home, tell your brothers and sisters what I have done."

[8] The contestants also rely on certain declarations of the testator made before the date of the will, and many of them several years before, to the effect that the law made a good will or a better will than he could make. Such evidence can have little, if any, weight in the determination of the matters at issue here, as the contestants admit that a will was made, but claim that the first sheet of the will is a forgery.

In the case of *Samuel v. Hunter's Ex'r*, in which the declarations were made after the will was executed, this court, speaking through Kelly, P., said:

"The authorities are not in accord upon the subject, but we are of opinion that the rule supported by the better reason and authority is that such declarations, standing alone, are not admissible as direct evidence to prove or disprove the genuineness of the will, but that in all cases where its genuineness has been assailed by other proper evidence the declarations are admissible as circumstances, either to strengthen or to weaken the assault, according to their inconsistency or their harmony with the existence or terms of the will. This is the settled rule in England, and it is well supported by authority in this country." *Samuel v. Hunter's Ex'r*, 122 Va. 636, 95 S. E. 399.

J. Alfred Dearing, the executor, was evidently held in high regard by his uncle, the testator, as the latter frequently sent for him to come to his home and list his notes and bonds, and the uncle's books showed

numerous entries in Alfred's handwriting. The selection of this nephew to keep his books and act as executor of his will was but natural, as J. Alfred Dearing was a man of education, a graduate of the V. M. I., at the head of his class, and winner of the Jackson-Hope medal. To his credit, the contestants have failed to produce any evidence which reflects upon his character or his integrity.

A careful examination of the evidence reveals nothing which would warrant a jury in finding that the paper writing bearing date on May 29, 1916, shown in evidence, is not the true last will and testament of A. W. Dearing, deceased.

The judgment of the circuit court sustaining the demurrer to the evidence and its decree establishing said will are plainly right and will be affirmed.

Affirmed.

(122 Va. 703)

MELTON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Criminal law \S 889—Verdict correcting mistake in penalty held invalid as rendered after discharge of jury.

Where the court told the jury after a verdict of guilty of rape that they were discharged, and the jurors thereupon returned to the jury room accompanied by the sheriff to claim attendance fees, but were thereafter recalled by the court upon discovery that the jury had made a mistake in fixing the penalty under Code 1919, \S 4414, and again retired and returned another verdict, such other verdict could not support a conviction, having been rendered after discharge.

2. Criminal law \S 889—Inadvertent announcement of discharge of jury may be recalled only if jury has not left presence of court.

So long as the whole jury are in the actual and visible presence of the court, and under its control, an inadvertent announcement of their discharge may be recalled as a matter still in the breast of the court, but, after they have left the court's presence, their functions as jurors have ended, and they cannot, either with or without the consent of the court, amend or alter their verdict.

Prentiss, J., dissenting.

Error to Circuit Court, Campbell County
Ernest Melton was convicted of rape, and he brings error. Reversed and remanded.

Duncan Drysdale and L. Bradford Waters, both of Lynchburg, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

BURKS, J. [1] The accused (plaintiff in error) was found guilty of rape, and sentenced to confinement in the penitentiary for five years, the minimum time prescribed by the statute. The accused insists that the judgment of conviction is erroneous because the jury were discharged before the verdict was rendered upon which the judgment was entered. The facts upon this question are set forth in bill of exception No. 2 as follows:

"Be it remembered that during the trial of this cause the jury after argument of counsel came into court from the jury room with the following verdict:

"We, the jury, find the prisoner guilty as charged in the indictment, and ascertain his punishment at three years in the penitentiary—the attorney for the commonwealth not being present at that time. Whereupon the judge said to the jury, 'Gentlemen, you are discharged,' and they, without leaving the courthouse, returned to the jury room accompanied by the sheriff for the purpose of claiming their attendance fees. Almost immediately the judge, having referred to the statute (section 4414), remarked to the attorney for the commonwealth, who had come in court in the meanwhile, that the jury had made a mistake in fixing the penalty; that if they found the accused guilty of rape the minimum punishment was five years confinement in the penitentiary—three years being the minimum punishment for attempt to rape—and at once directed the jury, which had not separated or left the courtroom, except to retire to the jury room as above detailed, to return into court, and, explaining the statute to them, both as to rape and as to an attempt to rape, directed them to retire to their room and render such verdict as they thought proper under the law and the evidence. Whereupon the jury retired, and after some time brought in their verdict in the following words and figures:

"We, the jury, find the prisoner guilty of rape as charged in the within indictment, and fix his punishment at five years' imprisonment in the state penitentiary. [Signed] J. R. Lawson"—to which action of the court in bringing the jury from their room back into the court room, and permitting them to again consider the case and bring in the verdict aforesaid, the accused by counsel excepted, which exception was overruled."

In *Mills v. Commonwealth*, 7 Leigh (34 Va.) 751, it is said:

"On the trial upon the plea of not guilty, the jury brought in a verdict in these words, 'We of the jury find the prisoner guilty of grand larceny'—which being openly read by the clerk, the court said to the jury, 'Gentlemen, you are discharged;' but it being at the same moment suggested to the court that the jury had not ascertained by their verdict any term of imprisonment in the public jail and penitentiary house, they were called back instantly, and before they had left the courthouse, except one of them, who had gone perhaps the distance of forty or fifty yards from the courthouse, and was accidentally accompanied by a deputy sheriff. The jury being so called back, were again sent out to ascertain the term of

imprisonment, which they accordingly ascertained to be two years, the juror who had left the courthouse being with them. The prisoner thereupon moved the court to set aside the verdict and discharge him from further prosecution; but the court overruled the motion, and pronounced judgment upon the verdict; and the prisoner filed a bill of exceptions, setting forth the facts above stated. On the petition of the prisoner, this court awarded a writ of error to the judgment."

The judgment of the court was:

"Judgment reversed, verdict set aside, and cause remanded to the circuit superior court, for a new trial to be had upon the indictment."

This holding is by no means peculiar to this state. In *Sargent v. State* (1842) 11 Ohio, 472, the judgment of the trial court permitting a jury to be recalled and amend their verdict after they had been discharged was reversed on appeal. In the course of the opinion it is said:

"After the verdict has been received and the jury discharged * * * the control of the jury, and of the court, over such verdict, is at an end. The court cannot alter it, nor can the jury be recalled to alter or amend it. As well might any other twelve men be called to alter it, as the men who were jurors. The office of a juror is discharged upon the acceptance of his verdict by the court. * * *

"Although in modern times the ancient strictness has yielded to a more enlightened reason, yet no rule, tending to insure the impartial administration of justice, and the purity of jurors, has in the slightest degree been abandoned or impaired. * * * But in no case can it be permitted to recall a jury, to alter or amend their verdict after it has been received and the jury discharged. This would jeopardize the jealous guards with which the law has surrounded jurors, to insure the pure administration of justice, and to protect the citizen."

In *People v. Lee Yune Chong* (1892) 94 Cal. 379, 29 Pac. 776, the jury, after rendering their verdict, were discharged for the term and left the courtroom. Most of them went downstairs to the clerk's office to get warrants for their pay as jurors. Several, by mistake, went to the sheriff's office on the floor below. Some of them had conversations about the case with outsiders. The first verdict was:

"We, the jury, find the defendant guilty, and fix the penalty at imprisonment for life."

This was deemed informal because it did not find the degree of the crime, and the jury was recalled and informed that they must find the degree of the crime, whereupon they retired to their room and subsequently brought in their verdict:

"We, the jury, find the defendant guilty of murder in the first degree, and fix the penalty imprisonment for life."

"The exact time which elapsed from the discharge of the jury until their return does not

appear, one of the witnesses putting it from five to ten minutes; but it is clear that during that time they were beyond the control of the court, had thrown off their characters as jurors, and had mingled with their fellow citizens, free from any official obligation."

The judgment of the trial court was reversed, and a new trial ordered. The court distinguishes the cases from *People v. Jenkins*, 56 Cal. 7, where the jury had not dispersed, and, while admitting that questions difficult of solution might arise under peculiar circumstances, and referring to the right of the jury to correct formal defects in their verdict, quotes from the last-mentioned case the following language:

"For that purpose the court can, at any time while the jury are before it, and under its control, see that it is amended in form so as to meet the requirements of the law."

While the jury are in the actual presence of the court, and under its control, it can see, without resort to testimony, that the fountain of justice has been kept pure, and that no harm could have come to the accused. Beyond this we are unwilling to go.

In keeping with this doctrine is *Levells v. State* (1877) 82 Ark. 585, where the verdict of the jury and the action of the court thereon appear from the following extract from the opinion:

"We, the jury, find the defendant guilty of murder in the first degree. S. Wiggins, Foreman." Which was read by the clerk, and the jury, upon the request of the defendant, was polled, and each juror answered that that was his verdict. The judge then said to the jury: 'Gentlemen, you are discharged; those of you who are of the regular panel, until this afternoon; those specially summoned in this case, are discharged finally,' when the jurors arose from their seats in the jury box, and began to pass out from the box, three or four at the further end of the box had moved eight or ten feet from their seats, the others still standing about where they arose, and all in full view of the judge and under his control, when he called to them, saying: 'One moment, gentlemen, take your seats in the jury box again,' and they, without having mingled with the bystanders, immediately returned to their seats, and the judge addressing them, said 'This verdict may be defective; there are two counts in the indictment, you will retire to the jury room and so amend your verdict as to show upon which of the counts you find.'

"The jury again retired and afterwards returned the verdict as follows: 'We, the jury, find the defendant guilty of murder in the first degree as charged in the first count in the indictment. S. Wiggins, Foreman,' and they were again polled at the request of the defendant, and each answered that that was his verdict.

"The defendant objected to the jury being sent back, and to any change in the verdict originally returned.

"The authorities say, that after the verdict has been received and the jury discharged, their

control over the verdict is at an end, and they cannot be recalled to alter or amend it. *Sargent v. The State of Ohio*, 11 Ohio, 472; *Mills v. Commonwealth*, 7 Leigh [34 Va.] 751; *Settle v. Allison*, 8 Ga. 208.

"But what is a discharge? Clearly it would seem to us that, if they had not separated, and as a body are still in the presence of the court, the order discharging is in fieri, and yet in the breast of the court, and may be recalled. To correct a mistake when no prejudice can result from it, is not only proper, but the duty of the court. *Brister v. The State*, 26 Ala. 132."

In *Cook v. State* (1877) 60 Ala. 39, 31 Am. Rep. 81, the jury in a felony case, rendered their verdict in the absence of the prisoner and were discharged. Two of them had left the courtroom, all of the others remaining therein, when the court discovered that the defendant was not present and within five minutes had that jury called together again. The two jurors who had left the courtroom were sworn and stated on oath that they had had no conversation with any one in regard to the case. The defendant was then brought into court, and the court handed the indictment to the jury and asked them if that was their verdict and they replied that it was. Counsel for the defendant were in court when the first verdict was brought in, but did not object to its being received until after the jury was first discharged. The judgment of the trial court was reversed on appeal, the court saying, amongst other things:

"It seems to have been supposed, that if there was error in receiving the verdict under the circumstances, it was not beyond correction; and therefore the persons of whom the jury was composed, were reassembled about five minutes after they had been discharged; and two of them having been out of the courtroom, they were sworn, and under oath declared that they had not conversed with any one in regard to the case. But, if the jury could then be reconstituted, to render a verdict which was the result of former deliberations, why should not the other ten jurors have been also examined under oath, as their companions were? They also could have communicated about the case with persons in the courthouse, during the same five minutes after they were discharged; and it was quite as necessary that they should have been purged on this subject, as that the two should be. We think there was no virtue in such an interrogation of any of them. * * *

"We are of opinion that our rulings on this subject should not be extended further in that direction. The jury, in the present case, were discharged, and had dispersed among the audience in the courthouse and persons outside. It would be a dangerous precedent, to hold that, after this, the persons who composed that jury could be reassembled as such to render a verdict in a case of which they had been thus discharged."

See, also, *State v. Dawkins*, 82 S. C. 17, 10 S. E. 772; *Ellis v. State*, 27 Tex. App. 190, 11 S. W. 111; note, 23 L. R. A. 733-734.

We do not find anything to the contrary in the cases cited for the commonwealth.

In *Cunningham v. State*, 14 Ala. App. 1, 69 South. 982, cited for the commonwealth, although the jury was recalled after discharge the error sought to be corrected was "immaterial, and could have in no way affected the rights of the defendant," and, further:

"It appears that the jury, although discharged, was called back by the court for the purpose of completing the verdict before leaving the courtroom."

In *Taggart v. Commonwealth*, 104 Ky. 305, 46 S. W. 675:

"When the jury first returned their verdict, it read as follows: 'We, the jury, find Dan Taggart guilty of voluntary manslaughter, and fix his punishment by confinement for seven years in the punishment. T. W. Hardy, Foreman.' The clerk read the word 'punishment' at the end of the verdict as if written 'penitentiary,' and the jury was discharged, taking their seats in the courtroom, except one, who stepped into a water-closet attached to the courtroom. The clerk then called the court's attention to the mistake, and the members of the jury were called up, and the word 'punishment' was changed to what the foreman said he intended it to be, namely, the word 'penitentiary.' The verdict was then reread, and the jury polled. We perceive no error in this. The context clearly showed that by the word 'punishment' was meant the word 'penitentiary,' and the immediate correction could not in any conceivable way have prejudiced the rights of the appellant. The instruction clearly embraced the law of the case. The judgment is affirmed."

In *Denham v. Commonwealth*, 119 Ky. 508, 84 S. W. 538, it was insisted that the jury had been discharged and were thereafter recalled to amend their verdict. The court found, as a matter of fact, that the jury never had been discharged, and that the amendment sought to be made was immaterial, and said in this connection:

"But if the jury had been discharged as charged by counsel for appellant, even then as they had not left the presence of the court before being recalled and directed to retire to their room for the purpose of returning the second verdict, no injury could have resulted to appellant's rights."

[2] When the jury left the courtroom and went into the jury room they were no longer subject to the usual charge to juries who are

allowed to separate pending the trial, that they should not converse with others about the case nor permit others to converse with them about it, nor was the sheriff in charge of them or under any obligation not to converse with them on the subject. So far as this subject is concerned, the relation of the sheriff and the jury to each other was that of third persons. Furthermore, it does not appear from the record who else was in the jury room, or what, if any, conversation the jury had with the sheriff or any other person on the subject of the trial. The record is simply silent on the subject. But this is not material. It is sufficient that the jury had left the presence of the court, and no evidence of what transpired thereafter was admissible. So long as the whole jury are in the actual and visible presence of the court, and under its control, an inadvertent announcement of their discharge may be recalled as a matter still in the breast of the court, but not thereafter. When the court announces their discharge, and they leave the presence of the court, their functions as jurors have ended, and neither with nor without the consent of the court can they amend or alter their verdict. The sanctity of jury trials cannot be thus subjected to the hazard of suspicion.

This conclusion renders it unnecessary to pass upon the assignment of error that the verdict is contrary to the law and the evidence. The judgment of the trial court will be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed.

This case was argued before Judge WEST took his seat on the court.

PRENTIS, J. I dissent from the conclusion of the majority of the court because I think, under the circumstances of this case, that the correction of the verdict was merely the correction of a clerical error of the jury, made inadvertently, in violation of the instruction of the court and the statute which in terms fixes the minimum punishment for the crime of which, before their discharge, the prisoner had been found guilty, and that the cases of *Cunningham v. State*, 14 Ala. App. 1, 69 South. 982, and *Taggart v. Commonwealth*, 104 Ky. 305, 46 S. W. 674, cited in the majority opinion, state the correct rule which should be applied to this case.

(182 Va. 281)

MOTLEY v. H. VICELLO & BRO. et al.(Supreme Court of Appeals of Virginia.
March 16, 1922.)**1. Courts ⇐99(1)—Decrees establishing lien held not res adjudicata of validity thereof on petition for rehearing by other lien creditors.**

A decree annulling a deed of trust establishing a lien on the land and referring the cause to a commissioner to report liens thereon, with their priorities, etc., and a decree confirming the report and directing the sale of the land, were not res adjudicata of the validity of such lien as against other lien creditors on a petition for rehearing, on the ground that the lis pendens memorandum was invalid on its face, whether or not petitioners were parties to the proceeding when the decrees were entered, though there was no affidavit in support of the petition, and one of the decrees confirmed a commissioner's report, to which there was no exception at the time; the error being apparent from the record and the decrees merely interlocutory.

2. Lis pendens ⇐17—Description of land in lis pendens memorandum held insufficient.

While the maxim that that is certain which can be made certain is applicable to a description of land in a lis pendens, as well as a pleading or deed, a creditor's lien under Code 1904, § 2460, on property conveyed by a void deed of trust executed by the debtor, was invalid as against other lien creditors, where lis pendens memorandum misstated the surname of the grantor in the deed and described the land only by reference to that "mentioned" in the suit, the petition in which was not filed until afterward, and contained the same defects; the sufficiency of the description in the memorandum being tested as of the time it was left with the clerk to be recorded, from which time the lien dates.

3. Fraudulent conveyances ⇐324—Creditor's lien, though invalid as against other lien creditors, may be enforced against debtor from surplus from sale of land after satisfaction of other liens.

A creditor, whose lien on land conveyed to another by a void deed of trust executed by his debtor is invalid as against other lien creditors by reason of the insufficiency of the description of the land in his lis pendens memorandum, may nevertheless enforce his lien against the landowner from the surplus of the proceeds of the sale of the land after satisfaction of the other creditors' liens and payment of costs of suit.

Appeal from Circuit Court, Pittsylvania County.

Suit by H. Vicello & Bro. and others against J. J. Motley. Decree for plaintiffs, and defendant appeals. Reversed in part and affirmed in part.

This cause involves a controversy between the appellant, Motley, claiming to be a lien creditor, and Vicello & Bro. and others, ap-

pellees, who are lien creditors of one Mrs. Minnie L. Reynolds. The controversy is over the questions of whether the appellant has ever acquired any lien upon a certain tract of land belonging to Mrs. Reynolds, and, if so, whether such lien has priority over the undisputed liens of the appellees upon such land.

The original suit was instituted on February 15, 1916, by certain parties composing a partnership of the firm name and style of Barker & Terry, creditors of the said Mrs. Reynolds, under section 2460 of the Code of 1887 as amended (Code 1904, § 2460), the object of which was to set aside a certain alleged fraudulent deed of trust theretofore executed by said Mrs. Reynolds and her husband, which conveyed the said land in trust to secure a certain debt of \$2,000, as stated in the deed of trust, to their son, O. H. Reynolds. The said Mrs. Reynolds and others were made parties to such suit, and Mrs. Reynolds was duly served with process, but has never made any appearance or defense in the cause to the original bill or to any other proceedings therein.

On the same day that the original suit was instituted, February 15, 1916, the plaintiffs therein, Barker & Terry, by their attorney, executed, acknowledged for recordation, and recorded in the clerk's office a lis pendens, setting forth the title of the cause and the other matters concerning the same required by the said statute. The bill in this suit, however, was not filed until March 6, 1916.

On February 24, 1916, the appellant, Motley, filed in the clerk's office his petition, under the statute aforesaid, which petition is in the following words and figures:

"To His Honor, E. J. Harvey, Judge of Pittsylvania Circuit Court:

"The petition of J. J. Motley respectfully shows unto your honor that there is pending in your honor's court a certain suit under style of Barker & Terry against Minnie L. Edwards, J. H. Reynolds, Otis H. Reynolds, and R. C. Blackford, trustee, which has for its object the setting aside and vacating a deed dated — day of —, 1916, from Minnie L. Edwards & J. H. Edwards, conveying to R. C. Blackford, trustee, a tract of 40 acres of land, in Pittsylvania county, Va., to secure to O. H. Reynolds the sum of \$2,000.00, as will be seen by the papers in said cause; the basis of said suit to vacate said deed is fraud and intention to defraud creditors of said grantors. Petitioner further shows that the said Minnie L. & J. H. Reynolds owe him \$750.00, by notes of several years' standing, as will appear from said notes herewith filed, and he asks to be permitted to file this petition in said suit, to participate therein, and to have said deed set aside as to his debts; also, may the said Minnie L. Reynolds, J. H. Reynolds, O. H. Reynolds, and R. C. Blackford, trustee, be required to answer this petition, but not on oath, may said deed

be set aside, and may your petitioner's debts be decreed to be paid, etc. Grant process," etc.

On the same day, February 24, 1916, Motley, by his attorney, executed the following memorandum, not acknowledged for record, and left it with the clerk to be recorded as a *lis pendens* under said statute, and the clerk, at 12:15 p. m. on that day, spread the same on record, as per the clerk's certificate at the foot of it.

"Barker & Terry v. Minnie L. Reynolds, etc.
"Circuit Court of Pittsylvania County.

"*Lis Pendens*.

"J. J. Motley has filed a petition in this suit which is pending in Pittsylvania Circuit court, under the style of Barker & Terry v. Minnie L. Reynolds, etc., to be made a party to said suit and to unite in setting aside the deed mentioned in said suit from Minnie L. Edwards, etc., to R. C. Blackford, trustee, securing to O. H. Reynolds \$2,000.00 and to subject the 40 acres therein mentioned to payment of \$750.00 due petitioner.
J. J. Motley,

"By James L. Tredway, His Atty.

"Virginia: In the clerk's office of the circuit court for the county of Pittsylvania, at the courthouse thereof, on the 24th day of February, 1916, at 12:15 o'clock p. m., the foregoing writing was admitted to record.

"Teste: S. S. Hurt, Clerk."

Some time during this same day, whether before or after 12:15 p. m. does not clearly appear from the record, the testimony being in conflict on that point, the alleged fraudulent deed of trust above mentioned in favor of O. H. Reynolds was marked satisfied, and was duly released of record, by entry on the margin of the deed book in which it was recorded, etc.

On March 28, 1916, at term, the court below entered a decree which recited, among other things, that the cause came on that day to be heard "on * * * the petition of J. J. Motley, filed in the clerk's office on the 24th day of February, 1916, according to law in such cases provided, taken also for confessed as to all the defendants named therein, they still failing to appear, plead, answer, or demur, * * * the *lis pendens* of the petitioner, J. J. Motley, filed in said clerk's office according to law on the 24th day of February, 1916," and thereupon set aside and annulled the said deed of trust and the debt thereby sought to be secured in favor of O. H. Reynolds as fraudulent, and, among other things decreed "that the debt of J. J. Motley, petitioner in this cause, against the defendants Minnie L. Reynolds and J. H. Reynolds for \$750, with interest from 24th February, 1916, be, and the same is hereby, established as a lien on said 40-acre tract of land, as of the 24th day of February, 1916, the time of the filing of the *lis pendens* of said petitioner according to law; * * * and the decree referred the cause

to one of the commissioners in chancery of the court to take, state, and report accounts of the real estate owned by the said Mrs. Reynolds, the liens thereon, with their priorities, etc.

On June 28, 1916, one of the commissioners in chancery of the court filed his report, under said decree, of the said 40-acre tract of land, as owned by Mrs. Reynolds, and of liens thereon amounting to \$3,831.41 as of that date, in nine different classes as to priorities, embracing the debts of Mrs. Reynolds to the appellant and appellees, and a number of her other debts to other parties, placing the debt to appellant, however, in the third class, and the debts to appellees in subsequent classes, thus giving the debt to appellant priority of lien over those to appellees.

The liens of some of the debts to appellees were obtained by means of a deed of trust duly executed by Mrs. Reynolds and husband, conveying the said land, dated March 1, 1916, duly recorded on March 2, 1916; and the liens of the other debts of appellees consist of those to Gammon & Co. and M. R. Reynolds, which were acquired by judgments against Mrs. Reynolds, obtained and docketed, respectively, on March 2 and 6, 1916. All of such liens appeared of record in the clerk's office at the time said commissioner's report was stated, and were reported by the commissioner solely from the evidence with respect to them disclosed by such record. None of appellees were then parties of said cause, and none of them appeared before the commissioner, or requested him to report their debts.

Concerning the parties to whom the commissioner gave notice of the taking of the accounts, the nonappearance of any one before him, and the evidence on which he reported all of the debts stated in his report, the commissioner in his report says this:

"* * * He issued notice to all parties concerned of the time and place at which said accounts would be taken and stated * * * which notice was duly executed on said parties, as will be seen from the same, which are herewith returned, that * * * none of the parties in interest appeared before the said commissioner in obedience to said notice, for which reason the accounts were kept open from day to day until the date of this report, when, from such evidence as was disclosed by the records of the clerk's office * * * the foregoing accounts were made up and completed."

The commissioner's notice does not appear in the record before the appellate court.

On July 19, 1916, at term, the court below entered a decree, reciting that the "cause came on this day to be heard on the papers formerly read, the report of [the commissioner in chancery aforesaid] to which there is no exception," and the decree confirmed the report, directed the sale of the said land, "unless the liens herein are paid in 10 days,"

appointed special commissioners to make the sale, fixed the terms of sale, etc.

On March 28, 1917, the appellees filed their petition in the cause, at term, in which they asserted their aforesaid debts as liens upon the said land; alleged that "no process was ever issued or served on [the] defendants" named in the aforesaid petition of appellant, Motley, to wit, the said Mrs. Reynolds and the other defendants named in such petition; that appellees had never been made parties to the cause up to that time; and took the positions that the aforesaid decrees of March 28, 1916, and July 19, 1916, were absolutely void, in so far as they undertook to establish the debt of appellant, Motley, as a lien upon the said land, because no process had ever been issued upon the aforesaid petition of Motley against the owner of the land, Mrs. Reynolds, or served upon her, and hence the court had no jurisdiction to enter such decrees so establishing such debt; and also that as the liens of appellees were acquired, recorded, and docketed as aforesaid, all prior to March 6, 1916, except that of M. R. Reynolds, which was acquired and docketed on March 6, 1916, as aforesaid, and thus became fixed liens of record upon said land on or before the last-named date, the lien of appellant, if any he has, was invalid as against appellees, as lien creditors, for the reason that no lis pendens was left by appellant with the clerk setting out the matters required by section 2460 of the Code of 1887 as amended (section 2460, Code 1904), and also for the reason that the memorandum was not acknowledged for record so as to have been recorded in contemplation of law. The petition of appellees further alleged that appellees "had no notice or knowledge" of the said commissioner's report or its contents, or of the decrees last named, "until long after the decree of July 19, 1916, was entered," and prays that:

"So much of said decrees of the March term, 1916, * * * as establishes said claim of said Motley as a lien upon said 40 acres of land, and rendering him a judgment for \$750, be corrected, set aside, and annulled, and that so much of the decree of July term, 1916, * * * as confirms the report of [the said commissioner in chancery] in toto be corrected and modified by eliminating so much of said report as reports the aforesaid claim of said Motley as a judgment and a lien upon said 40 acres of land"

—and Motley is made party defendant to such petition.

It appears from a decree entered in the cause on the last-named date, March 28, 1917, that process was directed to be issued on the petition of appellees against the appellant, and that the special commissioner that day reported a sale of the land on the terms of all cash, which had been paid, which report was confirmed by said decree, and that the first and second class liens aforesaid were directed to be paid out of the proceeds

of sale, and the residue of the money was directed to be deposited in bank subject to the further order of court. What amount the land sold for does not appear from this decree, or otherwise in the record. The special commissioner's report is not embraced in the record.

The appellant, Motley, on March 29, 1918, demurred to the petition of appellees on the single ground that the matters and things therein set forth were res adjudicata; and at the same time the appellant filed his answer to such petition. In this answer the appellant does not deny the allegation of the petition of appellees that process never issued against nor was ever served upon Mrs. Reynolds, party defendant to the aforesaid petition of appellant. The answer does allege, however, that appellees "were parties to said suit, and had knowledge of the pendency thereof, and filed their claims before" the said commissioner in chancery, and thus "had their day in court."

The only testimony which appears in the record consists of certain depositions of witnesses on the subject of whether the memorandum relied on by appellant as a lis pendens was left with the clerk for record before or after the alleged fraudulent deed was released of record. There is no certificate that this and the portions of the record above referred to constituted all the evidence in the case.

On August 28, 1918, the decree appealed from was entered. That decree provides that—

"So much of the said decree of the March term, 1916, * * * as takes for confessed the petition of J. J. Motley * * * filed in the clerk's office * * * on the 24th day of February, 1916, be and the same is hereby set aside, vacated, and annulled; it appearing that no process to answer the said petition * * * was ever served on the defendants Minnie L. Reynolds and J. H. Reynolds."

And such decree further provides that so much of the decree of the March term, 1916, "as establishes as a lien on the 40 acres of land owned by Minnie L. Reynolds the debt of J. J. Motley, * * * set forth in his petition, be vacated, set aside, and annulled, and the said decree be corrected to that extent, the judge of this court being of opinion that the so-called lis pendens of said J. J. Motley was never perfected, acknowledged, or recorded, as the law requires, and doth decide the same to be defective, invalid, and of no effect as a lien upon the real estate of the defendant Minnie L. Reynolds."

The decree appealed from further provides that the decree of the July term, 1916, is found to be erroneous, and "is corrected and annulled so far as it confirms said report in respect to treating the said debt of * * * J. J. Motley as a judgment or lien, * * * the judge of this court being of opinion and

doth decide that there has been no valid judgment lien or decree in favor of said Motley as against said Minnie L. Reynolds, * * * the said commissioner in chancery is directed to remodel and restate his report in accordance with such decree; and the petition of appellant is dismissed.

S. A. Anderson, of Richmond, and Jas. L. Tredway, of Chatham, for plaintiff in error.

Geo. T. Rison, and William Smith, both of Chatham, for defendants in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The correctness of the decree of August 28, 1918, under review, in so far as it holds the alleged lien of the appellant to be invalid as against appellees, constituting other lien creditors of the debtor, depends, primarily, upon whether the memorandum relied on by appellant is valid as a *lis pendens* under the provisions of section 2460 of the Code of 1887 as amended by Acts of 1893-4, p. 614. That statute was in force when the proceeding under review occurred. It is somewhat different from the present statute law on the subject. The statute first above referred to appears in the Code of 1904, § 2460, and, so far as material, is as follows:

"A creditor before obtaining a judgment or decree for his claim may, * * * institute any suit which he might institute after obtaining such judgment or decree to avoid a gift, conveyance * * * or charge upon the estate of his debtor declared void by either of the two preceding sections, and he may in such suit have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover. A creditor availing himself of this section shall have a lien from the time of bringing his suit on all the estate, real and personal, hereinbefore mentioned, and a petitioning creditor shall be entitled to a like lien from the time of filing his petition in the court or in the clerk's office of the court in which the suit is brought; but such lien shall not be valid against creditors * * * until and except from the time a memorandum setting forth the title of the cause, the general object thereof, the court wherein it is pending, the amount of the claim asserted by the complainant, a description of the property, and the name of the person whose estate is intended to be affected thereby shall be left with the clerk of the court of the county or corporation wherein the property is, who shall forthwith record the said memorandum in the Deed Book and index the same in the name of the person aforesaid. * * *

With this preface, we will proceed to deal with the questions presented by the assignments of error in their order as stated below.

[1] 1. Was the validity of the alleged lien of the appellant, Motley, a matter which was so determined by the decrees of March, 1916, and July, 1916, that it falls within the doc-

trine of *res adjudicata*, so that the court could not afterwards consider the question of the invalidity of the lien as against other lien creditors, to wit, the appellees, upon the filing of the petition by the latter on March 28, 1917, setting up alleged error of law in the holding of such decrees apparent from the record, in that such decrees undertook to establish the validity of such lien as against the appellees upon a so-called *lis pendens*, which, as it is alleged in substance in such petition, is invalid on its face in certain particulars?

This question must be answered in the negative.

In our view of the case it is entirely unnecessary for us to deal here with the argument presented for the appellant on the subject of how far the decrees of March and July, 1916, as entered, may have bound the appellees as quasi, although not formal, parties to the cause at the time the decree of July, 1916, was entered. Even if the appellees had been properly made parties and had been before the court when the decrees of March and July, 1916, were entered, neither of those decrees was a final decree. Hence the court had jurisdiction on a rehearing to correct the errors in them, as was done by the decree appealed from. Touching an error of law apparent from the record, the petition did not require affidavit in support thereof in order to be sufficient as a petition for rehearing. On the other hand, if it were considered that the appellees were not parties before the court in any sense at the time the decrees of March and July, 1916, were entered, still they had a right to file their petition for a rehearing of these interlocutory decrees. *Dally's Ex'r v. Warren*, 80 Va. 512. See, also, *Gills v. Gills*, 126 Va. 526, 101 S. E. 900. The circumstance that one of the decrees confirmed a commissioners' report, to which there was no exception at the time, would be, in such case, immaterial, the decree being interlocutory. *Id.*

As we view the case, it will be necessary for us to further consider only the questions raised by the assignments of errors which are stated below.

[2] 2. Was the memorandum relied on by appellant such a memorandum as is required by section 2460 aforesaid (Code 1904, § 2460), so as to render the lien claimed by appellant under that statute valid as against the liens of the appellees, if the memorandum were considered to have been properly recorded?

This question must be answered in the negative.

Without reference to any other provision of it, we deem it sufficient to say that the memorandum in question is fatally defective, in that it failed to comply with the statutory requirement with respect to setting forth the description of the property intended to be affected by the petition of appellant.

Since, where the other requisites of the

statute are complied with as against other lien creditors, the lien, under the terms of the statute in question, dates from the time the memorandum is left with the clerk, the sufficiency of the description of the property contained in the memorandum must be tested as of the time the memorandum was left with the clerk to be recorded. Further:

The identity of the deed sought to be set aside by the petition, and what deed and what 40 acres of land were "mentioned" in the suit in which the petition was filed, at the time the memorandum was left with the clerk, are essential elements of the description of the property contained in the memorandum in question, as the memorandum relies upon its references to these matters to describe the property. The description of the property is not set forth in the memorandum itself, except by such references. What is expressly said in the memorandum itself of the deed misdescribes the deed in the important particular of saying that the grantor therein was named Minnie L. Edwards, whereas the correct name was Minnie L. Reynolds. It is doubtless true, however, that the legal maxim that that is certain which can be made certain, which is referred to in the cases of *Norris v. Ile*, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233, as applicable to the description of property in a pleading, and *Harper v. Wallerstein*, 122 Va. 274, 94 S. E. 781, L. R. A. 1918C, 517, as applicable to such description in a deed, is also applicable to such description in a lis pendens. But when we follow up the references aforesaid in the memorandum in question we find nothing to aid the description. The bill in the principal suit was not filed until March 6th, long after the memorandum was left with the clerk. Therefore, when the memorandum was left with the clerk, which is the time as of which it speaks and makes reference to the principal suit for identification of "the deed mentioned in said suit," and of the "40 acres therein mentioned," nothing was "mentioned" in the suit on either of those subjects or on any other subject. The bill in the suit was not filed until some days after the memorandum was left with the clerk.

As said in *Lile's Notes on Eq. Pleading* (3), p. 231:

"Description of res in Pleading.—The res affected must be so described in the pleadings as to be capable of identification by the purchaser, had he known of and examined the record of the suit. *Va. Coal & Iron Co. v. Roberts*, 103 Va. 661."

As held in *Va. Iron, Coal & Coke Co. v. Roberts*, 103 Va. 661, 49 S. E. 984, supra:

"A purchaser having actual or constructive notice of a pending suit can only be held chargeable with knowledge of the facts of which the record in the suit, as it existed at the time of his purchase, would have informed him. He

cannot be charged with knowledge of facts afterwards brought into the case."

If the petition of the appellant mentioned in the memorandum could be referred to in aid of the description of the property, it would furnish no such aid. The petition contains precisely the same defects as the memorandum.

Hence the memorandum, containing in itself a material misdescription, and absolutely unaided in its description of the property by the references therein, does not comply with the statutory requirements aforesaid.

The decree of August 28, 1918, appealed from was therefore correct in holding that the said memorandum was defective in its terms, and therefore invalid.

This being our view of the case, it is unnecessary for us to pass upon the holding in the decree appealed from that the memorandum was invalid because not acknowledged for record, and hence was not recorded as required by law; and we express no opinion on that subject. And, for the same reason, it is unnecessary for us to pass upon the question of whether the decrees of March and July, 1916, were or were not absolutely void for lack of jurisdiction of the court over the necessary parties.

[3] 3. It is stated in the petition of appellant for the appeal that, when all the liens, including the claims of appellees, which are reported and established in the cause against the land, other than the claim of appellant, and all costs of suit, are paid out of the proceeds of the sale of the land, there will still be left of such proceeds some money applicable to the claim of appellant; and the position is taken that, as against this fund, the appellant has a lien under the provisions of said section 2460, provided he succeeds in establishing it against the owner of the land.

We think this point is well taken, if the facts are correctly stated.

The record before us does not disclose what the proceeds of the sale of the land were or what are the costs of suit that have been and will have to be paid out of such proceeds. If, however, there should prove to be such a surplus, it would, of course, stand in the place of the land, and to that extent the controversy would be between the owner of the land and appellant only. The statute, just referred to, gives the appellant a lien against the owner of the land from the time of the filing of appellant's petition, if he thereafter, at any time while the suit is pending, succeeds in establishing his lien as against the owner. Whether in the present condition of the cause as to the pleadings and the parties before the court appellant is entitled to a decree in the court below enforcing that lien against such a surplus as is mentioned, if it be found to exist, is a question not before us for decision, as the owner of the land is not a party before us. But the appellees had and have no interest in

this question. And certainly, in any aspect of the case, the appellant has the right to have process issue on his petition against the aforesaid owner, and to have the opportunity to establish his lien against the owner to the extent of the surplus aforesaid. Therefore the decree appealed from was erroneous to the extent that it dismissed the petition of appellant. For this reason such decree will have to be reversed, but the other holdings of such decree above approved and the result of such other holdings will be affirmed, with costs to appellees, as the parties substantially prevailing upon the appeal.

Reversed in part and affirmed in part.

This case was argued before Judge WEST took his seat on the court.

tributory negligence as a matter of law, though he did not actually stop to listen.

Appeal from Circuit Court, Loudoun County.

Action by N. Janney Purcell against the Washington & Old Dominion Railway, Incorporated, and from a judgment sustaining a demurrer to the plaintiff's declaration, and dismissing the case, the plaintiff appeals. Reversed, and remanded for further proceedings.

Chas. F. Harrison, of Leesburg, for plaintiff in error.

Wilton J. Lambert, of Washington, D. C., C. Vernon Ford and Wilson M. Farr, both of Fairfax, and R. H. Yeatman, of Washington, D. C., for defendant in error.

(132 Va. 325)

PURCELL v. WASHINGTON & O. D. RY., Inc.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Railroads \S 328(1), 338—Driver held negligent in failing to listen, and within last clear chance rule.

A count in a declaration for injuries to a one-horse buggy driver, showing that he did not slow down and listen after passing a point 150 yards from the crossing, and could not effectively look after passing that point, and that the operator of the train failed to give warning, but by the use of ordinary care could have discovered the driver's peril and avoided the collision, *held* to show contributory negligence in failing to listen, and to make a case under the last clear chance doctrine.

2. Railroads \S 330(4), 338—Driver held negligent in failing to look out, and not within last clear chance rule.

A count in a declaration for injuries to a one-horse buggy driver, alleging that he looked and listened at every point of vision, the only point being 150 yards from the crossing, which was so dangerous that defendant had agreed with the town to limit the speed to 4 miles an hour, but not alleging that the driver knew of the agreement which defendant violated by running the train too fast to stop in time, *held* to show contributory negligence in failing to look out for train, and to make no case under the last clear chance doctrine.

3. Railroads \S 350(23)—Contributory negligence of buggy driver in failing to stop to listen *held* for jury.

A count showing that plaintiff, driving a one-horse buggy, drove slowly and listened intently, but could not effectively look even by going ahead after passing a point 150 yards from a dangerous crossing over which a train moved by electricity was run at a speed too fast to stop, and in violation of a rule limiting the speed to 4 miles an hour, but not alleging that he knew of the rule, *held* not to show con-

KELLY, P. This is a writ of error to a final judgment sustaining a demurrer to the plaintiff's declaration and dismissing the case. The action was brought by N. Janney Purcell against the Washington & Old Dominion Railway, Incorporated. There was an original and a first amended declaration, to each of which a demurrer was sustained, with leave to amend. We are concerned here only with the declaration as amended the second time.

The material facts alleged in the first count were in substance as follows: The defendant owns and operates a railroad through the town of Purcellville, wherein it maintains a station. About 60 feet east of the station its tracks intersect the public road, making what is commonly known as a "railway crossing." The plaintiff was traveling on the public road in a southerly direction towards this crossing in a one-horse buggy. His position on the buggy seat was 10 feet from the horse's head. As he approached the crossing his view was obstructed by a cut and certain structures owned by the defendant, and there was no point nearer than 150 yards therefrom at which he could see a train coming from the west until he reached a point 5 feet from the track. At the former point, 150 yards (called 150 feet in this particular connection in the declaration, but shown by the context and conceded to mean 150 yards) from the crossing, plaintiff "slowed up," and looked and listened attentively for any approaching train. Seeing and hearing no train, and believing that it was safe to himself and his horse to proceed, he moved on towards and upon the crossing. The horse was on the track before he saw, or could see, the defendant's train, which was then running towards him from the west. The horse was visible to the operator of the train for a material length of time before the train was visible to the plaintiff. The plaintiff could not add to his safety by getting out of

the buggy and walking ahead to look for the train, because the time required to return and get back in the buggy would be sufficient to permit a train invisible when he was out at the crossing to arrive there before he could, after having made such observation, drive across the track. The defendant negligently failed to sound a bell, blow a whistle, or give any warning of its approach or keep a careful lookout for the crossing, and after it discovered, or by the use of ordinary care could have discovered, the plaintiff's peril, and avoided the accident (the horse having passed at slow speed entirely over the track before the collision occurred), failed to stop or control its train, and thereby collided with and destroyed the buggy, and seriously injured the plaintiff.

[1] This count shows actionable negligence on the part of the defendant in failing to give warnings for the crossing, and it also shows contributory negligence on the part of the plaintiff. According to his averments, he did not slow down and listen for the train nearer to the track than 150 yards therefrom, and at that point made up his mind that it was safe to drive straight ahead, and did drive straight ahead and onto the crossing without further precaution. The facts alleged with reference to the futility of getting out of the buggy and going ahead to look did not relieve him of the obligation to listen carefully before proceeding, and this he appears not to have done after passing the point 150 yards from the track. He could not, it is true, effectively look after leaving that point, but he ought to have continued to listen. It may be that he would not have heard the train if he had listened, but, in the absence of allegations to the contrary, the natural presumption is that he would have heard it, and it was his duty to overcome that presumption. He did overcome the presumption by his allegations in count 3, but they are not referred to or in any way made a part of this count. The court will not presume that a party's pleadings are less favorable to him than the facts will warrant.

But this first count of the declaration did make a good case for recovery on the doctrine of the last clear chance. If its allegations are true, the operator of the train, in the exercise of ordinary care, could have discovered the plaintiff's peril in time to avoid the accident, and his failure to do so was a supervening negligence which rendered the defendant liable. The case of *U. S. Spruce Lumber Co. v. Shumate*, 118 Va. 471, 87 S. E. 723, is relied upon in this connection by the defendant to support the contention that the doctrine of last clear chance cannot be applied here, but the case cited is not available for that purpose. The court refused to apply the doctrine in the *Shumate* Case be-

cause the declaration contained no averments showing that the defendant could by due care have avoided the injury. The averments there were merely to the effect that the defendant did not use ordinary care to discover the plaintiff's danger, and the court held that the declaration ought to have gone further, and alleged that, by the exercise of such care, the danger could have been both discovered and prevented. In the instant case the allegations clearly show that by the use of ordinary care the operator of the train could have discovered the plaintiff's danger and avoided the accident. It was therefore error to sustain the demurrer to the first count.

[2] The second count, after describing the situation at the crossing by reference to the first count, and further stating that the plaintiff "looked and listened intently for a train of the defendant at any and every point where the said defendant's trains would have been visible to him before he entered on the said crossing, and hearing none and seeing none" (the only such point of vision being, as shown above, 150 yards from the track), made the following additional averments:

"That said crossing is a very dangerous crossing, as is well known to the said defendant, and that theretofore the town of Purcellville, realizing the dangerous character of said crossing, had undertaken to exercise the rights it possessed to require the said defendant to either place gates across the highway at said crossing or to flag their said trains across the same, to the end that the traveling public might be safe in crossing the tracks of the said defendant at this point. To this end negotiations were had between the town of Purcellville on the one hand and the said railroad on the other, and, in order to prevent the said town of Purcellville from exercising its rights, and requiring the said gates or the flagging of said trains at said crossing, the said defendant represented that it would thereafter run its said trains over said crossing at a rate of 4 miles per hour. Relying on this representation the said town of Purcellville did not require the gates, nor the flagging, but accepted the promise and representation of the said defendant that it would operate its said train over said crossing at 4 miles per hour, which understanding was given on January 10, 1918, in writing, and which understanding and promise was in force and operation at the time of the accident herein complained of."

And this second count further avers that the defendant was running its train on that occasion at a rate far in excess of 4 miles an hour, and could, if it had slowed down to the latter rate for the crossing, have easily stopped in time to avoid the accident.

There was no allegation that the plaintiff knew of or relied upon the alleged agreement with the town of Purcellville, and the agreement, therefore, did not relieve the plaintiff

in any degree of his duty to look out for trains at the crossing, however much such agreement may have affected the primary liability of the defendant. The count, therefore, like the first, shows contributory negligence on the part of the plaintiff, and further shows that the train was running too fast to stop, and, hence, however much this rapid rate of speed may have affected the alleged negligence of the defendant, there was no last clear chance to save the plaintiff.

[3] The third count describes the situation at the crossing by reference to the first count, and in addition thereto avers: (1) That the motive power of the train was electricity; (2) that the plaintiff, as he approached the crossing, "drove along at a slow rate of speed," and "listened intently for a train of the defendant approaching said crossing"; and (3) that the defendant, realizing the dangerous character of the crossing, had adopted and notified the town of Purcellville of a rule to reduce the speed of its trains in the town to 8 miles an hour, and over the crossing to 4 miles an hour, and that the observance of this rule would have enabled the operator to stop in time to avoid the accident, whereas on this occasion it ran its train over the crossing "far in excess of 4 or even 10 miles an hour," knocking and dragging the plaintiff a distance of 60 feet.

It is further stated in this third count that the defendant, by adopting and notifying the town of the rule aforesaid, "lulled the town and the public in that vicinity into the belief that it would conform to said rule"; but there is no averment that the plaintiff knew of or relied upon the rule.

This count, in our opinion, does not show contributory negligence on the part of the plaintiff as a matter of law. The allegation that he drove slowly, and listened intently for a train as he approached the crossing, was sufficient to take the case to the jury upon the question of his contributory negligence. By adequate reference to the first count, this one shows that it would have been futile to attempt to look for the train by leaving the buggy, and the plaintiff was entitled to have a jury say whether he exercised due diligence by driving slowly and listening intently, even though he did not actually stop to listen as he approached the crossing.

In *Southern R. Co. v. Aldridge*, 101 Va. 142 146, 43 S. E. 333, 334, Keith, P., delivering the opinion, said:

"This court has never decided that as matter of law it was the duty of a person approaching the crossing of a railroad to stop, look, and listen for an approaching train. It has been said in numerous cases that the railroad track itself was a signal of danger, and imposed upon one approaching it the duty to look and listen, but it has in no case been held that it was his duty to stop in order to look

and listen, or that it was his duty when in a vehicle to get out in order to look and listen."

In *Southern R. Co. v. Bryant*, 95 Va. 212, 221, 28 S. E. 183, 185, Judge Riely, in delivering the opinion said:

"It cannot be inferred as a matter of law, under the circumstances disclosed by the record, that because Bryant drove upon the track without stopping, he did not listen. The instinct of self-preservation forbids the imputation of recklessness to any one. Where a traveler is killed at a railroad crossing, and the negligence of the railroad company is established, in the absence of evidence to the contrary, the presumption is, though perhaps slight, that the traveler did his duty in approaching the crossing."

In the instant case the fact is admitted by the demurrer that the plaintiff continued to look and listen intently.

In the case of *Wilmington v. Southern R. Co.*, 125 Va. 511, 521, 99 S. E. 665, Judge Sims, reviewing numerous cases with reference to the "stop, look and listen" rule, shows clearly that the rule could not be made to apply to the situation here.

It is insisted that the case of *U. S. Spruce Lumber Co. v. Shumate*, supra, is in conflict with the view here indicated, but there is in fact no real conflict between that case and the other Virginia cases last above cited. The gist of the decision in the *Shumate* Case, in so far as that decision is here involved, is that when a traveler on a highway undertakes to cross a railroad track, he must look and listen at such time and place as will make looking and listening effective, and that, if his allegations or proof show that he looked and listened where looking and listening would do no good, he makes a case of negligence on his own part, provided his failure to more effectively look and listen is "unexplained." 118 Va. 476, 87 S. E. 723.

In this case the averments of the count now under consideration contain an adequate and reasonable explanation of his conduct, and we are of opinion that the question of his negligence in failing to stop should be determined by a jury.

The demurrer to the third count of the declaration should have been overruled, and the action of the trial court in that respect was erroneous; but it is to be observed that the count does not, as plaintiff contends, present a case for the application of the last clear chance. Under its allegations the train was running too fast to have allowed any appreciable interval for the prevention of the accident after the discovery of the peril,

The fourth, and last, count of the declaration undertakes to state a case of liability on account of the defendant's failure to minimize the seriousness of the plaintiff's injuries and the extent of his damage, even though the collision itself could not have

been avoided. With respect to this count in the declaration, we deem it sufficient to say that its allegations are too vague and general to state a good cause of action, and we find no error in the judgment of the lower court with respect thereto.

For the reasons stated, we are of opinion that the court was right in sustaining the demurrer to the declaration as to counts 2 and 4, but that counts 1 and 3 are good, and that as to them the demurrer should have been overruled. We will accordingly enter an order in this court to that effect, and remand the cause for further proceedings.

Reversed.

This case was argued before Judge WEST took his seat on the court.

(90 W. Va. 533)

MASHUWAS v. BENNETT. (No. 4350.)

(Supreme Court of Appeals of West Virginia.
March 14, 1922.)

(Syllabus by the Court.)

1. Taxation \S 749—Tax deed may not be obtained after two years from sale except under special circumstances as provided by statute.

Notwithstanding the provision in section 19 of chapter 31, Code, as amended by chapter 67, Acts 1917 (Code Supp. 1918, c. 31, § 19 [sec. 1077]), authorizing a purchaser of land at a tax sale, to file, or cause to be filed, with the clerk of the county court of the county in which the property is situated, the survey or report required by other provisions of said chapter 31, and request the execution of a deed, at any time after expiration of a year and three months from the date of sale, and before the expiration of two years from said date, a deed for the property cannot be made or obtained after two years from the date of sale thereof, in the absence of special circumstances made ground of exception by a provision of section 24 of said chapter 31, as amended by said chapter 67 (Code Supp. 1918, c. 31, § 24 [sec. 1083]).

2. Taxation \S 749—Sections of statute relating to tax sales and prescribing time for issuance must be construed together.

Under the rules of construction, said provision of section 19 and the limitation prescribed by said section 24 must be read and considered together, and both allowed effect as far as possible.

3. Taxation \S 749—Implication of right to take tax deed after two years from sale must yield to prohibitory terms of statute.

The mere implication of right to take a deed after two years, under ordinary conditions, arising from the terms of the provision in said section 19, must yield to the express prohibitory terms of the limitation in said section 24.

Appeal from Circuit Court, Tucker County.

Suit by Peter Mashuwas against A. F. Bennett to set aside a tax deed. Decree for plaintiff, and defendant appeals. Affirmed.

D. E. Cuppett, of Thomas, for appellant.

J. P. Scott, of Parsons, for appellee.

POFFENBARGER, P. The decree, under review on this appeal, set aside a tax deed made more than two years after the date of the sale of property, for the taxes as to which it was delinquent, without any proof or claim that execution thereof had been delayed by any proceedings under section 22 of chapter 31 of the Code (sec. 1081), to compel execution thereof, or that such execution had been enjoined or stayed by any legal process or proceeding. By section 24 of said chapter, as amended by chapter 67 Acts 1917 (Code Supp. 1918, c. 31, § 24 [sec. 1083]), execution of a tax deed after two years from the date of the sale of the real estate is expressly inhibited, except in the two cases just mentioned. The property was sold December 4, 1917, for delinquency as to the year 1915, and the deed made December 12, 1919. There is no disclosure of failure or refusal of the clerk of the county court to make or correct a deed, causing a proceeding to compel him to do so, nor of any injunction or other proceeding by which execution thereof was precluded or delayed.

[1] The argument submitted to sustain the deed and reverse the decree is founded upon the provision of section 19 of chapter 31 of the Code, as amended by said chapter 67, Acts 1917 (Code Supp. 1918, c. 31, § 19 [sec. 1077]), allowing the purchaser the privilege of filing his survey or plat and making his request for a deed, at any time between the expiration of fifteen months from the date of sale and two years from the date thereof. The contention is that, as he can file his report or plat and request the deed at any time after fifteen months and before the expiration of two years, the Legislature must have intended to permit him, after having done those things within two years, to take his deed at any time after two years. Such construction would put it in his power to have unlimited time to take the deed. That result was not within the legislative purpose. There has always been a time limit upon acquirement of the deed. Formerly it was five years. In the amendment effected in 1917 it was reduced to two. This action discloses intent to adhere to it as a matter of policy.

[2] Both provisions must be read together and allowed such effect as they can have, and be made to conform, as nearly as possible, with manifest legislative purpose and policy. So read, they allow nine months in which to perform all the acts required of the

purchaser and clerk to vest the title in the former, and both are given reasonable and important operation and effect.

[3] The claim of right under section 19, to take a deed after two years, is based upon mere implication. That section does not give it in terms. The implication is not a necessary one, because section 24 negatives it, saying the deed shall not be taken after two years. A mere implication can seldom, if ever, stand against express terms.

Upon this construction of the two provisions of the statute involved, the decree complained of will be affirmed.

(90 W. Va. 358)

STATE v. SERGENT et al. (No. 4124.)

(Supreme Court of Appeals of West Virginia.
Feb. 21, 1922. Rehearing Denied
April 4, 1922.)

(Syllabus by the Court.)

1. Taxation \S 853—Party seeking redemption of lands from forfeiture must set up and prove title superior to state and all others.

One seeking to redeem land from forfeiture in a suit prosecuted by the commissioner of school lands, must in his petition filed pursuant to sections 16 and 17 of chapter 105 of the Code 1913 (secs. 4448, 4449), state in full his title to such land, accompanied by the evidence thereof, and by full and satisfactory proof show that at the time the title to the land is alleged to have vested in the State, he had a good and valid title thereto, legal or equitable, superior to that of any other claimant thereto, and failing in which requirements or any of them he should be denied redemption.

2. Taxation \S 853—Claimant should be denied right of redemption of school lands from forfeiture, where he had transferred his title to adverse claimant.

Where one seeking to redeem such forfeited land shows by his petition that he has made or joined with others in a deed or contract settling or compromising a suit against him and others involving his right and title to such land, and whereby he has granted to the adverse claimant all his right, title and interest therein, he thereby shows want of right and title superior to such adverse claimant justifying a decree of redemption in his favor, and redemption should be denied him.

Appeal from Circuit Court, Roane County.

Suit by the State of West Virginia against Caroline Sargent and others, begun by the Commissioner of School Lands, and from a decree therein the defendant Caroline Sargent appeals. Affirmed.

S. P. Bell, John W. Lance, and Harper & Baker, all of Spencer, for appellant.

Thos. P. Ryan, of Spencer, and R. G. Altizer and Raymond Dodson, both of Charleston, for appellees.

MILLER, J. This suit was manifestly begun and prosecuted by the commissioner of school lands at the instance of the defendant Caroline Sargent, to enable her to apply for redemption of the tract described in the bill as the first tract, and containing one hundred acres, more or less, in Geary District of Roane County, and which the bill alleges and she admits was forfeited in her name. The answer of the United Fuel Gas Company, however, if not that of the defendants W. F. Cook and H. O. Simmons, not found in the record, denies the forfeiture thereof by the owners thereof. The decree complained of shows the filing of the joint and several answers of Cook and Simmons, but these are not found in the record, and some advantage is sought by the appellant on this ground, she insisting that the plaintiff's bill ought to be taken for confessed as to them. The State is not complaining of the decree, and she can not rely on the supposed pro confesso of the State's bill.

Prior to the filing of the bill of the state, the appellant Caroline Sargent had instituted her suit in equity in the same court against the said W. F. Cook, Ephriam Sargent, her husband, Henry D. Sargent, United Fuel Gas Company and South Penn Oil Company. In her bill she undertook to deraign her supposed title to the tract she sought to redeem, and therein and thereby sought to correct a certain deed made by her and her husband Ephriam Sargent to said W. F. Cook, dated April 5, 1915, in so far as said deed purports to convey any part of the tract of 211 acres claimed by her other than the part thereof conveyed by her and her husband to James Hall and W. F. Cook, by deed of December 8, 1906; also to correct another deed made by her and her husband to Henry D. Sargent, dated May 14, 1916, purporting to convey to the said Sargent one-half of the oil and gas in and under a tract described by adjoining lands as containing 52 acres, more or less, and as being the same land conveyed by said W. F. Cook to her and her husband by deed of April 5, 1915, in so far as said deed attempts or purports to convey any of the oil and gas within and underlying any part of plaintiff's said 211 acres, and praying the court to remove the same as clouds on her title to the said 211 acres, in so far as said deeds purport to convey any part or parts thereof other than so conveyed to the said James Hall and W. F. Cook; praying also for the cancellation of the oil and gas lease executed by said Hall and Cook to the South Penn Oil Company, particularly set out in the bill, and that it might be construed to embrace or include only that part of the plaintiff's land as constituted a lap or interlock upon what she describes in the bill as the McClaskey tract, and which was conveyed by her and her said husband to the

said James Hall and W. F. Cook; and her bill also prayed for a perpetual injunction against the defendants, their representatives, agents and employees from entering upon plaintiff's said 211 acres and from putting down any well or wells, and from operating them or any of them, etc., except the portion thereof so conveyed by her and her husband to the said Hall and Cook as aforesaid; and there is also a prayer for general relief.

The bill in this case was answered by defendants, wherein all the allegations material to the alleged rights of the plaintiff to the relief prayed for were denied, who also and by way of estoppel pleaded and relied on the deeds of plaintiff which she sought to have corrected, set aside, canceled and annulled, and other deeds and contracts executed by her, and certain conduct on her part wholly inconsistent with her present claims to relief.

In appellant's petition and answer filed in the present suit of the commissioner of school lands she admits the forfeiture of the 100 acres, the first tract, as alleged in the bill, and then undertakes to show the manner of the forfeiture, alleging this land to be a part of the aforesaid 211 acres, that 61¼ acres thereof remaining after prior conveyance by her, which included about 14¼ acres continued on the land books for the years 1906, 1907 and 1908, were improperly dropped from the land books. She also in this connection alleges that about the year 1908 she purchased a tract of 83¾ acres, which was assessed to her for the year 1909 and each subsequent year, and that the balance, 14¼ acres with which she had been previously charged, seemed to have been dropped from the land books. So far as we find, she does not allege from whom she purchased the 83¾ acres in 1908 nor exhibit any deed therefor.

In the petition and answer of appellant she referred to the pendency of her suit against Cook and others, and asked that the original, amended and supplemental bills therein, together with all exhibits therewith, and the answers of the defendants thereto, and all exhibits therewith, and all depositions taken on behalf of plaintiff and defendants, together with all exhibits filed therewith, and all orders and decrees of the court made and entered therein, and papers filed therein, might be taken, read and treated as a part of her said answer and petition.

The answer of the defendant United Fuel Gas Company to the bill of the State also refers to the preceding suit of appellant and likewise prays that said suit may be consolidated or heard together with this suit. It alleges that the 100 acres sought to be redeemed was and is a part of a tract of 450 acres known as the McClaskey land, and that it was never any part of the 211 acres once owned by appellant, but was the residue of the 450 acres of McClaskey land left after

three prior conveyances by the McClaskeys out of the same, and which Virginia McClaskey conveyed to W. F. Cook and James Hall by deed of May 6, 1905, and thereafter leased by them to the South Penn Oil Company, by deed of lease of July 18, 1906, which lease by subsequent assignment came to respondent.

The decree appealed from shows that the cause was heard upon the pleadings and proofs in both suits, with the stipulation of counsel that the suit of the appellant should be governed by the decision of the suit of the State against her and others.

[1] To entitle appellant to redeem said land from the forfeiture thereof, pursuant to sections 16 and 17 of chapter 105 of the Code (secs. 4448, 4449) it was necessary for her in her petition to set out fully her title thereto, accompanied by the evidence thereof, and by full and satisfactory proof show that at the time the title became vested in the State she had good and valid title thereto, legal or equitable, superior to any other claimant thereof. The only title upon which she apparently relied was the deed to her from W. H. Sergeant and wife, dated May 12, 1902, calling for 211 acres, by metes and bounds, apparently covering the greater part of the 100 acres sought to be redeemed, a part of a 700 acre tract which was conveyed by W. H. Sergeant and wife to Smith and Rader, January 12, 1856. But the record shows that the said W. H. Sergeant had not owned any part of this larger tract since that date, and therefore had nothing remaining within said 700 acre boundary to convey to any one on September 14, 1901, and moreover, that the petitioner, prior to the filing of her petition, had sold and conveyed away to others all of the land outside of the boundary of said 700 acre Smith and Rader tract, and certainly had no title to any land within that boundary. The record further shows that the particular tract of 100 acres was part of lot No. 34, containing 450 acres, allotted to Smith or his daughter Virginia McClaskey in the partition of said 700 acres, and out of which she had subsequently conveyed three parcels as follows: 262 acres to W. H. Justice, 133 acres to Peter Looney, and 165 acres adjoining the 100 acres here involved to appellant's husband Ephriam Sergeant; that the residue thereof, supposed to contain about 80 acres, but actually containing 104 acres, becoming delinquent, was sold by the State and purchased by the heirs of Virginia McClaskey, who on May 6, 1905, conveyed the same to W. F. Cook and James Hall, who afterwards finding the Sergeants laying some claim to the land, instituted their suit in ejectment against them, which was compromised and settled by the parties, and the defendants, in consideration of seventy-five dollars cash in hand paid, by deed of December 8, 1906, granted and conveyed unto the said Cook and

Hall "all their right, title and interest in and to" the tract described as containing 95 acres and the same land conveyed to said Hall and Cook by Holly McClaskey and others by deed of May 6, 1905. The record further shows that subsequently, on March 22, 1913, James Hall and wife conveyed their half interest in said tract to W. V. Hall, who with his wife, on September 14, 1914, conveyed said half interest to appellant's husband Ephriam Sergent, reserving certain timber thereon, and that thereafter, by two deeds of April 5, 1915, the said W. F. Cook and Ephriam Sergent partitioned said tract of 95 acres, found to contain 104 acres and 27 square rods, equally between them, but each deed provided that the partitioners were to share equally in the oil and gas rentals should the then lessee drill on the tract for oil and gas. The record also shows that after these partition deeds were executed Ephriam Sergent and Caroline Sergent, in consideration of \$600.00 cash in hand paid, conveyed to the defendant Henry D. Sergent their one-half interest in the oil and gas underlying the said 52 acres, and described it as the same 52 acres conveyed to the parties of the first part by W. F. Cook, by deed of April 5, 1915.

[2] It was the purpose of appellant's bill to set aside, cancel and annul the said compromise deed of herself and husband of December 6, 1906, and the deed of said W. F. Cook to Ephriam Sergent of April 15, 1915, and the assignment of the said Ephriam Sergent to Henry D. Sergent of his interest in the oil and gas under the 52 acres aforesaid, as clouds on her alleged title to the whole of the said 211 acres, or that part thereof covered by the boundary of 80 acres, her theory being that these deeds on her part amounted to nothing more than the relinquishment of her dower in the lands covered thereby, and were not intended to convey her title to or

any interest in the 211 acres or any part thereof.

It is perfectly plain to us from the record recited as well as from other portions thereof not recited, that appellant has no semblance of right or title to any part of the 100 acre tract she seeks to redeem and never had any right or title thereto, acquired either under the deed from W. H. Sergent, of September 14, 1901, or by any other deed, and that even if she ever had any right outside of her inchoate right of dower in her husband's interest therein, she finally and forever concluded and estopped herself by the deeds of settlement and compromise of the said ejectment suit, by her joinder in said partition deeds and in the deed to Henry D. Sergent for the oil and gas rights in the 52 acres.

Much stress was laid upon the question of the true eastern and western boundary line between the W. H. Sergent and the so-called McClaskey or Smith and Rader tracts, and wide scope was taken in the pleadings and proofs, and in the briefs and argument of counsel, on this question. But as we view the case and the facts developed, this question is quite unimportant. The parties by contemporaneous and subsequent construction have placed this division line substantially where the appellees and their predecessors in title claim it to be, so as to conclude and estop appellant and her husband from asserting anything to the contrary. Appellant wholly failed to show right, legal or equitable, to correct, reform, modify or remove her deeds or the deeds of any of the other parties as clouds upon her title, and without this concededly she could have no right to redeem the land in controversy or any part thereof. We see no reason for citing authority for any of the familiar legal principles involved, and our conclusion is to affirm the decree.

(90 W. Va. 436)

JENKINS v. KIRBY et al. (No. 4307.)(Supreme Court of Appeals of West Virginia.
March 7, 1922.)*(Syllabus by the Court.)*

1. Taxation \S 679(5)—Where the state sues to subject land bought at tax sale to sale, a grantee of former owner is a necessary party.

Where a suit is brought by the state to subject real estate to sale for the benefit of the school fund, and the state's title is derived from a tax sale made in the name of a former owner, but after he had conveyed the land to another whose title is of record, such grantee is a necessary party to such suit.

2. Taxation \S 689(2)—Purchaser from owner may maintain bill to set aside state's resale of land purchased by it at tax sale where delinquent list was void.

Such a purchaser from the person in whose name the land was returned delinquent for taxes, if not made a party to such school land suit, may maintain a bill to set aside a sale made therein, where he contends that the state had no title to such real estate at the time of the sale thereof by the school land commissioner, because the delinquent list under which the sale was made by the sheriff was void, or because any title acquired by the state was transferred to him under the provisions of the Constitution because of his possession of and payment of taxes on such real estate.

Appeal from Circuit Court, Mercer County.

Suit by H. J. Jenkins against W. H. Kirby and others to set aside a deed made by commissioner of school lands. Decree for the plaintiff, and the named defendant appeals. Affirmed.

Thos. H. Scott, of Bluefield, and Hartley Sanders, of Princeton, for appellant.

McClagherty & Richardson, of Bluefield, for appellee.

RITZ, J. Reversal is sought upon this appeal of a decree of the circuit court of Mercer county setting aside a deed made by the commissioner of school lands to the defendant conveying a house and lot situate in the city of Bluefield which the plaintiff claims belongs to him.

For the year 1914 the real estate in question was properly assessed upon the land books of Mercer county in the name of G. E. Stafford, the then owner thereof. The taxes for said year were not paid, and upon a return of the same delinquent for such nonpayment, which delinquent return is challenged, the same was sold and purchased by the state. A suit was brought by the state returnable to August rules, 1918, for the purpose of subjecting to sale this lot, among oth-

ers, for the benefit of the school fund. Such proceedings were had in that suit that on the 13th of December, 1919, a decree was entered directing the sale of said real estate, and on the 2d of June, 1920, the same was sold by the commissioner of school lands, and purchased by the defendant Kirby. This sale was duly reported and confirmed by the court, and on the 2d of August, 1920, under the direction of the court, a deed was made by the commissioner of school lands conveying the lot to the said Kirby, and it is this deed and the decree confirming the sale, as well as the decree of sale, which is set aside by the decree complained of in this suit.

It appears that G. E. Stafford, who was the owner of this lot when it was assessed with taxes for the year 1914, was declared a bankrupt in that year; that just prior to being so adjudged bankrupt he conveyed this lot to one M. K. Harman, who in turn conveyed it to the wife of Stafford, who in turn conveyed it to one F. C. Bernard. The trustee in bankruptcy filed a bill alleging that these transfers by Stafford to Harman, and from Harman to Stafford's wife, and from her to Bernard, were fraudulent, and were for the purpose of depriving the creditors of said Stafford of the benefit of said real estate. Such proceedings were had in this suit that said deeds were set aside, and the said house and lot sold by the trustee in bankruptcy, at which sale L. J. Holland, trustee, became the purchaser. The said lot was conveyed to the said Holland by proper deed on the 2d of July, 1915, and on the 4th of August of that year said Holland, trustee, conveyed the same to the plaintiff in this suit. For the year 1915 said lot was entered upon the land books and assessed with taxes in the name of F. C. Bernard, the fraudulent grantee of said Stafford. For the years 1916, 1917, 1918, 1919, and 1920 it was regularly entered upon the land books of Mercer county and assessed with taxes in the name of the plaintiff to this suit, and all of the taxes charged or chargeable against the same for those years were paid by him. For the nonpayment of the taxes assessed and charged against the same for the year 1915 in the name of F. C. Bernard the said lot was returned delinquent, but before any sale thereof was made the taxes so delinquent thereon were paid to the proper authority by the plaintiff here, so that since his purchase of the lot the plaintiff has paid all taxes properly assessable against the same for six years. It also appears that he has been in the actual possession of the house during all of that time, living therein with his family. Upon discovering that his house and lot had been sold and conveyed by the commissioner of school lands to the defendant, he brought this suit for the purpose of setting aside the deed, as well as

the decree of sale, and the decree confirming the sale thereof, alleging, in addition to the facts above stated, that he was not made a party defendant to the suit brought by the state for the purpose of subjecting the said property to sale, and in which suit the decree of sale was made; that the state at said time did not have any title to said property which it could properly sell, for the reason that the delinquent list made by the sheriff for the year 1914 was not sworn to by him before or at the time it was presented to and allowed by the county court; that, while the order of the county court allowing the same shows that it was sworn to, an examination of the delinquent list itself shows that, while it was presented and allowed on the 31st of July, 1915, it was not in fact sworn to until the 15th of August following, and for this reason the plaintiff contends that the state did not acquire any title to his lot under the sale made by the sheriff. He further contends that the state did not have any title to his lot at the time it sold the same to the defendant, for the reason that he had been in the actual possession thereof for more than five years, and paid all the taxes charged and chargeable thereon during that time, and that, even if the state did acquire any title thereto by its purchase at the tax sale aforesaid, such title became transferred to him under the provisions of the Constitution of this state; and, because he was not made a party defendant to the suit brought by the state for the purpose of selling the said lot, he asks that the decree of sale, as well as the sale itself, the decree confirming the same, and the deed made to the defendant in pursuance thereof, be set aside, in order that he may make defense to said bill after being properly made a party thereto.

[1] The law requires that all known claimants of real estate sought to be sold for the benefit of the school fund in a suit brought for that purpose must be made parties defendant, and the only contention of the defendant here is that the plaintiff was not such a known claimant at the time of the institution of the state's suit. He was at that time in possession of the property. He had been paying taxes on it assessed by the agents of the state for several years. He had a deed on record conveying the lot to him, and he comes clearly within the definition of a known claimant, as laid down by this court in the cases of *Preston v. Bennett*, 67 W. Va. 392, 68 S. E. 45, *Neal v. Wilson*, 79 W. Va. 482, 92 S. E. 136, and *Ellis v. Hager*, 87 W. Va. 313, 104 S. E. 607. It will not do to say, as is urged by the defendant, that it would be imposing upon the commissioner of school lands and his attorney an undue burden to require him to ascertain such claimants to lands sought to be sold. The officers of the state charged with the duty of assessing the real estate for taxes had no difficulty

in determining that the plaintiff was the owner thereof, and in charging him with the taxes against the same, and it is not perceived that it would be any more difficult for the commissioner of school lands to have determined his interest therein than it was for such taxing officers to do so.

[2] Whether the plaintiff's contention that the state acquired no title under the sale made by the sheriff, because of the defective delinquent list, is tenable, or his other contention, that any title that the state may have acquired was transferred to him under the Constitution, because of his possession and payment of taxes upon the property, can be sustained, are questions which must be decided in the suit brought by the state for the purpose of subjecting the real estate to sale for the benefit of the school fund, but before the plaintiff in this suit can present such matters to the court in that suit it is necessary for him to first get rid of the decree of sale, the sale itself, the decree confirming it, and the deed made in pursuance thereof. He was entitled to be heard in that suit before a decree was entered therein adjudicating that his house and lot were subject to sale, and he is still entitled to be heard therein upon that question. The decree of the court below entered in this case simply sets aside the decree of sale, the sale made under it, and the decree confirming it, and the deed made to the defendant. This leaves the suit pending, and it will now devolve upon the state, if it desires to proceed further against the plaintiff's lot, to amend its bill and make the plaintiff a party defendant to that suit in order that he may assert the rights contended for by him; and, in case his contentions should be decided adversely to him, he would then have a right to redeem his property from the delinquency for which it was sold upon payment of the taxes and proper costs and charges. This case is not like that where a party admits the title in the state, and seeks to simply set aside a sale made by the commissioner of school lands for the purpose of being allowed to redeem, as was the case of *Neal v. Wilson*, supra. In that case we treated the bill as a petition in the school land suit upon the theory that the petitioner, not having any title by his own admissions, could not maintain a separate suit relative to the real estate. In this case, however, the plaintiff contends that he has good title to the lot, and that the state had no right to proceed against the same at the time it did, and of course the objection to the maintenance of the suit because of lack of interest which made necessary the treatment of the bill as a petition in the school land suit in the case of *Neal v. Wilson* does not here exist.

We are of opinion that the decree of the circuit court is plainly right, and the same is affirmed.

(90 W. Va. 424)

MOST WORSHIPFUL GRAND LODGE A. F. & A. M. OF WEST VIRGINIA v. MOST WORSHIPFUL PRINCE HALL GRAND LODGE OF WEST VIRGINIA, A. F. & A. M. (No. 4151.)

(Supreme Court of Appeals of West Virginia.
March 7, 1922.)

(Syllabus by the Court.)

1. Beneficial associations \Leftrightarrow 4—Members withdrawing and forming a new organization may use any derivative of the old name not so closely resembling it as to deceive.

Members withdrawing from a fraternal society and associating themselves together in a new organization, for the accomplishment of the same purposes for which the old society was formed, may use as their new name any derivative of the old name they may wish to employ, so long as it does not so closely resemble the name of the parent order as to be calculated to deceive ordinary persons proceeding with ordinary care.

2. Corporations \Leftrightarrow 49(2)—Corporation may be enjoined from using a name similar to another but not deceptive, if officers misled people to deal with it as the other.

A corporation which adopts a name similar to another, but not of itself calculated to deceive, may nevertheless be enjoined from using it if it be shown that its officers and agents, by false representations and deceptive practices, are causing people to deal with it in the belief that they are dealing with such other concern.

Appeal from Circuit Court, Mercer County.

Suit by the Most Worshipful Grand Lodge of Ancient Free & Accepted Masons of West Virginia against the Most Worshipful Prince Hall Grand Lodge of West Virginia, A. F. & A. M. From a decree dismissing its bill the plaintiff appeals. Affirmed.

J. M. Ellis, of Oak Hill, and A. G. Froe, of Welch, for appellant.

W. F. Denny, of Richmond, Va., and Sanders, Crockett, Fox & Sanders, of Bluefield, for appellee.

RITZ, J. The plaintiff seeks to enjoin the defendant from using as a part of its name the words "Ancient Free & Accepted Masons," or the letters "A. F. & A. M.," or the word "Masons," or from using these terms in any way in conducting its affairs. From a decree dismissing its bill the plaintiff prosecutes this appeal.

Prior to the organization of the defendant the plaintiff, "the Most Worshipful Grand Lodge of Ancient Free & Accepted Masons of West Virginia," was incorporated under the laws of this state. Its constituent elements were made up not of individuals, but of groups of individuals, known as subordinate lodges. Prior to 1918 there were about 40 of these subordinate lodges. Be-

cause of the conduct of some of its officers at a meeting held at Huntington in June, 1918, as well as for some other reasons, a schism arose which reached such proportions that, by the spring of 1919, more than a majority of the subordinate lodges withdrew from the plaintiff lodge and declined to further affiliate therewith. A number of the leaders of this schism were expelled from membership in the plaintiff lodge. In March, 1919, the withdrawing membership sent representatives to a meeting held at Huntington, for the purpose of organizing another grand lodge of Masons to be composed of such subordinate lodges as desired to affiliate with it. Representatives from more than 20 lodges attended this meeting, and it was there determined to form a grand lodge of Masons by the name of "Most Worshipful Prince Hall Grand Lodge of West Virginia, A. F. & A. M." This determination was effected by procuring a charter from the Secretary of State, and organizing in the manner provided by law. This suit was then brought by the plaintiff, for the purpose of enjoining the defendant from conducting its business under the name adopted by it, upon the theory that the plaintiff had the exclusive right to use the words "Ancient Free & Accepted Masons" or the letters "A. F. & A. M." as a part of its corporate name; that the defendant's corporate name is so similar to that of plaintiff as to be misleading and confusing and an encroachment thereon; and that the defendant and its officers are actually practicing fraud upon the plaintiff by inducing persons, intending to become members of the plaintiff, to join the defendant under the belief that they were really joining the plaintiff.

[1] That a court of equity will interfere to enjoin the use of a name by a corporation so closely simulating that of another corporation, as to result in fraud upon such other is very well established. *Benevolent & Protective Order of Elks v. Improved Benevolent & Protective Order of Elks*, 205 N. Y. 459, 98 N. E. 756, L. R. A. 1915B, 1074, Ann. Cas. 1913E, 639; *Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias*, 113 Mich. 133, 71 N. W. 470, 38 L. R. A. 658; *Emory v. Grand United Order of Odd Fellows*, 140 Ga. 423, 78 S. E. 922. There are many other cases affirming the doctrine, but denying the relief upon the facts in some cases and granting it in others. In the New York case above cited the relief was granted. The court found that plaintiff had given to the word "Elks" a distinctive meaning when applied to a secret benevolent order, and that defendant might not use it. The court took occasion to say, however, that if the persons organizing the defendant corporation had been formerly members of the plaintiff,

and had split off from it because of a schism in the order, they would perhaps be as much entitled to use the word "Elks" as part of the name of a corporation organized by them for the purpose of carrying on the work of the order, as would the plaintiff. The Michigan case above cited was one in which the only change in name was to change the word "Supreme" to the word "Improved," the new corporation being called Improved Order Knights of Pythias, while the old corporation was known as the Supreme Lodge Knights of Pythias. In this case, however, the members of the new order had been members of the old, having withdrawn therefrom because of dissatisfaction therewith, and organized the new corporation for the purpose of carrying on the same work in which they had been engaged in the old. The attempt was made to enjoin the use of the term, Knights of Pythias, but the court held that the new order might use any derivative of the old name so long as it was not calculated to deceive ordinary persons proceeding with ordinary care, and the relief was denied. That case is very much like the one we have here, and we cannot say that the name of the defendant corporation is so similar to that of the plaintiff as to deceive an ordinary person proceeding with ordinary care. In a case in which there was no former connection between the members forming the new corporation and the old corporation, the adoption by such new corporation of a name closely resembling the name of the old is naturally attributed to some sinister purpose, but, where the new corporation is organized by persons withdrawing from the old and for the purpose of promoting the very same objects, the adoption of a derivative from the old name, which is largely descriptive of the purposes sought to be attained accompanied by distinctive words, as a name for the new organization is not accompanied by any presumption of bad faith. The adopted words in this case indicate the work in which they are engaged. In English nomenclature they indicate to all, the uninitiated as well as the initiated, that the persons applying to themselves these terms are engaged in promulgating a principle of moral philosophy, having thousands of adherents among every civilized race of the world. To say that only the plaintiff's membership may call themselves "Masons" in West Virginia would be to give to it a monopoly in this great philosophical and moral principle, and no organization can ever secure a monopoly in practical benevolence and morality.

[2] The principal contention of the plaintiff, however, is that the defendant and its officers and agents are fraudulently inducing prospective members of the plaintiff to become members of the defendant's lodge; that many persons have joined the defend-

ant organization in the belief that they were joining the plaintiff, because of false representations made to them by the defendant's agents; and that such fraudulent practices have been aided by the similarity in the names of the two organizations. That one may be denied the right to use a particular name in the conduct of his business, because of his fraudulent conduct and fraudulent use thereof to the prejudice of another, is too well established to require the citation of authority. When, however, we look to the proof in this case, we find that there has not been the slightest effort to produce confusion on the part of either party. As is usually the case in such instances, there seems to exist a rather exaggerated feeling of bitterness by each party toward the other, because of the claim of each that the other has departed from some of the established traditions of Masonry. This feeling has resulted in clearly setting forth the contentions of each side, and in vividly portraying that, in colored Masonry, there are at least two distinct and separate organizations, each claiming that the other is not orthodox. The evidence utterly fails to show any deception or fraud practiced upon the plaintiff, and the only injury that it has suffered, so far as appears from the evidence, has resulted from the withdrawal of a large number of its members because of dissatisfaction with its practices, and the organization of the defendant by these withdrawing members.

We find no error in the decree complained of, and the same is affirmed.

(90 W. Va. 509)

BULICK v. MILKINT et al. (No. 4351.)

(Supreme Court of Appeals of West Virginia.
March 14, 1922.)

(Syllabus by the Court.)

1. Evidence \S 383(7)—Recital that certain part of consideration has been paid is prima facie evidence thereof, but open to explanation.

While a recital in a deed that a certain sum of money, being a part of the consideration, has been paid, and the receipt thereof acknowledged, is usually open to explanation, and is not conclusive of the facts stated, it is prima facie evidence thereof.

2. Evidence \S 220(1), 263(1)—Check reciting that it is payment in full, when used by payee, is admission of such statement, but may be overcome by contrary evidence.

A check given for a sum of money less than the apparent obligation of the drawer of the check to the payee therein, which recites on its face, however, that it is in full for the balance due on the obligation, describing it, is an admission upon this part of the payee of the

check that the amount named therein is all that remains unpaid at that time, if he accepts the check and indorses and uses the same, which admission may be overcome, however, by evidence showing that such amount was not in fact the true balance remaining unpaid.

Appeal from Circuit Court, Tucker County.

Suit by Martha Bulick, as administratrix of the estate of Joe Bulick, deceased, against P. L. Milkint and others. Decree for the plaintiff, and defendants appeal. Reversed, and decree rendered for the defendants.

D. E. Cuppett, of Thomas, for appellants.
W. K. Pritt, of Parsons, for appellee.

RITZ, J. In this suit, brought for the purpose of subjecting to sale certain real estate in satisfaction of a vendor's lien, the plaintiff had a decree adjudging that a certain deferred purchase-money note for the sum of \$1,000, with interest, was unpaid, and constituted a lien upon the real estate, and providing for a sale of the same in satisfaction thereof, to review which decree the defendant prosecutes this appeal.

It appears that plaintiff's decedent, Joe Bulick, sold to the defendant P. L. Milkint lots Nos. 115 and 116 in the town of Thomas for the consideration of \$3,000. This transaction was had on the 1st of March, 1919, but, because of the absence of Bulick's attorney, the deed was not prepared until the 11th of March, 1919, and acknowledged on the 12th day of that month. This deed recites a consideration of \$3,000, of which \$1,000 was cash in hand paid, the receipt thereof being acknowledged in the deed, and the remainder was evidenced, according to the recitals of the deed, by two notes dated the 1st of March, 1919, due respectively at six and nine months from that date. It appears that Joe Bulick left his home in Thomas some time in the fall of that year and went to the city of New York with the purpose and intent of returning to his former home in Austria. He had with him the note due December 1, 1919, and turned it over to a banker in New York, by the name of Isador Hirz, to be collected, and the proceeds remitted to his wife who was left behind at Thomas. It appears that Bulick did not notify his wife that he was returning to his former home, but his reasons for clandestinely leaving are not apparent. He took a receipt from the New York banker to whom he delivered the note, and, on the eve of his expected departure for Europe, wrote his wife a letter advising her of his intention, and enclosing the receipt given him for the note, and also informing her that it would be collected by this banker and the proceeds sent to her. Before the time fixed for his departure he died, and the plaintiff here was appointed and duly qualified as administratrix of his estate. This note was presented for payment when it be-

came due, and the defendant Milkint refused payment of the same, contending that he had paid the amount thereof to Joe Bulick long before its due date, to wit, in the month of August, 1919. The administratrix then brought this suit for the purpose of enforcing the vendor's lien reserved in the deed to secure the deferred payments of purchase money. Milkint answered the bill and asserted that he paid \$1,000 at the time the transaction was closed, as recited in the deed; that in the month of May, 1919, in advance of the date when it was due, he paid off the first deferred note, and exhibited a receipt signed by Bulick showing this fact, as well as the note itself. He also averred in this answer that he paid off the second deferred note due December 1st to Bulick long before it was due; and produced a check for the sum of \$350 paid in August, 1919, in which was contained a recital that it was in full of balance on note due December 1, 1919, and a like check for \$28.33 given on the same date, which recites on its face that it was for interest on note, and a calculation discloses that it is for the exact amount of interest which would be due at its date upon the sum of \$1,000 from March 1, 1919; and, by way of affirmative relief, he asked that the plaintiff be required to surrender the note to him, and that the lien upon the lots reserved in the deed be formally released of record.

Milkint, because of the death of Bulick, could not, of course, testify as to the personal transactions that he had with him, and the evidence to support his contention of payment is largely writings admitted to have been executed by Bulick in his lifetime. After the defendant's answer came in, the plaintiff amended her bill in an endeavor to explain the payments indicated in Milkint's answer, and to apply them to the cash payment recited in the deed instead of to the deferred notes, and it is insisted that, because Milkint made no formal answer to this amendment, its allegations are taken as true. There is nothing in this contention. The amendment is not substantial. It was only an attempt to explain a payment, which it is admitted by all parties was in fact made in some manner, and Milkint's answer to the original bill, setting up definitely all the facts in regard to the transaction, is a complete answer to all of the pleadings filed in the case by the plaintiff.

[1] The plaintiff contends that the recital in the deed that \$1,000 of the purchase money was paid in cash, the receipt whereof was acknowledged, is not conclusive, but is subject to be rebutted by parol evidence, and the real facts shown. Just what is the effect of this recital in the deed? It seems to be very well established that such a recital is no more than an admission of payment, and that the grantor in the deed, or his personal

representative, may show that in fact the payment was not made, or was in a different amount from that expressed in the deed, but that such recital is presumptive evidence that the transaction happened just as stated, until it is overcome by some competent proof. *Flannagan v. Tie & Lumber Co.*, 77 W. Va. 158, 87 S. E. 165; *Jones on Evidence*, § 469; *Wigmore on Evidence*, § 2433; *Shehy v. Cunningham*, 81 Ohio St. 289, 90 N. E. 805, 25 L. R. A. (N. S.) 1194, and note at page 1197; 10 R. C. L., title "Evidence" § 237; *Click v. Green*, 77 Va. 827. It seems quite clear that a recital in a deed such as is contained in the deed involved in this case is prima facie evidence of the facts recited. It has just exactly the same effect as a receipt showing the payment of money would have, and the effect of such a receipt is well established in this jurisdiction. *Anderson v. Davis & Ould*, 55 W. Va. 429, 47 S. E. 157; *Onyx & Marble Co. v. Miller*, 74 W. Va. 686, 82 S. E. 1078. It is not conclusive, but it is evidence that the payments recited to have been made were actually made, and is proof thereof, in the absence of evidence impeaching its integrity.

[2] In addition to the recital in the deed that \$1,000 was paid in cash, the receipt of which was acknowledged, there is also introduced in evidence a check for \$650, given by Milkint to Bullick on the 12th of March, 1919, the date on which the deed was delivered, and it is admitted by the plaintiff that this check was part of the cash payment. There is also introduced in evidence by the defendant, a receipt dated May 6, 1919, for the sum of \$1,000, which recites upon its face that this sum was received in payment of the first deferred purchase-money note on lots 115 and 116, and the note itself is likewise produced by Milkint, and, as before stated, there is introduced in evidence a check given by Milkint to Bullick on the 19th of August, 1919, in which there is a recital that it is in full of the note due December 1, 1919, and another check given on the same date for the sum of \$28.33, which recites that it is for interest on the note. It is shown by the bank officers that Bullick indorsed both of these checks and deposited them to the credit of his account on the day after their date. The plaintiff contends that the defendant has not proved the payment of the \$3,000; that the \$650 check of March 12th, the receipt given in May for \$1,000, and the check of August, 1919, for \$350, making \$2,000 in the aggregate, is all the competent evidence offered showing the payment of the debt, and the court below accepted this view.

It cannot be doubted, from the authorities cited above, that the recital referred to in the deed is competent evidence to show the payment of the sum of \$1,000, unless the plaintiff has successfully impeached it, and shown that that sum was not in fact paid

at that time. It is admitted that the sum of \$650 was then paid, but it is claimed that \$350 of this cash payment was to be paid at a later date, and that some of the subsequent payments, or some part of them, must be applied to the discharge of this \$350. The evidence offered by the plaintiff to impeach this recital in the deed is inconclusive and unsatisfactory. In fact, it may be said that it does not amount to evidence upon the question at all. The justice of the peace, who took the acknowledgment, testifies that at that time no money was paid by Milkint to Bullick, and he also says that the deed was not delivered at that time. Counsel for the plaintiff attempted to get him to say that there was some conversation in regard to a note being given, representing the cash payment, expressed in the deed, but he declined to make any statement of that kind, so that all his evidence amounts to is that there was nothing paid in his presence. Another witness, a brother of the plaintiff, testifies that, a short time after this sale, Joe Bullick showed him three notes signed by the defendant, but he did not know the amount of them, what they were for, or that they were notes except that Joe Bullick stated that they were, and, upon being shown one of the receipts introduced in evidence, which it appears bore no resemblance whatever to the notes, and which was signed by Bullick instead of by Milkint, he stated that the paper shown him by Bullick was like the paper exhibited upon the examination. This evidence is entirely insufficient to overthrow the acknowledgment of the receipt of the money contained in the deed. This acknowledgment is unequivocal, and the evidence to overcome it should at least be equally satisfactory and unequivocal. Such is not the case. We are therefore constrained to hold that the evidence proves that \$1,000 was paid upon the delivery of the deed.

It is admitted that \$1,000 was paid on the 6th of May, and, whether admitted or not, it is satisfactorily proven by a receipt introduced in evidence executed by Bullick, and by the first deferred purchase-money note offered in evidence by Milkint.

This leaves for consideration the last note due December 1st. That there was at least \$350 paid on this note there can be no question. There is no attempt made to show that Bullick did not get the check for \$350 above referred to, or that it was not then in exactly the same condition that it was when offered in evidence, that is, that it contained a recital that it paid the balance of the note due December 1st; nor is there any attempt to show that such was not the fact. What is the effect of this recital in the check received by Bullick and indorsed and collected by him? In the case of *Polino v. Keck*, 80 W. Va. 426, 92 S. E. 665, a check containing a recital that it was in full of account was

offered in evidence and insisted upon as barring a right to recover, and we held, in that case, that the effect of such a recital in the check was the same as if a receipt had been given containing the language used therein; that it was subject to explanation but would be proof of payment unless overcome by some evidence. This, it occurs to us, settles the question here. If Bulick had given a receipt to Milkint for the sum of money for which the check was given, and recited in that receipt that it was in full of the balance of the note due December 1, 1919, this would have been equivalent to saying \$650 of this note has been paid, and this \$350 represents the remainder thereof, which is now paid. The recital in the check accepted and indorsed by Bulick must be taken to mean exactly the same thing, and to be an admission upon his part. It is not in any way contradicted or explained, and fully proves the payment of the note sued on in this case. The fact that the check given for interest on the same day is for an amount which exactly equals the interest on \$1,000, from March 1st to August 19, 1919, is also significant.

We are clearly of the opinion that the evidence shows that the purchase money for these lots has been fully paid, and the court below should have so decreed. We will enter that decree here, and will remand the cause to the circuit court with directions to have the note delivered up to the defendant for cancellation, and the lien reserved in the deed properly released.

(90 W. Va. 547)

WOODYARD v. SAYRE et al. (No. 4305.)(Supreme Court of Appeals of West Virginia.
March 14, 1922.)*(Syllabus by the Court.)***1. Mortgages §319(1)—Burden of proving payment on mortgagor.**

Where a deed, absolute on its face, conveys real estate for a consideration equal to its value, and the personal representative of the grantor sues to have it declared and treated as a mortgage, and it is admitted by the grantee to be a mortgage to secure payment of indebtedness owing to him, it is error to cancel said deed until it is established that the indebtedness is paid. The burden of proving payment, by a preponderance of evidence, is on the personal representative.

2. Executors and administrators §221(9)—Decedent's protested check and negotiable notes in payee's hands prima facie evidence of debt against the estate.

A protested check and negotiable notes, executed by a decedent a short time before his death, and in the hands of the payee, are prima facie evidence of indebtedness against the

estate, and, when produced and filed in a proper suit, the burden of proving payment rests upon the administrator, by a preponderance of the evidence.

3. Executors and administrators §85(5/4)—Decedent's creditor's possession of bank stock is prima facie evidence of creditor's absolute or conditional ownership, and the burden of proof is on the administrator seeking to recover it.

Possession of a certificate of shares of bank stock, held by a creditor of a decedent at the time of his death, is prima facie evidence of the ownership thereof by the creditor, either absolute or conditional, and, if the administrator of the decedent seeks to recover the stock, the burden is upon him to successfully rebut such evidence of ownership in the creditor.

4. Witnesses §178(3)—Administrator relying on cross-examination of party waives objection to his evidence which otherwise might be incompetent.

And in such case, if the administrator relies upon cross-examination of the possessor of the stock to disprove such absolute or conditional ownership, he thereby makes him his witness, and waives objection to his evidence, which otherwise might have been incompetent.

5. Discovery §27—Answers to interrogatories in bill of discovery held to constitute prima facie evidence for answering party.

Answers under oath to interrogatories propounded in a bill for discovery, which are responsive, full, complete, and unequivocal, constitute prima facie evidence in favor of the answering party, of the facts therein contained.

Appeal from Circuit Court, Wirt County.

Action by William Woodyard, as administrator of the estate of Harry Sayre, deceased, against Lizzie Sayre and others, and, from a decree therein, the defendant H. P. Bode appeals. Reversed and annulled in part, and decree for defendant in part.

See, also, 110 S. E. 689.

Y. B. Archer, of Parkersburg, for appellant.

T. A. Brown and C. M. Hanna, both of Parkersburg, for appellee.

LIVELY, J. From a decree of the circuit court of Wirt county, entered November 29, 1920, an appeal and supersedeas is prosecuted by H. P. Bode.

This decree divests Bode of his legal title to, and equitable interest in, a house and lot in the city of Huntington in Cabell county, and vests the title in the estate of Harry Sayre; divests him of title to, and possession of, a certificate of 5 shares of stock of the Wirt County Bank, delivered to him by Sayre, and in Bode's possession at the time of the institution of this suit; renders a personal judgment against him for \$168, in favor of said estate; disallows certain notes as indebtedness against it; and decrees a

protested check of the decedent in his favor as an unsecured debt.

Plaintiff, as administrator of Sayre's estate, filed his bill for the purpose of marshaling assets, converting the real estate into money, ascertaining and paying the indebtedness, and distributing the remainder, if any there should be, to the heirs. The bill charged that Bode held title to the house and lot in Huntington in trust, the exact nature of which was unknown to plaintiff, and asked for full discovery from Bode of the terms, conditions, and provisions of the trust, and propounded interrogatories for that purpose. It also averred the possession of the certificate of shares of bank stock by Bode, alleging that the latter claimed to hold the same as collateral security for a debt owing by Sayre to him, and that he was demanding payment of his debts against the estate, and refused to surrender possession of the certificate until payment was made to him. Bode answered the bill, stating specifically and fully his transactions with Sayre, the amount of the debts he claimed, how and when contracted, when due, when and for what purpose the house and lot was deeded to him, and how and for what purpose he held the certificate of stock. The interrogatories propounded were fully and unequivocally answered, both with reference to the Huntington property and the bank stock.

The cause was referred to a commissioner in chancery, before whom Bode appeared, unaccompanied by counsel, and presented his evidence of indebtedness against the estate, consisting of a protested check in his favor, signed by Sayre, for the sum of \$1,956, dated November 18, 1918, which was a few days before the maker's death; a note of \$850, signed by Sayre, dated June 15, 1916, payable at 4 months, to order of Bode, at the First National Bank of Marietta, Ohio; and a like note for \$853.33, dated the same day and payable in 4 months at said bank, less \$57.67 interest paid June 15, 1917. He exhibited the certificate of bank stock with a memorandum attached, made by him at the time of the delivery of the stock to him, showing that he had loaned at that time \$500 to Sayre, and that he held this stock for repayment of the loan. He was then examined at great length by counsel for the administrator, by the commissioner, and by counsel representing a bonding company, which was surety on the decedent's official bond as sheriff of Wirt county. From this examination it was shown that Sayre and Bode had dealt with each other extensively in the purchase and sale of live stock, horses, mules, and the like for many years, and up until Sayre's death. In the year 1914 Sayre was indebted to Bode in the sum of \$1,700, and desired a loan of \$300, to secure which he made the deed to the Huntington property on March 11, 1914, which deed was duly placed on rec-

ord. A short time before Sayre's death, on November 18, 1918, they had a settlement, when it was ascertained that Sayre owed, in addition to the notes, the sum of \$1,956, for which he gave this check. Said check was protested for nonpayment, and Sayre was notified, and stated he would at once deposit a sufficient sum in the bank to meet the check, but unfortunately died a very short time thereafter. It also appeared, from this examination, that, since 1914, Bode had paid the taxes on the Huntington property and had collected, through Davis as agent, the rents which, less taxes, repairs, and commissions, were credited on the indebtedness, and accounted for in the settlement; that since Sayre's death he had received \$168 from rents, which should be credited on the indebtedness; that the property was held by Bode in trust to secure the payment of his said indebtedness, a fact which he had freely admitted both before and after Sayre's death, and so told the administrator when he came to see him about the property. In the cross-examination by Mr. Brown, of counsel for the administrator, he also detailed fully the circumstances under which he became the possessor of the bank stock, and for which stock he had loaned to Sayre \$200 in cash and delivered to him certain live stock in the year 1917. There was no evidence before the commissioner to show release of the trust property, or payment of the various notes or the check.

We find nothing in the record which controverts the evidence of Bode, or which is not entirely consistent with his claims of indebtedness, except the evidence of G. W. Roberts, a creditor of the estate, wherein he undertakes to detail a conversation with Bode in Robert's storeroom after Sayre's death and in which he says that Bode said he held title to the Huntington property and wound up the remark by saying that he did not have a dollar against it; and the statement of the administrator that Bode had told him that he (Bode) would make a deed for the property to any one he designated, that he had nothing in the property, and simply held it in trust for Sayre. These alleged conversations are entirely inconsistent with the evidence of Bode, his sworn answer and his conduct, all buttressed by the notes and protested check, given eight days before Sayre's death. The mortgage on the property (admitted to be such), the existence of the notes and check, the possession of the stock certificate with memorandum attached thereto, were sufficient proof of the indebtedness claimed, and the burden was upon the plaintiff to show payment. He offered nothing to this end. Apparently the administrator had no evidence to offer, showing payment, and it seems that the attorney for the bonding company assumed to conduct the cross-examination of Bode, for the purpose

of showing payments or credits to which the estate was entitled. After he had testified, counsel for the administrator, not finding anything of benefit in the testimony, objected to his evidence as incompetent. It is now insisted that Bode's evidence did not establish his claims. If the lengthy and searching cross-examination of Bode be stricken out in its entirety, we do not think the plaintiff has carried the burden of proof to overcome the *prima facie* case made by appellant. It will be remembered that Bode's deed was unconditional and, on its face, conveyed to him absolute title; his possession of the shares of stock created presumptive ownership; and hence it may be that his cross-examination evidence, even if it had been given in chief, being adverse to his absolute interest in the properties, would be admissible under the statute. However, this is a suggestion only, and, not necessarily arising here, is not decided.

[1-3] The commissioner reported that Bode claimed the stock as security for a debt, which debt was not proven by competent evidence, although it showed that Bode was in possession of the stock at the time of Sayre's death. As to the Huntington property, he reported that there was no competent proof of Bode's debt and therefore that the property belonged to the estate of Sayre, held in trust by Bode, but free from the trust claimed by him. The commissioner "after some hesitation" reported the protested check of \$1,956 as an unsecured debt in favor of Bode. He reported against allowing either of the notes as debts. The rents collected by Bode after Sayre's death, amounting to \$168 were reported as an obligation due the estate. Bode took exceptions to all of these findings of the commissioner, but the court overruled them and pronounced the decree, the substance of which is hereinbefore recited. The production and filing of the trust deed, notes, protested check, and certificate of stock do not fall within the prohibition of section 23, c. 130, of the Code (sec. 4879), as relating to personal transactions or communications between Bode and Sayre. These are silent witnesses and speak for themselves. The notes and check are evidences of debt. The burden of proving payment was on the administrator. *Dodrill v. Gregory*, 60 W. Va. 118, 53 S. E. 922. We are unable to find the slightest evidence to discharge this burden. The commissioner reported against allowing these notes as debts against the estate, because he was unable to ascertain whether they had been paid by the protested check, or whether the check was given in settlement of them. Bode testified that they were not, but he considered his evidence incompetent for that purpose and rejected it. But where is the evidence to the contrary? Both notes and check were in Bode's possession and imported valuable con-

sideration. The shares of stock, evidenced by the certificate, are personal estate, and were transferable by delivery. *Lipscomb v. Condon*, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938. Bode's possession evidenced some title or right therein. He was asked to discover his right of ownership or possession by the bill, to which he responded fully in his answer. He was cross-examined by counsel for the administrator in order to ascertain the character of the consideration paid for the stock, by which it was elicited that \$500 had been loaned to Sayre with right of redemption, and a memorandum to that effect made at the time of the loan in 1917, and attached to the certificate. By such cross-examination, upon a matter not testified to by Bode in chief, the administrator made him his witness in that particular and is bound by the answers. *McGuire, Administrator, v. Railroad*, 70 W. Va. 538, 543, 74 S. E. 859; *Miller v. Miller's Administrator*, 92 Va. 510, 23 S. E. 891. Upon the character of Bode's trust on the Huntington property, he was examined minutely by counsel representing the bonding company, and freely and fully explained when, where, for what purposes, and under what circumstances the deed was made to him, fully sustaining the facts set out in the answer. Davis, the agent in charge of the Huntington property, said that, after the deed was made, he was directed by either Sayre or Bode, or possibly both, to collect rents and remit to Bode. The testimony of Underwood, who had agreed to buy the house and lot from Sayre, by exchange of his farm in Wirt county, clearly evinces the ownership and interest of Bode therein. Bode inspected the farm of Underwood for the purpose of ascertaining its value, and took an active part in the proposed trade. This was a short time before Sayre's death. If he had no interest in the property why did he expend time and money in its proposed sale?

The deed, notes, check, and possession of the stock establish a *prima facie* case of indebtedness against the estate, and that the properties were held, at least, as security for the payment; and this *prima facie* case has not been successfully overthrown by the evidence; on the contrary, it has been strengthened.

There is another cogent reason why the deed to the Huntington house and lot should have been adjudged to be held in trust to secure appellant's debts, and why the certificate of bank stock should have been decreed as collateral security for the payment of the loan of \$500. The bill charges that the deed to the house and lot was not an absolute deed, but was a trust, the exact nature of which was unknown to plaintiff, and it asked for a full discovery from Bode, under oath, of the terms, conditions, and provisions of the trust under which he held, and propound-

ed interrogatories for that purpose, to be answered by him; as to the bank stock, it charged that Bode had possession thereof as collateral security for money advanced to Sayre in his lifetime, as claimed by Bode, and also propounded interrogatories seeking discovery of the right by which he held the stock, and, if as a security for a debt, then to state when and what amount he advanced, with full particulars of the transactions. These interrogatories, as before stated, were fully, specifically, and unequivocally answered. His cross-examination confirmed and strengthened his answers. Can we consider the answers as evidence? If so, how has it been met by the administrator?

The bill, so far as Bode is concerned, is a mixed bill of discovery. It has a different status from the ordinary bill. Plaintiff, having no evidence of the right of his intestate to the house and lot and to the stock, has sought to make appellant his witness by requiring him to answer interrogatories, under oath, and to ascertain from him the true ownership. He has asked for a full statement of the dealings between Bode and his intestate, and specifically, if there are any money claims against the properties, and if so when, where, how, and for what purposes contracted. Can these answers be treated as nullities, without probative value, at the option of plaintiff? How can it be said that no indebtedness has been proven in consideration of the full answers to these interrogatories backed by the notes, check, and possession of the properties? Answers to interrogatories in bills for discovery are very generally held to be evidence, but not conclusive, and may be contradicted by other testimony. 18 C. J. p. 1108, § 95, title "Conclusiveness of Answer," and authorities cited. In this connection we have considered the case of *Knight v. Nease*, 53 W. Va. 51, 44 S. E. 414, wherein it is held that answers to interrogatories propounded in a suit to set aside a fraudulent conveyance cannot be considered as evidence for defendant. That suit was for the purpose of setting aside a deed from Nease to Lieving, his father-in-law, of a tract of land made in fraud of plaintiff, who held a note against Nease at the date of the deed. The interrogatories were made to search the consciences of defendants as to payment of valuable consideration and the bona fides of the transaction. Necessarily, the bill charged fraud. The burden of rebutting the fraud was upon defendants, the vendee and his son-in-law. Lieving, the father-in-law, answered the bill and interrogatories, claiming to be an innocent purchaser of the land for value. It was incumbent upon him to sustain these answers by evidence sufficient to overcome the charges of fraud, which evidence he failed to produce. The interrogatories were not necessary, for it was incumbent upon defendants, in order to fully answer the bill, to incorpo-

rate therein the substance of the data asked for by the interrogatories. That case is different from the case under consideration. Here there is no charge of fraud or of bad faith, simply a discovery in aid of a proper administration of the estate.

[4, 5] The administrator has asked the appellant to speak about personal transactions with his decedent, about which the statute sealed his lips. But the broad statement is made in *Knight v. Nease*, supra, that in no case is an answer now entitled to any weight as evidence, by virtue of sections 36, 38 and 59 of chapter 125, Code (secs. 4790, 4792, 4813), citing *Rogers v. Verlander*, 80 W. Va. 619, 5 S. E. 847; and Judge Brannon's dissenting opinion in *Johnson v. Riley*, 41 W. Va. 147, 23 S. E. 698. It will be observed that the two cases last cited, like *Knight v. Nease*, were suits to set aside conveyances as fraudulent, and the observations therein are not properly applicable to answers to interrogatories in bills of discovery.

The rule therein announced, that answers to bills are not evidence for defendant, is based upon our statute, chapter 125 of the Code. Does this statute, properly construed, divest answers to interrogatories in bills of discovery of probative value? Section 36 of chapter 125 of the Code makes true and not requiring proof every material allegation of the bill, and every material allegation in the answer constituting claim for affirmative relief, which is not denied; section 38 requires verification of the bill, if the answer is desired under oath; but if the bill be not verified, then the answer need not be verified, but, if the answer be verified, it has no more weight than if not verified; and section 59 provides that, when a material allegation of the bill is denied by the answer, it puts the plaintiff to proof of the averment. These sections apply where there is an issue, an affirmation of some right and a denial of it. By section 48 (sec. 4802) of the same chapter, where interrogatories are propounded, defendant may be attached, or brought into court by an order for the purpose of answering the interrogatories, although the bill may have been taken for confessed as to him. Does not this contemplate that the information, as disclosed by the answers, shall be of some value as evidence? If not, why should a vain thing be required? If evidence for plaintiff, why not for defendant? Plaintiff cannot sift the answers thus obtained and use that portion favorable to him and discard that which is unfavorable. All must be considered or none. This section (48) seems not to have been considered in the case of *Knight v. Nease*, supra. A defendant may be forced, by compulsory process, to testify by answers to specific questions. Plaintiff is not conclusively bound by the answers. He may overcome them by satisfactory evidence. If they have no weight, it is difficult to per-

ceive any good reason for bringing them into the case. Certainly the drastic step authorized by the statute meant that the replies should be given some importance in arriving at a just adjudication of the matters involved. Moreover, in the cases cited above, there was an issue between the parties; the defendants were charged with fraud in making the conveyances attacked. There is no such issue here, no controversy; plaintiff is seeking the aid of Bode in the proper settlement of the estate.

Now, since all parties are allowed to be witnesses, discovery is less needed than formerly, and less frequently asked by technical bills of discovery, which in practice have been largely superseded by other methods of ascertaining the facts from the parties. But there are instances where a party has some important knowledge of a material fact and remains silent, thus requiring discovery. Section 48 provides for such cases. In the case at bar, the rule of evidence prescribed by section 23, c. 130, Code, prevented Bode from voluntarily testifying about his transactions with Sayre, out of which his title and possession of the property arose. He was relieved from that rule of evidence by the administrator of Sayre, when he was called upon to testify in relation thereto under oath. The case of *Knight v. Nease*, so far as it, by its general and broad terms, holds that answers to interrogatories in cases of this character are not to be considered as evidence, is disapproved. It will be observed that all of the above sections of chapter 125 of the Code were in the same chapter of the Code of 1868, bearing the same section numbers. The only addition (made in 1882) is to the latter part of section 88, as follows:

"A general replication to an answer claiming affirmative relief, shall not apply to so much of said answer as states facts constituting a claim to such relief."

This addition has no bearing upon the question now under consideration. In the case of *Jones v. Cunningham*, 7 W. Va. 707, 713, Judge Haymond said:

"When the plaintiff, by bill of discovery, seeks a discovery from the defendant as to any matter of fact, the answer is evidence for the defendant so far as it is responsive to such bill, as to the fact as to which discovery is sought; yet as to matter in respect of which the bill seeks no discovery, if the answer alleges anything affirmatively, it is not evidence for the defendant, but it is to be proved by him. *Taylor v. Moore*, 2 Rand. 575 and 576, opinion of Judge Green; 2 Rob. (Old) Prac. 830."

The provisions of chapter 125, Code, above referred to were then in existence. We re-

gard this case as in point, specific discovery having been sought therein, and of equal, if not superior, authority to *Knight v. Nease*. The courts of Virginia have consistently held to the rule that, in order to overcome the evidential effect of an answer to a mixed bill of discovery, it is necessary to have a certain amount of opposing proof. *Shenandoah Land Co. v. Clarke*, 106 Va. 100, 55 S. E. 561. The Virginia rule is stated in *Thompson v. Clark*, 81 Va. 428, as follows:

"By that rule the answer is treated as evidence, including its affirmative statements of fact which are pertinent to the discovery sought by the bill, and is conclusive, unless overcome by the testimony of two opposing witnesses, or of one witness corroborated by other circumstances, or by corroborating circumstances or documentary evidence alone."

This decision followed the case of *Fant v. Miller*, 17 Grat. (Va.) 187, which is the principal case, and which has been approved in *Morrison v. Grubb*, 23 Grat. (Va.) 350; *Corbin v. Mills*, 19 Grat. (Va.) 438; *Shurtz v. Johnson*, 28 Grat. (Va.) 663; *Shultz v. Hansbrough*, 33 Grat. (Va.) 531; *Bell v. Moon*, 79 Va. 349; and *Batchelder v. White*, 80 Va. 109. See monographic note to *Tate v. Vance*, 27 Grat. (Va.) 571, Va. Reports Annotated, p. 599.

We think the sections of chapter 125 of the Code, above referred to, were not intended to, and do not, take from answers to interrogatories propounded in bills for discovery all value as evidence. On the contrary we think such answers, in so far as they are responsive to the interrogatories, are prima facie evidence of the matters therein contained. They may be rebutted and overthrown by evidence satisfactory to the chancellor. The answers of Bode to plaintiff's interrogatories are responsive, full, complete, and unequivocal, are evidence in his favor, and have not been overcome by plaintiff.

The court erred in not sustaining the exceptions of appellant to the commissioner's report. The decree will be reversed and annulled in so far as it divests appellant of his equitable interest in the house and lot in Huntington, Cabell county, W. Va.; divests him of his equitable title to the 5 shares of capital stock of the Wirt County Bank, as security for the repayment to him of his debt of \$500, secured thereby; disallows the two notes, one for \$850 and the other for \$853.33, both dated June 16, 1916; decrees the \$1,956 protested check as an unsecured debt; and renders judgment against appellant for \$168, rents collected by him from the Huntington property since Sayre's death. In all other respects the decree is not disturbed.

Reversed and remanded.

(90 W. Va. 822)

SWIGER v. RUNNION. (No. 4308.)

(Supreme Court of Appeals of West Virginia.
Feb. 21, 1922. Rehearing Denied
April 4, 1922.)

(Syllabus by the Court.)

1. Damages \S 216(1)—In an action for damages resulting from automobile collision, an instruction as to damages allowable to plaintiff for injuries to his wife and child held erroneous.

Where action is brought to recover damages arising from an automobile collision for injuries to plaintiff and to plaintiff's automobile, for expenses incurred in effecting the cure of injuries to plaintiff's wife and child, and for loss of her services during her illness consequent upon such injuries, it is error to give a general instruction to the jury that, if they find that defendant negligently permitted his automobile to run into plaintiff's and thereby injured plaintiff and his wife and child, or any of them, then the jury shall find for the plaintiff, and assess such damages as they believe from the evidence he is entitled to, because such instruction does not properly limit or define the damages for which plaintiff is entitled to recover for the injuries received by his wife and child.

2. Trial \S 253(4)—Instruction held error because ignoring the defense of contributory negligence.

In an action for personal injuries, growing out of a collision of automobiles on a public road, where the defense relied on is plaintiff's contributory negligence, it is error to instruct the jury that, if they believe that at the time of the collision the defendant's automobile was not on his right-hand side of the road, there is a presumption that defendant was at that time guilty of negligence, and he is liable to plaintiff for the injuries sustained, and that defendant is not relieved from such liability even though the jury may believe that plaintiff did not have his automobile under control at the time, because such instruction ignores such defense.

3. Highways \S 184(4)—In action for personal injuries, refusal of an instruction on contributory negligence held error.

In an action for damages arising out of an automobile collision, where defendant relied upon plaintiff's contributory negligence as a defense, it was error to refuse the following instruction offered by him:

"The court instructs the jury that, if they believe from the evidence in this case that, at the time of the injury and collision complained of in this case, that the plaintiff was running on a public highway at a greater rate of speed than is allowed by law, and did not have his automobile under control at the time of the accident, and as a result he collided with defendant's automobile, he cannot recover in this action because of contributory negligence, even if the jury may believe that at the time of the accident complained of the defendant was on the wrong side of the public road, and the jury should find for the defendant."

4. Damages \S 215(3)—Instruction on punitive damages held erroneous.

It is error to instruct the jury that, if they find the plaintiff is entitled to damages, they shall take into consideration the injuries sustained by him, and what amount is necessary to compensate him therefor, and that, if they further find that the defendant did the injuries complained of in a wanton or willful manner, or from a reckless indifference to the rights and safety of plaintiff or his property, they may find such further damages as they may believe the plaintiff is entitled to, in assessing punitive damages the correct rule being that, if the jury find that the acts complained of were malicious or wanton, or in reckless disregard of plaintiff's rights, they may allow punitive damages for such amount as, added to the actual damages sustained, will be sufficient to punish the defendant, and to deter others from committing like offenses.

Error to Circuit Court, Roane County.

Suit by C. C. Swiger against A. J. Runnion. Judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and cause remanded for new trial.

Thos. P. Ryan, of Spencer, for plaintiff in error.

Harper & Baker, of Spencer, for defendant in error.

MEREDITH, J. Plaintiff, C. C. Swiger, sued defendant, A. J. Runnion, in trespass on the case for damages arising out of a collision of plaintiff's with defendant's automobile, about a quarter of a mile east of the city of Spencer, on the Spencer-Arnoldsburg pike. There are four counts to the declaration, covering injuries to the plaintiff's car, injuries to plaintiff, expenses incurred on account of injuries to his wife and child, and for loss of services of his wife during her consequent illness. There was a verdict for plaintiff. The court refusing to set aside the verdict on defendant's motion, judgment was entered for plaintiff, and defendant obtained a writ of error to this court.

Defendant's counsel complains in this court of the overruling of his demurrer to the declaration, but neither the printed record nor the original record, which is also before us, shows that any demurrer was entered in the court below. While the demurrer cannot be entered here, it may not be improper to say that, in our opinion, the declaration is sufficient.

From the record it appears that plaintiff was driving from Spencer and defendant was driving toward Spencer. The collision occurred at or a short distance beyond a curve in the road, plaintiff's car being on the inside of the curve. A small garage building which then stood about 3 feet from the inside curb obstructed the view of both parties for some distance at or near the curve. About 75 or 80 feet east of the garage there

is a small bridge over which the road runs. About the farther end of the bridge defendant claims he passed two men with horses, and hence had to pass them on their left, thus throwing his car over on his left-hand side of the road, and that he passed the horses slowly, and that he did not have time to get his car fully over to his right-hand side of the road before the plaintiff's car, which, as defendant claims, was running at a very high rate of speed around the curve, struck defendant's car; defendant claims that plaintiff gave no warning, and did not have his car under proper control, considering all the circumstances, and he relies on plaintiff's contributory negligence as a bar to recovery. Plaintiff claims he gave proper warning, but that defendant was looking down into the bottom of his car, and paid no attention to the warning if he heard it; that he (plaintiff) had his car under proper control, and that the collision would not have occurred had defendant not been on plaintiff's side of the road. As is usual in such cases, each party seeks to justify himself and to place the whole blame on the other. We express no opinion as to which party is right; we make no comment further than is necessary to afford a clear understanding of the points raised as to the instructions given for plaintiff or refused for defendant.

[1] Defendant complains of instructions Nos. 1 to 5 given at plaintiff's instance. Instruction No. 1 tells the jury that, if they find that plaintiff was driving his car at a reasonable rate of speed, and with his car within his control, and on his right-hand side of the road, and that defendant carelessly and negligently permitted his car to run into plaintiff's car, and cause injury to plaintiff and his wife and child, or any of them, then the jury shall assess such damages for the plaintiff as they believe he is entitled to, not exceeding the amount sued for.

The objection to this instruction is that it does not limit or point out the kind of damages for which plaintiff might recover because of injuries to the wife or child. He could recover for the expense incurred by him in effecting their cure and for loss of services of his wife during her consequent illness, but not for permanent injuries to her or the child, or for their pain and suffering. We think the court should not have given this instruction without modification.

[2] Plaintiff's instruction No. 3 is as follows:

"The court further instructs you that, if you believe that, at the time the automobiles of plaintiff and defendant collided with each other, as described in the evidence, that the automobile of defendant was not on his right-hand side of the road, that the presumption is that defendant was at that time guilty of negligence, and is liable to the plaintiff for any injuries sustained by him, by his wife and child

then with him, and to his automobile, and defendant is not relieved from such liability even though you may believe that plaintiff did not have his automobile under control at the time."

This instruction practically told the jury that defendant had no defense; that, no matter if plaintiff were driving his car at too high a speed, or for that or any other reason may have lost control of his car, and thereby contributed to or caused the injury, yet the defendant was liable because he was on the wrong side. If they were both at fault, and if plaintiff's negligence contributed to the injury, then plaintiff cannot recover. It was plaintiff's duty to have his car under control; not merely such control as might enable him to guide the car and keep it in the road, but such control as would enable him to stop it within half the distance that the road was in view, as required by section 118, c. 66, Acts 1917 (Code Supp. 1918, c. 43, § 118 [sec. 1940—118]). The collision occurred near a curve, and both parties were familiar with the road at that point, and both knew of the frequent use of automobiles upon this road. We think this instruction should not have been given, because it ignores the defense of contributory negligence.

Instruction No. 4 has the same vice that is contained in Nos. 1 and 2, relative to the kind of damages for which the plaintiff might recover, and also directs the jury to find for the plaintiff "unless it affirmatively appears that such collision was the fault of said plaintiff." It must be remembered that defendant was not, under the defense of contributory negligence, required to show that plaintiff was wholly at fault; if plaintiff's negligence in part contributed to the injury, the plaintiff could not recover.

Instruction No. 5 is proper in so far as it covers compensatory damages, but as to punitive damages is directly contrary to many decisions of this court. While the instruction does not mention punitive damages by that name, it tells the jury they may, in addition to the damages necessary to compensate the plaintiff for the injuries sustained, also find such further damages as they may believe the plaintiff is entitled to in case they believe the defendant did the injuries complained of in a wanton or willful manner, or from a reckless indifference to the rights and safety of the plaintiff and his property. As was said by Judge Ritz in the case of *Goodman v. Klein*, 87 W. Va. 292, 298, 104 S. E. 726:

"The correct rule for the allowance of exemplary damages is that if the jury determine that the acts complained of are malicious or wanton, and in reckless disregard of the plaintiff's rights, they may allow exemplary damages for such amount as taken together with the actual damages will be sufficient to punish the defendant and deter others from committing like offenses."

To the same effect are the cases of *Claborn v. Railway Co.*, 46 W. Va. 363, 33 S. E. 262; *Allen v. Lopinsky*, 81 W. Va. 13, 94 S. E. 866; *Hess v. Marinari*, 81 W. Va. 500, 94 S. E. 968; *Pendleton v. Railway Co.*, 82 W. Va. 270, 95 S. E. 941; and *Fisher v. Fisher*, 89 W. Va. 199, 108 S. E. 872.

[3, 4] Defendant also complains of the court's refusal to give his instruction No. 2 as follows:

"The court instructs the jury that, if they believe from the evidence in this case that, at the time of the injury and collision complained of in this case, that the plaintiff was running on a public highway at a greater rate of speed than is allowed by law, and did not have his automobile under control at the time of the accident, and as a result he collided with the defendant's automobile, he cannot recover in this action because of contributory negligence, even if the jury may believe that at the time of the accident complained of the defendant was on the wrong side of the public road, and the jury should find for the defendant."

The court seems to have tried the case on the theory that, if defendant was on the wrong side of the road when the collision occurred, he had no defense; that this in and of itself constituted such an offense against the law of the road that, no matter whether the plaintiff was negligent or not, the defendant is liable. The record does not disclose whether the place of the collision is inside the corporate limits of Spencer or in a "closely built up" section, as defined by section 117, c. 68, Acts 1917 (Code Supp. 1918, § 117 [sec. 1940—117]) or not. If it were not, it was not unlawful for defendant to drive his car on the left-hand side of the road. *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; *Statten v. Monroe* (Tex. Civ. App. 1912) 150 S. W. 222; *Giles v. Ternes*, 93 Kan. 140, 143 Pac. 491; *Linstroth v. Peper* (Mo. App. 1916) 188 S. W. 1125; *Baker v. Zimmerman*, 179 Iowa, 272, 161 N. W. 479. Of course when they approached each other it was the duty of each to pass to the right; but defendant contends that plaintiff was driving so fast defendant did not have time to turn to the right and get out of his way; that plaintiff was coming at such a rapid rate of speed that he did not have his car under control, such control as would enable him to stop his car within the distance required by law, and hence defendant contends that if, as a result, the collision occurred he is not liable because of plaintiff's contributory negligence. Defendant was entitled to this instruction, and it was error to refuse it. We do not think this error was cured by the other instructions given.

Defendant's instruction No. 7 should have been given, but its refusal was not error, as its substance is covered by defendant's in-

struction No. 6, which was given, and we see no error in the court's refusal to give defendant's instruction No. 8 as offered, and giving it in its modified form.

For the errors of the court in giving plaintiff's instructions 1, 2, 3, 4, and 5, and in refusing to give defendant's instruction No. 2, we reverse the judgment, set aside the verdict, and remand the case for a new trial.

(90 W. Va. 496)

STATE v. GOLDEN. (No. 4387.)

(Supreme Court of Appeals of West Virginia.
March 14, 1922.)

(Syllabus by the Court.)

1. Criminal law § 473—Physician's testimony as to age of fetus held admissible to show pregnancy by another than defendant, as tending to show consent.

In a prosecution for rape, where the prosecutrix fixes the time and place of the assault, and testifies that as a result thereof she became pregnant, and had a miscarriage within three months from the time of the assault, and that she never had other sexual intercourse either before or after the time of the assault, testimony of the physician, who attended her miscarriage, to the effect that the fetus had been conceived "in the neighborhood of 8 to 4 months" prior to its delivery, is admissible as tending to show that the prosecutrix had become pregnant by some other person, and as tending to prove consent, thus sustaining defendant, who swears he had intercourse with her by her free consent.

2. Criminal law § 473—Where attending physician stated sex of fetus was easily ascertained, contradictory testimony of other physicians held admissible.

In such case, where the attending physician swears that the sex of the fetus was easily ascertained by casual examination, evidence of other physicians is admissible to prove that the sex of a fetus cannot be ascertained by such inspection until four months from the date of its conception.

3. Criminal law § 594(1), 600(2)—Where defendant will otherwise be deprived of material evidence, affidavit of absent witness should be admitted or hearing postponed.

Where it is plainly apparent that a misunderstanding has innocently arisen between opposing counsel as to the introduction of an affidavit at the trial, in lieu of the testimony of a witness who has been summoned, but who has left the state on urgent business, and whose evidence is material and vital to the defense in a prosecution for rape, and by reason thereof defendant will be deprived of such evidence, the court should either permit such affidavit

to be admitted as evidence, or continue the hearing until the attendance of such witness could be procured.

4. Criminal law §936(1)—New trial awarded where defendant has been deprived of material testimony by surprise.

Where a defendant in a criminal case, without fault on his part, has been deprived of material and vital evidence in his defense by surprise, thus preventing a fair trial, the verdict should be set aside and a new trial awarded.

(Additional Syllabus by Editorial Staff.)

5. Rape §54(1)—Prosecutrix's uncorroborated testimony is sufficient.

Prosecutrix's uncorroborated testimony is sufficient to sustain verdict convicting of rape.

6. Rape §49(2), 57(1)—Prosecutrix's failure to make prompt complaint may be explained, and value of testimony is for the jury.

Failure of prosecutrix to make prompt complaint of the alleged rape may be explained as being through fear of being sent away as threatened by her foster mother, "if she ever did any such thing," its value being for the jury.

7. Rape §40(1, 3)—Evidence of prosecutrix's reputation for chastity and of other illicit sexual acts is admissible to show resistance unlikely.

In a prosecution for rape evidence of prosecutrix's reputation for chastity, and of acts of illicit intercourse with other men, was admissible to show that prosecutrix's resistance was unlikely, and to corroborate defendant's testimony that she told him at the time that she "had been out with other boys" and had consented.

8. Criminal law §656(2)—Court's remarks as to cross-examination of prosecutrix criticized.

Where prosecutrix testified that the rape took place at time of her menstrual flow, and that she had an absorbent pad pinned to her underclothing, and the defense theory was that she had no flow at such time, and it became material on cross-examining prosecutrix to inquire what disposition she made of such pad, the court's statement to defendant's counsel, "I want you to understand that this girl is only a child and not much latitude will be allowed in your examination of her; you can ask this one question, but you cannot go into this any further," held subject to criticism.

Error to Circuit Court, Mineral County.

John Golden was convicted of rape, and he brings error. Reversed and remanded for new trial.

H. G. Shores, of Keyser, J. Philip Roman, of Cumberland, Md., and F. M. Reynolds, of Keyser, for plaintiff in error.

E. T. England, Atty. Gen., R. Dennis Steed, Asst. Atty. Gen., and Arthur Arnold, Pros. Atty., of Piedmont, for the State.

LIVELY, J. Defendant was convicted of the crime of rape, and on the 3d day of June, 1921, sentenced to confinement in the penitentiary for 10 years, and prosecutes this writ of error.

The prosecutrix, Thelma Graham, who had been adopted in the family of Herbert Short, and who was known as Thelma Short, was 14 years and 5 months old at the time of the alleged rape. She was fairly well developed physically and weighed 122 pounds. The defendant was 31 years of age, was married, of well-developed physique, and weighed about 175 pounds. These two persons were casually known to each other, possibly having nothing more than a speaking acquaintance. The prosecutrix testified that on the 13th day of December, 1920, about the hour of 8 o'clock p. m., she had been sent on an errand to a downtown store, and while performing that errand she observed defendant, who preceded her in a small Chevrolet touring car, and waited for her on another street, where he stopped his car and asked her to come over, that he had something to tell her; that after some conversation, in which he asked her to take a drive with him, she finally consented and got in the front seat of the car with him, and they drove out of town about three miles to a bridge on the turnpike which spanned a small stream, where he turned his car and came back in the direction of Keyser until he reached a lane near the house of a Mr. Paris, which lane led up near to what was called the red barn. He stopped the car about 35 or 40 yards from the main road, which was at that time frequently traveled, automobiles passing in either direction continuously, and within about 100 yards of the residence of Mr. Paris and somewhat nearer to the red barn. She testified that, after stopping the car and working a short time with some of the machinery, he got back in the car, and "stood her up" behind the front seat, and then climbed over the front seat, sat her down upon the rear seat of the car, sat down by her, put his arm around her, and "loved her a little," kissed her, and then by force and against her will laid her on the back seat and had intercourse with her. She testified that she "hollered," was scared, and resisted until her strength gave out; that in about 10 minutes he drove away, having placed her in the front seat with him, and took her back to the city of Keyser, conversing with her upon general topics while on the way; that she alighted from the car near her home on an unfrequented street, and thence went to her foster parents' residence. After then explaining to her foster parents that she had been detained down town on the errand she had started to run, as an excuse for not returning earlier, she went into the kitchen, where she obtained a newspaper and was reading it when her foster mother came in.

She told her foster mother she was going to bed, and her foster mother said, "Yes; it is time to go to bed," and then she, prosecutrix, retired for the night. The reason she gave why she did not divulge the alleged crime was because, as she said, her foster mother had told her if she ever did anything of that kind she would be sent to some institution or home, presumably some place of correction for such girls. There was nothing unusual about her appearance; her clothing was in no way disarranged or torn; no marks or bruises about her body, and nothing unusual in her demeanor, except, as stated by Mr. Short, that she appeared stupid and "did not act like herself at all." She said that she was menstruating at the time of the assault, and described the clothes she wore, including an absorbent pad. According to her testimony she became with child as a result of the alleged rape, but said nothing about the crime until about the 1st of March, when her condition impelled inquiry on the part of her foster parents, at which time she told them that a rape had been committed upon her by the defendant, as above set out. She swore that she never had illicit, carnal intercourse with any other person before or after this time.

The version of the affair by the defendant is altogether different from that stated by the prosecutrix. He said he was standing in front of Evans' jewelry store on some day during Christmas week, in company with Frank Githens and Elmer Wilson, when this girl passed them. A short time thereafter he got in his car, and he again saw her on another street, and he asked her if she would take a ride with him; and she replied that she would like to go, but was afraid because her people were watching her; and, after making an appointment to meet him on Orchard street, he subsequently drove to that street, where he took her in the car and rode with her out to the bridge, as testified to by her, and there turned and came back to the intersecting road next to the red barn, where he turned out of the main road up toward the barn, where the car was stopped; and, after asking her to get over in the rear seat, he there sat down by her and "courted her," hugged her, kissed her, and asked her if she had ever been out with any other men; and, after some conversation along that line, he made a proposition to her to which she consented, and that he had intercourse with her without objection on her part, but with her consent readily given. He testified that while it was dark the car could be readily seen from the main road, which was nearby and frequented at the time, many automobiles passing along over it, or from the residence of Mr. Paris, if any one had come out, or from the barn, which was somewhat near. The minutiae of the sordid affair were detailed by him. He further stated that after getting his car started out of the lane she

got in the front seat, where he sat down by her, and took her back to a place near her residence, and at her request, put her off at a street near her home. He is in part corroborated by Frank Githens, who testified that he was in company with defendant near the jewelry store at the time designated.

Thus it will be seen that the act of intercourse actually occurred near the time and place stated by the principal actors. The question then to be determined by the jury was whether the act was committed against the will and without the consent of the prosecutrix. On this question the statements of the two are diametrically opposed. There is nothing to corroborate the prosecutrix in that regard except a statement made by Alma Paris to the effect that, some time before Christmas, the exact date she was unable to state, whether it was the 12th, 13th, or 14th, she heard some girl scream in the direction of the lane which was near her house, but that she paid no attention to it, stating, "We hear those screams so often we do not think anything of it anymore." There is little probative value in this vague and general statement, both as to the time the screams were heard and their character. However, it was possibly admissible and might be considered by the jury for what it was worth.

[5, 6] On the other hand, there is some corroboration of the testimony of the defendant in the fact that the girl's clothing was not torn or disarranged; no bruises or marks on her person, and nothing in her appearance or demeanor to indicate an unusual occurrence. But it is well established in this jurisdiction that the uncorroborated statements of the prosecutrix in such cases are sufficient to sustain a verdict. Another fact which tends to buttress the defendant's contention that no rape was committed is that prosecutrix made no complaint and said nothing about the occurrence until more than two months afterwards, when it became apparent that she was enceinte, and had to give some reason for her condition. But she was young and inexperienced apparently, and she gave a reason which might have been sufficient to her why she did not tell of the occurrence to her foster mother. As before stated, her reason was that she was afraid of being sent from her then home because her foster mother had told her that if she ever did anything of that kind she would be sent away. Failure to make a prompt complaint on the part of the prosecutrix may be explained, in order to make her evidence admissible, and then the value of the testimony is to be weighed by the jury. 33 Cyc. p. 1469; *People v. Gage*, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854. In *People v. Gage* prosecutrix was a girl of very tender years, and for a considerable time after the assault upon her did not divulge it, giving as a reason

her fear that her father would whip her. The court said:

"Delay in making complaint in case of rape calls for explanation before the court will admit the complaint in evidence. But the fact that the person injured was a girl of tender years, and appeared to be under a sort of duress, caused by fear of the whipping which the perpetrator of the offense impressed upon her mind would befall her if she told her parents, is a sufficient explanation of the delay to justify the court in admitting her complaint in evidence."

The defense introduced evidence to show that the reputation of the prosecutrix for chastity was bad. It was shown by Viola Fleming that there was a fair in progress near the city of Keyser on the 13th, 14th, and 15th of December, 1920, and that she, in company with prosecutrix and Mrs. Dorsey's small children, attended this fair, and while there Vernon Rose was introduced to the prosecutrix by Orlando Whetzell, Rose being introduced under the assumed name of Sisk, who accompanied these two girls on their return to the home of Mrs. Dorsey, and from there the prosecutrix and Vernon Rose, alias Sisk, went in the direction of the home of Thelma Short. Viola Fleming is corroborated by Whetzell and Vernon Rose, and they all three fix the date as of the 13th day of December, 1920, the time at which the alleged assault by defendant was committed. Rose testified that instead of accompanying the Short girl home he took her to some old abandoned fort on the outskirts of the town, and had sexual intercourse with her on the top steps at a convenient place. All of the statements made by these witnesses are flatly denied by the prosecutrix. The Fleming girl also testified that between the 1st and 10th of that month and year she and Thelma Short were on the streets of Keyser one night when Thelma began flirting with two boys on the street who were in soldier's uniform. These boys, Austin Sayre and Roy Baker, accompanied them a short distance from the town, where they entered through a fence into a field, where there was a straw rick or stack of some kind, and Thelma and Baker went behind the stack and remained there for 10 or 15 minutes. For some reason the court refused to permit Viola Fleming to detail a conversation she had with the prosecutrix just before or about the time they entered this field, and exceptions were made to the ruling of the court, but the record does not show what the witness would have said. It is apparent that it related to the purpose for which they went to the haystack; but this is a surmise, as the record was not vouched. Neither Sayre nor Baker was introduced as a witness, because it was shown that they were in the military service, and their whereabouts could not be ascertained. As rebuttal to this statement of

Viola Fleming, L. T. Carskadon testified that he was the owner of the field and haystack, and had moved the haystack some distance away previous to the time of the visit, as stated by the Fleming girl. This was at the close of the trial, and the court and prosecuting attorney understood that each side had rested their case, and the instructions on behalf of the state were placed in the hands of the court for his consideration. The defense was not ready to submit its instructions then, but stated that they could be prepared and placed in the hands of the court after adjournment. At the session of the court the next morning the defense stated to the court that it had three witnesses then coming to the court house in response to summonses, who would testify positively that Carskadon was mistaken as to the time when the haystack had been removed by him, and that the haystack was at the place at the time designated by Viola Fleming, and asked that the evidence be permitted to be introduced. The court refused to permit this to be done, stating that each side had closed their evidence at the last adjournment of the court the evening of the day before.

Much evidence was produced for the state to the effect that the reputation of the prosecutrix for chastity was good; that she was a member of a church and an attendant at Sunday school.

[7] The evidence of the reputation for chastity of the prosecutrix, and of the acts of illicit intercourse with other men, was for the purpose of showing that it was not likely that she resisted the defendant, and that it was not against her will or without her consent; and, conversely, to sustain the evidence of the defendant that she had told him that she "had been out with other boys," and had consented. It is clearly established by our own decision that such evidence may be introduced and considered for that purpose. *State v. Kittle*, 85 W. Va. 116, 101 S. E. 70.

[1,2] It appears that on the 13th day of March, 1921, just three months after the alleged commission of the assault, the prosecutrix had a miscarriage, and Dr. H. F. Coffman was called about two o'clock a. m. to attend her. He made an affidavit to that effect, in which he stated that he examined the fetus, which was in a bucket near her, and that the sex was plainly discernible. Dr. Coffman was summoned as a witness for the defense, but for some good reason was compelled to leave the state just before the trial, and so stated to the special judge who had been elected to conduct the trial, and the judge informed him that he should see the attorney for the defense and possibly his absence could be arranged for. This attorney prepared the doctor's affidavit, which contained the material fact above referred to, and presented it to the prosecuting attorney, prior to the trial, and a conflict arose at the

trial between the attorney for the defense and the prosecuting attorney as to the agreement to introduce this affidavit as evidence. Defendant's counsel made affidavit that when the case was called for trial he announced that he would be ready if this affidavit was admitted as evidence. This is denied by the state's attorney, and the trial judge has no recollection that such a statement was made. The record is silent upon that part of the controversy. William MacDonald, a practicing attorney at the bar, made an affidavit, which is in the record, to the effect that he heard the prosecuting attorney and the counsel for the defense talking about an affidavit made by Dr. H. F. Coffman, and that his attention was called to the affidavit and he read it. He also stated that he asked the prosecuting attorney if the statement of Dr. Coffman would not be evidence to show that the prosecuting witness was mistaken as to the time when she had intercourse with Golden, and that the prosecuting attorney agreed that it might be evidence on that point. This affidavit of Dr. Coffman was offered in evidence after the state had closed its evidence in chief, and objection was made by the prosecution to its introduction. After some controversy about its introduction, one point being urged against it by the assistant prosecutor, that Dr. Coffman, in the affidavit, had not qualified himself as an expert, the court took the matter under advisement. Doctors Chas. S. Hoffman, Arnold A. Scherr, and M. R. Bell were in attendance as witnesses for the defense, and, as they were anxious to be about their professional duties, the court then took their evidence in the absence of the jury and pending his decision upon the admissibility of the affidavit of Dr. Coffman. These three doctors all stated that they were qualified physicians of long practice, and had experience in matters of childbirth and miscarriage. They stated that Dr. Coffman was an eminent and well-qualified physician of long standing, and an expert in such matters. They stated, with slight variance, that it would be impossible to ascertain from a fetus, which had been miscarried and delivered, the sex of the child until it had been in existence for four months; and, if the sex of this fetus was plainly discernible, as was stated by Dr. Coffman in his affidavit, then the child would have been begotten about four months prior to the date of this miscarriage. It is apparent that if the affidavit of Dr. Coffman had gone to the jury, buttressed by the affidavits of these three other eminent physicians, it would have had a material bearing upon the case, tending strongly to show that the prosecutrix was mistaken by a month's time as to the date of the alleged assault; or that she had become with child by some other person prior to the 18th of December, 1920. This evidence would have

been admissible for the same purpose as that of carnal communication of prosecutrix with other persons, and therefore tend to support the contention of the defense that the prosecutrix had consented. It can be readily seen that this was vital and important testimony for the defense.

[3] When the court again convened, and the presiding judge had considered the relevancy of the affidavit of Dr. Coffman, he stated that he was of the opinion, on the authority of *Mendum v. Commonwealth*, 6 Rand. (Va.) 704, and *State v. Maynes*, 61 Iowa, 119, 15 N. W. 864, that it was competent to show that Dr. Coffman was a physician, and the court would so hold; and then counsel stated that they could not reach an agreement in reference to admitting any portion of such statement, and counsel for the defendant then asked the court to admit only the relevant part thereof. The court then investigated the circumstances under which the affidavit was taken, and whether the attorneys had agreed upon its introduction. The attorney for the defense was positive that he had exhibited the affidavit to the prosecuting attorney, and that he had agreed that it should go to the jury as evidence. The prosecuting attorney stated to the court that he knew nothing of the statement until early in the term, and he was asked to sign an agreement to the effect that it could be used in the trial, but he refused to sign an agreement, and so informed defendant's counsel, and that he stated to defendant's counsel that he would object to the offer of the statement at the trial. Thereupon the court refused to admit the affidavit of Dr. Coffman or any part of it or any of the evidence of Drs. Hoffman, Scherr, or Bell, taken out of the hearing of the jury, to which ruling of the court the defendant by counsel objected and excepted. Counsel for the defendant makes affidavit that he then stated he was taken by surprise, and asked for a continuance of the case, which was refused. This statement is denied by the trial judge and the prosecuting attorney, and the record does not disclose that such motion or statement was made. It is reasonably clear that counsel for the defense was under the impression that the affidavit of Dr. Coffman would be admitted as evidence in the trial, or at least the material part thereof, and that he gained such impression or understanding after conference with the prosecuting attorney. The prosecuting attorney admits having the affidavit presented to him for that purpose, but denies that he agreed to its introduction. The affidavit of Wm. MacDonald is persuasive that some negotiation or understanding was pending between the attorneys prior to the trial with reference to its introduction as evidence. Defendant's counsel is very positive in his affidavit that there was such an understanding, and that he relied upon

the same, and as a result thereof permitted his important witness to be absent from the trial. The fact that he did allow this witness to go without the jurisdiction of the court, carrying with him evidence of the most vital and important character to his client, charged with a capital offense, is strongly indicative that he relied upon an assurance that the affidavit would be permitted. Which of the contentions is true we do not know, and it is immaterial. Here was an unfortunate misunderstanding, and a matter of serious import to the defendant. The trial court could see that the evidence, if it had been introduced, would be material and vital to his defense. The defendant himself was not to blame. Can we say that blame should be charged to any person? The defendant has been the innocent victim of an unfortunate circumstance. The question that concerns us here is whether the defendant under these circumstances has had a fair trial. Seeing the importance of this pertinent evidence, would it not have been proper for the trial court to delay the trial, or discharge the jury and await a time until the defendant could procure his evidence, and present a full defense under all these facts and circumstances? The Constitution provides that a person accused of crime "shall be confronted with the witnesses against him, and shall have the assistance of counsel, and a reasonable time to prepare for his defense; and there shall be awarded to him compulsory process for obtaining witnesses in his favor." The spirit of this provision in our Bill of Rights is summed up in the expression "the defendant shall have a fair trial." We are not unmindful that the accused must use diligence, and if he does not do so it is at his peril. But can we say that diligence has not been used here? It is apparent that from the time the indictment was returned defendant had made diligent preparation for his trial. We think under the circumstances that the material part of Dr. Coffman's affidavit, together with the supporting evidence of the other physicians, should have gone to the jury, or that the trial should have been delayed until reasonable effort had been made to procure the attendance of Dr. Coffman. It is apparent that such evidence could have been procured, that it was material to the issue, and that it was prejudicial error to the defendant, under all these facts and circumstances, to proceed with the trial in its absence. In *Boxley v. Commonwealth*, 24 Grat. (Va.) 649, the prosecutrix made a different statement on the trial from that made by her in the preliminary hearing before Justice of the Peace Melvin, who at the time of the trial was not in attendance upon the court and had not been summoned. His absence and failure of the defense to introduce him as a witness was satisfactorily accounted for, and, upon affidavit showing in

what particulars she had varied in her two statements and that such variance could be shown by Justice of the Peace Melvin, the verdict was set aside, and a new trial awarded on the ground of surprise. Is it not apparent that there was surprise in the case at bar?

[3] Error is assigned because the court refused to permit the defense to cross-examine the prosecutrix about what became of an absorbent pad which she claimed to have had pinned to her underclothing at the time of the alleged assault, and because of the remarks made by the judge to defendant's counsel in that connection. It was the theory of the defense that the ride in the automobile took place in Christmas week, and at a time when the girl had no menstrual flow, and therefore it became material to inquire specifically as to what disposition was made of this pad on the occasion designated by her. Upon inquiry along this line, the court said, "Mr. Shores, I want you to understand that this girl is only a child and not much latitude will be allowed in your examination of her. You can ask this one question, but you cannot go into this any further." While the court has wide discretion in controlling the manner of examination of young and unsophisticated witnesses, it should not prevent full investigation of facts in their knowledge which may have a material influence in deciding the issues. The court permitted this witness to be led to some extent in her examination, which, in tender consideration of her age and inexperience, may have been proper; but, on the other hand, defendant was on trial for his life, and a full cross-examination on the details of the alleged crime should have been permitted. We cannot say that the remarks of the court as shown by the record, were prejudicial. It is the result of the ruling, couched in these remarks, which is subject to criticism.

Many exceptions were taken by the defense to refusals to permit answers to be made to questions propounded, but in most instances there is nothing to show what the answers would have been, and hence these assignments of error cannot be sustained.

There are many other assignments of error which, in view of a new trial, it will not be necessary to consider.

[4] The fact that defendant was deprived of the benefit of material evidence by reason of an unfortunate misunderstanding between counsel, clearly shown, coupled with refusal of the trial judge to permit the introduction of witnesses to show that Carskadon was mistaken as to the time when he removed the haystack, together with lack of corroborating evidence of force used in the commission of the alleged assault, the silence of the prosecutrix until she became pregnant, the verdict of the jury wherein they recom-

mended leniency of the court, and all the other facts, have impelled us to the conclusion that a new trial should be accorded defendant.

The judgment is reversed, the verdict set aside, and a new trial awarded.

Reversed and remanded.

(90 W. Va. 525)

THAYER v. HOLLEY. (No. 4347.)

(Supreme Court of Appeals of West Virginia.
March 14, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 1033(9)—Verdict for less than sum called for by contract, and supported by evidence, will not be set aside on defendant's theory that it should be treated as a finding against any contract.

Where in an action for damages the verdict of the jury is much less than the sum sued for or called for by the contract sued on and supported by the evidence, the judgment on the verdict will not be set aside on writ of error by the defendant, on the theory that the verdict should be treated as a finding of the jury against the fact of the contract, and lack of evidence to support the verdict, or upon any other theory.

2. Trial \S 260(1)—Instructions repeating law applicable may be rejected without error.

Instructions to the jury which properly present the different theories of the parties are all that can properly be demanded on the trial, and instructions repeating the law applicable to the case may without error be rejected.

Error to Circuit Court, Kanawha County.

Action in assumpsit by John J. Thayer against James A. Holley. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

W. E. Chilton and Conley & Johnson, all of Charleston, for plaintiff in error.

S. B. Avis, of Charleston, for defendant in error.

MILLER, J. In assumpsit, upon the common and two special counts, the plaintiff sued for \$4,000.00 and obtained a verdict and judgment for but \$700.00.

The suit was for commissions or compensation alleged to have been earned by the plaintiff, employed by defendant on March 24, 1919, to negotiate and make sale of the standing timber on a tract of 1,075 acres of land in Lincoln County, the terms of the contract, a verbal one, being that plaintiff was to have as his commissions or compensation all that he should obtain for the timber over and above \$14,000.00, the net price stipulated to be paid to defendant. The only plea was non assumpsit, on which issue was joined.

[1] On the trial plaintiff proved and relied

on the negotiations with and sale of the timber to one George E. Breece, which negotiations he and Breece swear were begun some time prior to April 1, 1919, but the sale was not actually concluded until about May 17, 1919. Breece it is proven was able, ready and willing to consummate the purchase at the price of \$18,000.00, and upon the other terms stipulated, of which defendant had notice but refused to execute the contract on his behalf for various reasons.

The first of these reasons is that the verbal authority given plaintiff was on April 1, and not on March 24, 1919, a controverted fact, which, if material, must be regarded as having been settled adversely to defendant's contention by the verdict of the jury.

The second reason affirmed by defendant is that one Sweetland, who had an interest with him in the land, was advised by him by letter of April 1, 1919, that he had that day offered the timber to plaintiff at the price of \$14,000.00 net to them, in which letter he advised Sweetland that, "I think his people are the Courtneys who are stave people," etc., also saying, "If the price mentioned is satisfactory and you have any information you can give me relative to this timber let me have it right quick." He further says that Sweetland replied, by letter dated April 3d, received by him April 4th, expressing dissatisfaction with the price for various reasons, but did not disaffirm the proposition made to Thayer, of \$14,000.00. And defendant swears that he showed this letter from Sweetland to Thayer on April 5, 1919, and that on that occasion limited his authority to a sale to Courtney, whom Thayer had represented to him to be his immediate customer for the timber; and that Thayer accompanied by Courtney a few days after April 21st went upon the land to inspect the timber, and subsequently decided not to take it upon the terms stipulated; and that Thayer thereafter had no authority to negotiate a sale to Breece or to any one else, his authority to sell being limited on April 5th to Courtney.

That defendant showed Thayer Sweetland's letter of April 3d is admitted by Thayer, but he says that this occurred in Holley's room in the Holley Hotel, about the 16th or 17th of April, the Wednesday or Thursday before the city election which occurred on April 21st. Thayer flatly contradicts defendant that his authority was then, or at any time, limited to a sale to Courtney. On the contrary he says that he had not then talked to Courtney, but had him as well as Breece and others in mind as prospective customers for the timber, but did not then refer to Courtney; that several days after he was employed to sell the timber, he met defendant in the lobby of the Union Building, and among other things re-

questioned that if anybody should come to him to make a price, to name \$25.00 per acre; that Holley replied that he would not do that, but would refer them to plaintiff. He denies that Holley ever showed him the Sweetland letter in his office. Other facts and circumstances were introduced in evidence tending to corroborate the parties in their respective contentions on the question of this limited authority of Thayer. The fact is a very much controverted one, and was one clearly for the jury, and must be regarded as having been found in favor of the plaintiff.

So that the fact of the negotiations with and sale to Breece being settled by the verdict in favor of plaintiff's contention, we can not say that the evidence preponderates on the side of defendant.

It is insisted that the documentary evidence introduced corroborates Holley, referring especially to Holley's letter to Sweetland and the latter's letter to him, and to Holley's letter to Thayer of May 17th. We do not find much, if anything, in these letters to support Holley's contention on the question of limited authority. In his letter to Sweetland of April 1st, he says not a word about having limited Thayer's authority to a sale to Courtney, or to any one in any way. He does not even say he knew Thayer's customer was Courtney. All he said was: "I think his people are the Courtneys." This could have been but a surmise, if it be true, as Thayer swears, that he had not yet seen Courtney. In Thayer's letter to Holley of May 20th, in reply to that of Holley of May 17th, he denies flatly that Holley had limited his authority to a sale to Courtney, and calls Holley's attention to the fact that he, when he showed him Sweetland's letter, said go ahead and sell the timber and that he would stick to his agreement with him. This letter advised Holley that afterwards he had completed the sale to Breece. We think this documentary evidence tends rather to corroborate Thayer than Holley. The letter of Holley to Thayer contained self-serving declarations, after Thayer had made sale to Breece, and thus denied by Thayer, Holley's letter had no preponderating force in his favor.

On this contention, however, it is strenuously urged that all the evidence introduced by plaintiff was under the third count, counting on the alleged contract, and sale of the timber to Breece, and demanding the stipulated compensation of \$4,000.00, to which plaintiff would have been entitled, if entitled to anything thereunder, and that the jury's verdict for \$700.00 should be regarded as a finding against plaintiff on the theory of a sale to Breece, and as a finding in his favor

on the theory of a quantum meruit, under the second count; but that as there was no proof of the actual value of his services or expenses, there is nothing in the evidence on which the verdict should be allowed to stand for any sum. The amount of the verdict is exactly five per cent. of the net price stipulated to be paid defendant for the timber. It is possible the jury may have concluded that under the circumstances this sum would sufficiently compensate the plaintiff. But we can not say this was the basis of their verdict. On the contrary they might have found the full amount claimed by plaintiff. That they found a less sum defendant can not complain, and plaintiff does not complain of the verdict. In such a case this court will not be justified in disturbing the verdict. *Morris v. Risk*, 86 W. Va. 30, 102 S. E. 725.

Counsel for defendant say we have decided on several occasions that a verdict contrary to the decided weight of the evidence, or resting upon both oral and documentary evidence and uncontroverted facts decidedly against the preponderance of the evidence, will be set aside, and a new trial awarded. And we have so decided. *Fuccy v. Coal & Coke Ry. Co.*, 75 W. Va. 135, 83 S. E. 301; *Devericks v. Fair Grounds Improvement Co.*, 73 W. Va. 174, 80 S. E. 143; *McDermitt v. Forbes*, 73 W. Va. 240, 80 S. E. 356; *South Penn Oil Co. v. Blue Creek Development Co.*, 77 W. Va. 682, 88 S. E. 1029; *Kyle v. Huddleston*, 80 W. Va. 439, 92 S. E. 679. But we find no justification in the evidence for the application of these principles in the present case.

[2] Errors are assigned in the giving and refusing of instructions. Only one instruction was given on behalf of the plaintiff. It simply told the jury that if they found from the evidence that the contract was as alleged and sworn to by plaintiff, and that he had negotiated the sale to Breece, they should find for the plaintiff, unless they should find from the evidence that prior to such sale defendant had revoked plaintiff's agency. This instruction did not exclude the theory of revocation of Thayer's authority by defendant.

Of the six instructions requested by defendant the court gave numbers 1, 2, 3, and 5, and rejected numbers 4 and A. Those given covered fully defendant's theory of a revocation of Thayer's authority to sell to any one except Courtney, and the duty of plaintiff as a condition of recovery to present a case of preponderant evidence in his favor. Instruction A, which would have directed the jury to find a verdict for defendant, was of course properly rejected.

The judgment must be affirmed.

(90 W. Va. 280)

TALBOTT v. PAYNE, Director General of Railroads. (No. 4430.)(Supreme Court of Appeals of West Virginia.
Feb. 14, 1922. Rehearing Denied April 4, 1922.)*(Syllabus by the Court.)*

1. Carriers \S 205, 216—Not an insurer of live stock; not liable for injuries arising from inherent nature and propensities of animals.

A carrier is not an insurer of live stock delivered to it for transportation as in the case of inanimate property. For injuries to such live stock shipments arising from the inherent nature or propensities of the animals the carrier is not liable.

2. Carriers \S 228(1)—Where animals found dead at destination were shown to have been in good condition and properly loaded and carried promptly without accident, result attributed to animals' propensities.

Where it is shown that a shipment of live stock was in good condition when delivered to a carrier; that the car was not improperly loaded, where the loading was done by the shipper; that the car was promptly and expeditiously moved from the initial point to destination without any accident to the train carrying the same; and, that no injury could have occurred to such stock from negligence in the transportation thereof, notwithstanding which it is found that some of the stock are dead upon arrival at destination—such result will be attributed to the inherent nature or propensities of the animals, and not to the negligence of the carrier.

3. Carriers \S 218(3)—Shipper not barred from suing for loss to interstate shipment because failing to file claim as per contract.

A shipper is not barred from maintaining a suit against the carrier to recover for a loss to an interstate shipment of live stock occasioned by the carrier's negligence, because he did not file his claim with the carrier within four months, as provided by the live stock contract; the federal Interstate Commerce Act providing that no such notice shall be required in such case as a condition precedent to recovery.

Error to Circuit Court, Greenbrier County.

Action by L. H. Talbott against J. B. Payne, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and cause remanded for new trial.

Fitzpatrick, Campbell, Brown & Davis and O. W. Strickling, all of Huntington, for plaintiff in error.

R. L. Clark, of Union, for defendant in error.

RITZ, J. The defendant, the Director General of Railroads, by this writ of error seeks reversal of a judgment against him for the value of certain live stock which, it is claimed by the plaintiff, died while being

transported over the Chesapeake & Ohio Railroad as a result of the negligence and carelessness of the carrier.

About the 1st of October, 1919, the plaintiff ordered a stock car for a shipment of hogs from Ft. Spring, W. Va., to Baltimore, Md. Pursuant to this order, the defendant placed a car upon the tracks at Ft. Spring. The hogs for shipment were gathered by the plaintiff from various parts of Monroe county, being driven to the point of shipment from these points, ranging in distance from 6 to 30 miles therefrom. They reached Ft. Spring and were placed in the pens about noon on the 2d of October, where they were watered and fed, and were, according to the testimony of the parties who drove the hogs in, being the plaintiff's son and another man hired for the purpose, in good condition. Later in the evening, the exact time not appearing, they were loaded into the car, and at 9:20 picked up by an east-bound freight train. The shipment reached Clifton Forge at 4:30 on the morning of October 3d. It remained there until 6:30 on that morning, when it continued its journey east, arriving at Charlottesville at 3:25 p. m. on October 3d. It seems that the train containing this shipment moved out of Charlottesville five minutes after it reached that station, to wit, at 3:30 p. m. on October 3d, and arrived at Potomac Yards at 9:05 p. m. of that day, covering the whole distance from Ft. Spring to Potomac Yards, more than 300 miles, in a little less than 24 hours. At Potomac Yards the car was cut out for the purpose of feeding, watering, and resting the animals. It was discovered upon unloading the car that 21 of the hogs therein were dead. The remaining 88 were fed, watered, and rested, and sent forward on the next morning to their destination at Baltimore, where they arrived in good condition, as testified to by the party receiving them, and where they were sold without depreciation in the price on account of their condition. It is for the value of these 21 hogs that died between Ft. Spring and Potomac Yards that recovery is sought in this suit. The plaintiff testifies that the hogs were worth \$25 apiece, or a total of \$525. There was no other direct evidence as to their value. The jury found a verdict for \$175, and upon this verdict the court rendered judgment.

[1] There is no substantial conflict between counsel as to the liability of a common carrier of live stock. It seems to be very well established that the general rule making a carrier absolutely liable for the loss of goods intrusted to it for transportation, unless such loss occurs from the act of God or the public enemy, is qualified when applied to live stock, and made subject to the further exception that it is not an insurer against injury resulting from the inherent

nature or propensities of the animals, and without fault of the carrier. And this rule in this case is still further modified by the fact that the shipment was loaded by the plaintiff, or his agent, and because thereof, under a condition in the bill of lading authorized by the act of Congress regulating interstate commerce, the shipper is liable for any injury resulting from negligence in loading the car.

[2] The plaintiff introduced the two men who drove the hogs into Ft. Spring, who testified that they were in good condition when placed in the pens for loading. These witnesses also testify that the number of hogs with which they started was 114, that one died on the way, and that they reached Ft. Spring with 109. They do not account for the other four. They further state that a car of the size of the one in which these hogs were loaded could easily contain the number loaded in it. In fact, their testimony is that such a car could comfortably contain from 120 to 125 of such hogs. The party who loaded the hogs for the plaintiff likewise testifies that they were in good condition when loaded, and that the car was not crowded; that it was of sufficient size to contain from 120 to 125 hogs of the size of the ones loaded therein. The commission merchant in Baltimore who received the hogs testified that the 88 received by him were in good condition when received, and that the car in which they were shipped was of sufficient size to comfortably haul from 120 to 125 hogs of that size. On this showing the plaintiff contended that it was incumbent upon the defendant to account for the death of these hogs from some cause for which he was not responsible, and this he undertook to do. He showed by the three conductors who had charge of the trains that carried the hogs from Ft. Spring to Potomac Yards the movement of these trains, as above indicated. Each of these conductors testified from their records of the trip made by them at the time, showing when the shipment left Ft. Spring, when it reached Clifton Forge, and when it left Clifton Forge and reached Charlottesville, and left that point and its arrival at Potomac Yards. In addition to this showing, it is proven that the trip made was an exceptionally good one; the time consumed being less than is ordinarily consumed by live stock shipments. It is shown further by each of these conductors that there was no rough handling of the train, nor any accident of any kind which could have caused the injury to the animals. The conductor who moved the car from Ft. Spring states that when he picked it up the hogs were restless, and were squealing, and that he called the attention of the agent to this fact at the time, and that it was his belief that they were overcrowded in the car; that, while the shipment was made on the 2d of October,

the weather was unusually warm for that time of the year, the thermometer reaching 94° at Charlottesville, Va., on the 3d of October, the day on which the hogs passed through that place. The conductor who took the shipment from Clifton Forge to Charlottesville testifies that there was no accident to his train between Clifton Forge and Charlottesville, nor any unusual handling of it that could have caused any injury to the animals. It appears from the testimony of one of the conductors that when the hogs reached Charlottesville some of them were then dead, and that they were extremely restless, were attempting to break out of the car, and were fighting and squealing at that time. The conductor who took the train from Charlottesville to Potomac Yards made an exceptionally quick trip, covering the 110 miles in less than six hours. He testifies that his train only made two stops between Charlottesville and Potomac Yards; that there was no rough handling of it, and no accidents happened to it. All three of these conductors observed this car of hogs while in the train in their charge, and all swear that the hogs were at various times fighting and squealing, and that in their opinion the car was overloaded; there not being sufficient space therein for the hogs to be carried in comfort. The man in charge of the stockyards at Potomac Yards who unloaded the hogs states that the death of the 21 hogs was evidently due to the fact that too many hogs were placed in the car. He has had many years' experience in handling live stock, and is very confident that this car was badly overloaded. It is further testified by one of the witnesses for the plaintiff that hogs raised out in the fields will stand being driven or shipped very much better than hogs raised in pens, but it is not shown how many of these hogs were raised in pens and how many were raised out in the fields.

The court instructed the jury that the defendant would not be liable for the loss of the hogs if they believed that such loss was caused by the car being overloaded, or if they believed that the hogs died as a result of their inherent nature or propensities and without fault of the carrier. By its verdict the jury has answered both of these questions in the negative, that is, it has found that the car was not overloaded, and it has also found that the hogs did not die as the result of any inherent propensities or weaknesses which they possessed as animals, but from the negligence and carelessness of the defendant in handling them. The defendant insists that this finding cannot be sustained by the evidence.

As before stated, it seems to be well established that the measure of liability of a carrier of live stock is a little different from that of a carrier of dead freight. In the case of dead freight, there is nothing inher-

ent in the nature thereof against which the carrier cannot protect himself. He can safely secure the boxes or packages in which the same is contained against interference, either from the freight itself, or from any other cause, except the act of God or the public enemy. In the case of live stock such is not the case. He can, of course, handle them with all of the care which is required in the case of handling any other freight, but, because of the fact that the animals have the power of locomotion and action, he is not in a position to secure them against injury from each other; and, further, because of the fact that their value depends upon their being alive at the point of destination, he is unable to prevent their death from causes due to their natural propensities. This doctrine is well recognized by the authorities. *Maslin v. R. R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748; 4 R. C. L. tit. Carriers, § 421; 10 C. J. p. 123.

Recognizing this to be the law, does the evidence in this case justify the finding that the death of the 21 hogs was due to the negligence of the defendant? The evidence is clear, positive, and distinct that no act was done or duty omitted by the defendant, or any of his agents, which could have resulted in injury to the animals. There is no attempt made upon the part of the plaintiff to show that such was the case, but negligence is sought to be implied from the fact alone that the hogs were dead when they reached Potomac Yards. Assuming, as the jury has found, that the car was not overloaded, and that the hogs were in good condition when placed in the car, and taking as true that the carrier handled the shipment with all reasonable dispatch, and with all reasonable care, and we must take this as true because it is proven beyond question, and the time consumed in making the trip fully corroborates the evidence of the witnesses, then is there a presumption that the hogs died from some negligent act; or, rather, under such circumstances, would not the presumption be that the death of the hogs came from some cause for which neither of the parties might be responsible? In other words, should it not be attributed to the natural propensities of such animals when taken from the surroundings in which they had been raised, and placed on board a railroad car to be transported a long distance under circumstances to which they were entirely unaccustomed? In the case of *Schaeffer v. R. R. Co.*, 168 Pa. 209, 31 Atl. 1088, 47 Am. St. Rep. 884, it was held that where it is shown that the carrier has used all reasonable care in the transportation of the animals, and their death cannot be accounted for upon any satisfactory grounds, it will not be presumed that the same arose from the negligence of the carrier; and in *Lewis v. R. R. Co.*, 70 N. J. Law, 132, 56 Atl. 128, 1 Ann. Cas. 156,

it is held that, where the injuries received by the live stock are such that they are as likely to have been caused by the nature of the animals as by the negligence of the carrier, the court cannot assume, in the absence of evidence, that the injuries were due to the latter cause. There is a note to this case as the same is reported in the Selected Case Series cited, in which it is stated that, upon proof that the carrier performed the duty incumbent upon it, the loss or injury to live stock is presumed to have been due to the natural propensities of the animals, and not to the negligence of the carriers, which is supported by elaborate citation of the authorities. If no explanation of the handling of this shipment had been made by the carrier, we think undoubtedly, under the showing made by the plaintiff, the jury might very well attribute the loss of the hogs to the carrier's negligence. This presumption, however, is removed by the proof of proper handling of the shipment from the initial point to the point of destination. In such a case, where the evidence fails to attribute the death of the animals to any particular cause, and it is shown that the carrier has fully discharged its duty, we must presume that their death was occasioned by the natural propensities of the animals. Of course, it is well known that such animals are much more likely to die when being transported in stock cars than while being kept in the pens or fields to which they have been accustomed. Death may overtake such animals even when kept in the pens or fields where they are ordinarily raised without negligence upon the part of those charged with their custody, and this likelihood is much increased when they are taken from the mode of living to which they are accustomed and submitted to one imposing upon them a very much severer strain for a long space of time. We are of opinion that when a case like this is presented in which the evidence clearly shows that the carrier has been guilty of no default in the performance of his duty, and it is doubtful whether the plaintiff was not himself in default, although the jury has found that he was not, the death of the animals in transit must be attributed to the natural propensities of such animals.

[3] There is another question raised by the defendant which it is contended bars recovery, and that is that no notice of claim was given to the defendant by the plaintiff within four months from the loss of the animals, as required by a provision in the bill of lading. This contention is met by the first section of the Bills of Lading Act, being section 7976 of Barnes' Federal Code (U. S. Comp. St. § 8604a), wherein it is provided:

"That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice

of claim nor filing of claim shall be required as a condition precedent to recovery."

This was an interstate shipment, and is controlled by the federal Interstate Commerce Act (24 Stat. 379), and it is unnecessary under that act to give the notice or make the claim within 4 months, as contended for by the defendant.

Our conclusion is to reverse the judgment, set aside the verdict of the jury, and remand the case for a new trial.

(90 W. Va. 529)

WARREN et al. v. BOGGS et al. (No. 4301.)

(Supreme Court of Appeals of West Virginia.
Feb. 21, 1922. Rehearing Denied
April 4, 1922.)

(Syllabus by the Court.)

1. Boundaries \S 48(3)—Under a compromise agreement, held that land should be surveyed as of the date of a designated deed using surface measurement.

Where claimants to land compromise their differences by a writing, and the land which one of the claimants shall take thereunder is designated by corners, lines, and distances as found in a deed of a certain date, recorded, and made to his predecessor in title, and, in locating and surveying the land, it appears that all of the corners have been destroyed and the true locations thereof disputed, except one on which the parties agree, the land should be surveyed as of the date of the designated deed, and not as of the time of the compromise agreement, and by the method of measurement used in the original survey, beginning at the undisputed corner; and, if the deed shows on its face that the corners, lines, and distances were made by surface measurement, the same measurement should be used in restoring the destroyed corners and in ascertaining the true boundaries. The proper construction of the compromise agreement is that the parties intended that the corners and boundaries should be ascertained by the measurement set out in the original deed referred to by them.

2. Boundaries \S 3(2)—Where distance of one line and the course of another conflict, either should control, according to intent.

Where there is a conflict between the distance of one line and the course of another, either the course or the distance shall control, according to the manifest intention of the parties.

3. Boundaries \S 35(1)—What is to be weighed and considered in determining whether one line should control the courses of another line, or vice versa, stated.

In such case the method of making the original survey, whether by surface or horizontal measurement, the quantity of land conveyed and the price paid therefor, and generally the facts and circumstances surrounding the parties at the time of the survey and deed, may be weighed and considered in determining whether the

distance of one line of the survey should control the courses of another line, or vice versa.

Appeal from Circuit Court, Roane County.

Action by Agnes Warren, an infant, etc., and others against J. O. Boggs and others. From a decree sustaining a demurrer to and dismissing plaintiffs' bill, plaintiffs appeal. Reversed and remanded for further proceedings in conformity with the opinion.

S. P. Bell, of Spencer, A. G. Mathews, of Grantsville, and Daniel Pendleton and Harper & Baker, all of Spencer, for appellants.

V. B. Archer and C. N. Matheny, both of Parkersburg, and Geo. F. Cunningham, of Spencer, for appellees.

LIVELY, J. This cause was formerly considered by this court on appeal from a decree sustaining a demurrer to, and dismissing, plaintiffs' bill. *Warren v. Boggs*, 83 W. Va. 89, 97 S. E. 589. A statement of the facts, as set out by the pleadings, is there found.

The respective property interests of the parties in the subject-matter of the litigation have been determined in a compromise agreement entered into by them and dated May 12, 1913. By that agreement the parties have designated the metes and bounds of the 94-acre tract and the metes and bounds of the 17-acre and 115-pole tract, designated in the pleadings "as the 18-acre tract," which interlocks on the 94-acre tract. The controversy is now as to the proper location, with respect to these two tracts, of an oil well known as *Boggs No. 5*. If that well is on the 94-acre tract, the plaintiffs are entitled to seven-eighths of the one-eighth royalty therein and defendants to one-eighth of the royalty; if the situs of the well is on the 18-acre tract, then defendant is entitled to all of the royalty. The lower court decided that the well was on the 18-acre tract, that plaintiffs were not entitled to any relief, and dismissed their original, amended, and supplemental bills. This appeal was awarded from that decree.

[1, 3] The compromise agreement of May 12, 1913, which is the basis of this litigation and on which the contentions of the parties is predicated, recites that defendant Boggs is the owner of the 18-acre tract—

"which was conveyed by C. C. Smith and wife and A. B. Wells and wife to N. B. Hoff by deed dated March 1, 1886, of record in the Roane county court clerk's office in Deed Book No. 12 at page 64, which is therein bounded and described as follows: Beginning at a stake and pointers Hiram Nestor's northwest corner; thence N. 2° E. 16½ poles to a stone pile and pointers; thence S. 87½° E. 180 poles to pointers on line of No. 9 and 10; thence S. 2° W. 15 poles to a white oak, corner to said Nestor; thence N. 87½° W. with Nestor line 180 poles to the beginning—which said tract

of 18 acres of land is claimed by the said J. P. Boggs to lap or interlock on the said tract of 94 acres."

The deed from Smith and Wells to Hoff is exhibited, and the same courses and distances are found therein as above given, with the addition thereto, after the last course and distance (N. $87\frac{1}{2}^{\circ}$ W. with the Nestor line 180 poles to the beginning), of the words "surface measurement containing 17 acres and 115 poles." The consideration named is \$106.30. In 1892 Hoff executed a trust deed on this land to J. A. A. Vandale, trustee, to secure a debt owing to H. W. Goff, in which the same corners, courses, and distances are given, and the acreage stated to be 18 acres, more or less. And on July 29, 1907, Vandale, trustee, executed the trust and deeded the land to J. O. Boggs for \$160, in which the same courses, distances, and corners are given, "being the same tract of land conveyed to the said N. B. Hoff by C. C. Smith and A. B. Wells by deed bearing date on the 1st day of March, 1886, and recorded," etc. In the two last-named deeds no reference is made to surface measurement. The boundaries of the 94-acre tract are incorporated in the compromise agreement, but they have little bearing upon the question at issue, the location of the well, as the entire 18-acre tract seems to be an interlock upon and lying within the boundaries of the 94-acre tract. The location and establishment of the northern line of the 18-acre tract running from the stone pile and pointers "S. $87\frac{1}{2}^{\circ}$ E. 180 poles to pointers on a line of No. 9 and 10" decides the issue. If this line runs south of the well, then plaintiffs are entitled to relief, as the situs of the well would be on the 94-acre tract; conversely, if the true location of the line is north of the well, then the well is on the 18-acre tract, and the decree should be affirmed.

Twelve surveyors, six on each side, went upon the land and surveyed the 18-acre tract, and those introduced as witnesses for plaintiffs, Thorn, Taylor, Shoup, Bell, Childs, and Parks, place the northern line of the 18-acre tract from 4 to 13 feet south of the well; and those employed by defendants, Wolf, Woodyard, Dunbar, Scott, Ewing, and Daniels, place the line from 4.6 to 11 feet north of the well. On this conflicting evidence we are called upon to ascertain the location of the lines, especially the northern line of the 18-acre interlock. These surveyors have had many years of practical experience in their profession and seem to be well versed both in theory and practice. How can it be that in the ascertainment of one line of so small an area, bounded by four lines only, a difference of from 8 to 24 feet arises? The science of geometry and mathematics is exact. The infinite depths of stellar space are measured with such exact nice-

ty that the apposition of stars and planets can be calculated to the fraction of a second of time. One corner of the survey, the southeastern corner, the white oak stump replaced by an iron pipe, is agreed upon as the only corner about the location of which there is no controversy. From this point the surveyors began, and from that point the three remaining corners are differently located by them. It is evident that the methods pursued, and not a defective science, have brought about the different results, different maps. By what method should the surveys have been made? Plaintiffs insist that the surveys should be made according to the courses, lines, distances, and corners denoted as of the date of the compromise agreement of May 12, 1913, allowing for the magnetic variation from that date, or, if the survey be made as of the date of the original survey in 1886, and the magnetic variation calculated from that date, then surface measurement should be invoked, the method of measurement then used, as expressly stated in the original deed from Smith and Wells to Hoff. Defendant asserts that the survey should now be made with magnetic variation calculated from 1886, and by horizontal measurement, under section 2, c. 67, Code (sec. 3685). It appears that all of the surveyors calculated the magnetic variation from 1886, each using practically the same degree of variation when running the lines. If the survey is to be made as of that date, and we think it proper to do so, the same measurement should be used as was then used—surface measurement. In that way only could the footsteps of the original surveyors be followed. In that way only can the boundaries be determined and fixed as they were then ascertained and fixed. Any other method will bring about a different result. That is fully demonstrated, for, by using horizontal measurement, the side lines have been shortened about 6 poles and the eastern line lengthened by $1\frac{1}{2}$ poles. These surveyors should, as nearly as possible, do exactly what the surveyor then did.

Was it the intention of the parties, when they made the compromise agreement in 1913, that the 18-acre tract should be run out and located by the survey and deed as of 1886? Such seems to be the contention of defendant, for his surveyors have calculated and used the magnetic variation from that date. It follows that the surface measurement as set out in that deed must also be adopted. The beneficial portions of that deed cannot be taken by either party and the portions which are not beneficial ignored. The agreement refers specifically to the deed of 1886, and the courses, distances, and corners are copied "as therein bounded and described." Horizontal measurement should govern unless surface measurement is contracted for. Smith and Wells contracted for surface measurement with Hoff, and the parties here

have contracted for the location of the land just as the original deed stipulated, by specific reference thereto.

"A deed, for a description of the land, may refer to another deed or map, and the deed or map is considered as incorporated in the deed itself for description of the land." *Blowpipe v. Spencer*, 46 W. Va. 590, 33 S. E. 342.

The parties, by referring to the deed of 1886 as the basis for the location of the land, are bound by all of its provisions with reference thereto. Surface measurement of the southern line running from the white oak stump westwardly 180 poles to the northwest corner of Nestor (the beginning corner of the deed of 1886) is practically the same as horizontal measurement; and the same is true of the western line running from the northwest corner of Nestor north to the stone pile and pointers 16½ poles. But the northern line is over rough, hilly land, and horizontal measurement of this line reaches the line of Nos. 9 and 10 at 174.43 poles to 175.4 poles instead of 180 poles, as called for in the deed. Again, the distance from the point thus located by them on the line of lots 9 and 10 as the northeast corner of the 18-acre tract was found to be 16½ poles, horizontal measurement, from the white oak at the southeastern corner, the beginning point of their surveys, instead of 15 poles, as called for in the deed. It is argued that, this being the closing line, and the north and south side lines being parallel, the distance must give way, and 1½ rods added thereto in order to close the survey and make the eastern line equal to the western line.

At the time of making the survey and deed in 1886 it appears that Smith and Wells had no title to the land, but arbitrarily went upon the Warren land (now the 94-acre tract), made the survey, and conveyed the 17 acres and 115 poles to Hoff for the sum of \$106.30, exactly \$6 per acre. Smith was the surveyor, with Wells and Samuel Evilsizer as chain carriers. The surveying was begun by them at the northwest corner, thence on a bearing S. 87½° E. 180 poles to a hickory, but for some reason they did not care to go that far north on the line of lots 9 and 10, and either Smith or Wells went up the hill further south and located the northeast corner, and from there southwest 15 poles to the white oak corner. Then the western and southern lines were run. The eastern 15 poles line was not the closing line of their survey; neither is it the closing line in the deed made by them. There is no more substantial reason why the eastern line should be lengthened so as to correspond with the length of the western line than that the western line should be shortened to be the same length as the eastern line. In the first instance the acreage will exceed 18 acres (more than that conveyed in the deed); and in the latter instance the acreage would be

less than that conveyed in the deed. It will be observed that the quantity of land conveyed in the deed is exact, 17 acres and 115 poles, not "more or less." It will also be observed that the purchase price, \$106.30, is exactly \$6 per acre. These are pertinent and significant facts and are peculiarly indicative of the intentions of the then contracting parties. Did they not intend to convey a tract of land 180 poles long by 16½ poles wide at one end and 15 poles wide at the other end, when we find that these produce the exact acreage conveyed at an exact figure per acre? Why, then, should these lines be lengthened or shortened, thus making a conveyance of a greater or less quantity of land than that intended to be and actually conveyed? It is especially to be noted in this connection that after the northern 180-pole line was run on a bearing of S. 87½° the vendors deliberately moved the corner thus ascertained as the northeast corner on a line of lots 9 and 10 further south and a distance of 15 poles surface measurement from the white oak, and made their deed accordingly. Under these facts should not the bearing of the northern line give way to the distance of the eastern line thus deliberately located?

"It is proper to consider a correspondence of quantity given by a line with the quantity mentioned in the deed or in the approximation to such quantity as tending to establish the truth of such line." 2 Devlin on Deeds, § 1045.

See, also, *Goff v. Goff*, 78 W. Va. 423, 89 S. E. 9; *Croghan v. Nelson*, 3 How. 187, 11 L. Ed. 354.

"There is no uniform rule that the length of one line, as mentioned in a deed, shall control the course of another line, or that the latter shall control the former. Other circumstances will determine the adoption of the one or the other." *Western M. & M. Co. v. Peytona C. C. Co.*, 8 W. Va. 406 (syl. 4).

"Where the description of land by monuments, distances, or otherwise is vague and indefinite, by reason of conflicting lines or omission of a line, or from other cause, the statement of the acreage is an essential part of the description." *Smith v. Owens*, 63 W. Va. 60 (point 6, syl.) 59 S. E. 762; *State v. Hicks*, 76 W. Va. 508, 85 S. E. 665.

According to *Ewing*, one of defendants' surveyors, if the eastern line be extended to 16½ rods level measurement, so as to make it correspond in length with the western line, it would make the deed convey 18 acres and 90 poles by level measurement. How much more it would include by surface measurement does not appear.

[2] "Where there is a conflict between the distance of one line and the course of another, either the course or the distance shall control, according to the manifest intent of the parties and the circumstances of the case." *Raffner's Heirs v. Hill*, 31 W. Va.

428, 7 S. E. 13. See, also, *Smith v Chapman*, 10 Grat. (Va.) 445.

It appears to be conceded by all of the surveyors that, if the courses and distances are run by surface measurement with proper magnetic variation from 1886, the well is not on the 18-acre tract, even if the eastern line be extended to 16½ poles. Surveyor F. F. Daniel testified that, if a line were run from the northwest corner of the 18-acre tract as fixed by Mr. Ewing (another witness for defendant) to the end of the 16½-rod surface measure line from the white oak (southeast corner) towards the gum sapling (the northeast corner fixed by defendants' surveyors), the well would be north of the line about 1.14 feet; and if the eastern line were measured 15 poles horizontal measurement from the white oak towards the gum sapling, and the northern line extended from the end of the 15 poles so measured westward to the northwest corner, then the well would be north of the last-mentioned line about 1½ rods, and on the 94-acre tract. G. C. Ewing testifies to practically the same. J. V. Dunbar, a witness for defendants, states that the only way the well can be located on the 18-acre tract is to lengthen the eastern boundary line running north from the white oak from 15 poles as called for in the deed to 16½ poles and change it from surface to level measurement. The surveyors agree that, if the eastern line is measured from the white oak a distance of 15 rods either by surface or horizontal measurement, and the northern line extended therefrom to the northwest corner, giving proper variation from 1886, the well would be north of the northern line, or outside of the 18-acre tract known as the Interlock.

Having concluded that the survey of the 18-acre tract should be made by surface measurement, the method by which Smith and Wells made their original survey in 1886 as shown by their deed to Hoff, and it appearing that such measurement will place the situs of the well without the Interlock and on the 94-acre or Warren tract, it follows that the decree must be reversed. All of the defendants' surveyors ran out the lines and distances by horizontal measurement, giving proper magnetic variation from 1886, and extended the eastern line 16½ poles, by which method it was found that the well was within the 18-acre tract from 4.6 feet to 9.2 feet. Lawson Scott by this method placed the well a little over 11 feet south of the northern line of the tract. It is argued that horizontal measurement should control, inasmuch as nothing is said in the compromise agreement about how it should be measured, and hence the statute reads into the agreement horizontal measurement. It is argued that the reference to the deed of 1886 is a mere recital under a "whereas" clause; and yet, when defendant surveys the

land, the deed of 1886 is invoked, and the survey made as of that date; that is, the magnetic variation is calculated from that date. If the reference to the deed of 1886 be a mere recital and of no effect as evidencing the intentions of the parties, then the land should have been located under the calls and distances of the agreement of 1913, and the magnetic variation calculated from that date. It is conceded by the surveyors that, unless the variation is calculated from 1886 and used in the survey, the well will lie north of the 18-acre tract. It seems that a survey of that tract, if it had been made as of the time of the agreement, and with horizontal measurement, would place the well without the 18-acre tract. As before stated, defendants cannot invoke the benefit of the recital under the "whereas" clause in the agreement and ignore that which is not beneficial therein. The true test is a survey of the land in the manner in which it was originally surveyed. We so construe the compromise agreement of 1913.

In view of our disposition of this cause largely upon the evidence of defendants' surveyors, in which it is shown that by surface measurement the well will be located on the 94-acre tract, we do not deem it necessary to pass upon plaintiffs' exceptions to certain portions of defendants' depositions.

The decree will be reversed, and the cause remanded for further proceedings in conformity herewith.

Reversed and remanded.

(90 W. Va. 491)

ROUSH v. ROUSH. (No. 4291.)

(Supreme Court of Appeals of West Virginia.
March 14, 1922.)

(Syllabus by the Court.)

1. Divorce \S 27(8)—False charges of adultery against husband will not ordinarily be deemed "cruel or inhuman treatment."

False charges of adultery made by the wife against the husband ordinarily will not be deemed cruel or inhuman treatment, within the meaning of section 8, chapter 64, of the Code 1913 (sec. 3641), entitling the husband to a divorce from bed and board.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cruelty.]

2. Divorce \S 27(12)—Refusal of intercourse is not cruelty.

Nor is denial of sexual intercourse cruel or inhuman treatment within the meaning of the statute.

3. Divorce \S 287—On reversal of decree for husband, awarding alimony to wife, Supreme Court will provide for wife's maintenance and remand.

Where a decree awards a divorce to the husband and alimony to the wife, and it ap-

pears that they are living separate and apart, this court, in reversing the decree as to the divorce, will enter a decree providing for the payment of the alimony as for the wife's maintenance, upon a prayer therefor in her answer, and will remand the cause for the execution thereof.

Appeal from Circuit Court, Tucker County.

Action by Homer Roush against Rosa Roush for divorce. Judgment for plaintiff for divorce from bed and board, and awarding him the custody of their four children, and awarding the defendant \$25 per month alimony, and she appeals. Reversed and remanded, for execution of decree entered in the Supreme Court for alimony as for wife's maintenance.

W. K. Pritt, of Parsons, for appellant.
D. E. Cuppett, of Thomas, for appellee.

MEREDITH, J. Defendant complains of a decree granting her plaintiff husband a divorce from bed and board, awarding him the custody of their four children, and by which decree she was awarded alimony of \$25 per month.

This suit is based on the legal charge of cruel or inhuman treatment; numerous acts are alleged, but the two relied on by the husband are: (1) False charges by the wife of the plaintiff's adultery; and (2) denial of sexual intercourse. All allegations are denied by the wife's answer, except the one charging the plaintiff with adultery; this is admitted and reiterated in her answer.

[1] The suit is brought under section 6, chapter 64, of the Code (sec. 3641):

"A divorce from bed and board may be granted for cruel or inhuman treatment, reasonable apprehension of bodily hurt, abandonment, desertion, or where either party after marriage becomes a habitual drunkard. A charge of prostitution made by the husband against the wife falsely, shall be deemed cruel treatment, within the meaning of this section."

It will be observed that the terms used in the statute are not defined. It does not say what shall be "cruel or inhuman" treatment, except in the one instance—"a charge of prostitution made by the husband against the wife falsely." It does not even say that a false charge of adultery made by the husband against the wife is cruel or inhuman treatment, but it uses the word "prostitution," a very different word. We do not mean to say that such a charge, when made against the wife, would, under no circumstances, be considered cruel treatment, but it is significant that the term "prostitution" is used, and not the term "adultery." We think that this statute, which in general terms enumerates grounds on which a divorce from bed and board may be granted, and, in the one instance, points out one specific act on the

part of the husband toward the wife, which shall be deemed cruel treatment, and omits saying that repeated charges of adultery, falsely made against the husband by the wife, shall also be considered cruel treatment, inferentially, at least, negatives the idea that such false charges against the husband shall be deemed cruel treatment.

For obvious reasons a charge of adultery against the wife ordinarily is much graver than the same charge against the husband; and, if such charge is falsely made by the husband, and especially so if it is malicious and unfounded, and tends to cause the wife great mental distress and to undermine her health, it is ground for divorce. But it should take much stronger proof where the husband sues on this ground. Such a charge would affect different men differently. A gay Lothario would feel complimented; while a sensitive man of high position, good character and reputation might be subjected to great mental suffering, far beyond that which such a charge would naturally have upon the average man. But in the present case we do not think plaintiff has shown that he has been so affected. The charge does not seem to have disturbed his standing among his neighbors and friends, nor can we say that the evidence shows that he has been caused such mental distress as would tend to undermine his health. In the case of *Maxwell v. Maxwell*, 69 W. Va. 414, 71 S. E. 571, it was held that, in a suit for divorce from bed and board, based on cruel or inhuman treatment, the true issue and test is whether, under all the facts proven, plaintiff can, with safety to person and health, continue to live with defendant. And in the case of *Goff v. Goff*, 60 W. Va. 9, 53 S. E. 769, 9 Ann. Cas. 1083, it was held that such treatment of the wife by the husband as produces reasonable apprehension of personal violence, or produces mental anguish, distress, and sorrow, and renders cohabitation miserable, impairing, or likely to impair, the wife's health or mind, is cruel and inhuman treatment under the statute. But the proof in the present case in no sense comes up to this standard. We think, so far as this charge is concerned, the plaintiff can, with perfect safety to himself, continue to live with his wife.

[2] There is nothing whatever in plaintiff's second alleged ground, denial of sexual intercourse; he not only failed in his proof, and even had that not been the case, under the circumstances shown, he would not be entitled to a divorce. The record shows that, when the suit was instituted and for three months thereafter, the parties lived together, ate at the same table, slept under the same roof and in the same bed. Not until plaintiff's attention was called to this inconsistent and strange position, while being cross-examined by defendant's counsel in giving his deposition in this case, did he leave his wife's

bed, and then simply moved into another part of the home. From the record it appears they continued to live that way up to the time of the final decree, and we would not know that they are now living separate and apart, had we not been so informed by counsel upon the oral argument of this case. But had it been clearly and positively proved that intercourse had been denied by the wife, under the circumstances shown in this case, the plaintiff would not be entitled to a divorce. Under the decisions of some states this is considered good ground, by a few as cruelty. *Campbell v. Campbell*, 149 Mich. 147, 112 N. W. 481, 119 Am. St. Rep. 660; *Sisemore v. Sisemore*, 17 Or. 542, 21 Pac. 820; *Nordlund v. Nordlund*, 97 Wash. 475, 166 Pac. 795, L. R. A. 1918A, 59; by others as desertion, *Vosburg v. Vosburg*, 136 Cal. 195, 68 Pac. 694; *Graves v. Graves*, 88 Miss. 677, 41 South. 384; *Whitfield v. Whitfield*, 89 Ga. 471, 15 S. E. 543; *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605. The great weight of authority, however, is the other way. *Platt v. Platt*, 38 Pa. Super. Ct. 551; *Pinnebad v. Pinnebad*, 134 Ga. 496, 68 S. E. 73; *Varner v. Varner*, 35 Tex. Civ. App. 381, 80 S. W. 386; *Cowles v. Cowles*, 112 Mass. 298; *Schoessow v. Schoessow*, 83 Wis. 553, 53 N. W. 856; *Underwood v. Underwood*, 50 App. D. C. 323, 271 Fed. 553; *Steele v. Steele*, 1 MacArthur (D. C.) 505; *Stewart v. Stewart*, 78 Me. 548, 7 Atl. 473, 57 Am. Rep. 822; *Pratt v. Pratt*, 75 Vt. 432, 56 Atl. 86. So has this court held in the cases of *McKinney v. McKinney*, 77 W. Va. 58, 87 S. E. 928; *Wills v. Wills*, 74 W. Va. 709, 82 S. E. 1092, L. R. A. 1915B, 770; and *Reynolds v. Reynolds*, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889. There might be some reason for holding otherwise, though we do not mean to say we would so hold, where such denial would defeat one of the essential objects of the marriage; but in this case the parties have four children, ranging from five to seventeen years of age, perhaps more than the number in the average family, so one of the principal objects of marriage has been attained.

[8] The charge that the wife threatened to poison the husband is wholly unfounded. Plaintiff's conduct disproves it. He makes this charge and, in the same breath, complains that his wife refused to cook his meals, clearly showing that he has no fears on this ground. We have purposely refrained from detailing any of the evidence. Charge has been met with countercharge, crimination with recrimination; neither party is wholly free from fault, but the situation is not hopeless. The plaintiff is not entitled upon the record to a divorce. The defendant has not asked one, and she would not be entitled to it if she had; she does, however, ask for alimony, and the court allowed her \$25 per month. In the case of *Lord v. Lord*, 80 W. Va. 547, 92 S. E. 749, we held that, in a suit for divorce, in which the prayer for relief was denied and, no divorce granted, there is no jurisdiction to alter the custody of the children, so that the decree, in so far as it grants a divorce to the plaintiff and awards the custody of the four children to him will be set aside; and upon her prayer for an allowance for her maintenance a decree will be entered here, requiring the plaintiff to pay to the defendant the sum of \$25 per month, from the 1st day of January, 1921, that being the date fixed in the final decree of the circuit court, until the parties become reconciled and renew cohabitation, or the allowance becomes barred by her misconduct, or until the further order of the circuit court of Tucker county, as was done in the case of *Huff v. Huff*, 73 W. Va. 330, 80 S. E. 846, 51 L. R. A. (N. S.) 282, and upon principles announced in *Lang v. Lang*, 70 W. Va. 205, 73 S. E. 716, 38 L. R. A. (N. S.) 950, Ann. Cas. 1913D, 1129, and *Vickers v. Vickers* (W. Va.) 109 S. E. 234; but the sums so decreed are to be credited with whatever payments have been made by plaintiff under the decree of the circuit court since the entry thereof, and the cause will be remanded for the execution of the decree entered in this court, and the defendant will be allowed her costs upon this appeal.

(188 N. C. 758)

STATE v. YATES. (No. 274.)

(Supreme Court of North Carolina. April 5, 1922.)

1. Habeas corpus ⇐113(1)—No appeal from denial of writ, only remedy being by certiorari.

No appeal lies from a judgment in habeas corpus proceedings, except in cases concerning the care and custody of children (C. S. § 2242), such judgment, if it involves the denial of a legal right, being reviewable only by certiorari, under Const. art. 4, § 8, authorizing the court to issue any remedial writs necessary to give it general supervision and control over proceedings of inferior courts.

2. Habeas corpus ⇐113(12)—Though no appeal lies from denial of habeas corpus, contention that parole cannot be revoked after expiration of term of sentence may be considered on merits.

Though no appeal lies from a judgment denying a writ of habeas corpus to one recommitted for violation of a parole, appellant's contention that such parole could not be revoked after expiration of the time for which he was sentenced, being a question of public importance and general interest, may be considered on the merits.

3. Pardon ⇐9—"Parole" construed as conditional pardon.

Since neither Const. art. 3, § 6, nor the statutes (C. S. §§ 7642-7644, 7749, 7752, et seq.), relative to pardons, authorize a "parole," unless the word be construed as importing a conditional pardon, an order granting a parole must be interpreted as a pardon on condition that the recipient comply with the terms imposed.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Parole.]

4. Pardon ⇐14—Prisoner violating parole may be recommitted for unexpired term, though time of sentence has expired.

If the conditions contained in a parole or conditional pardon be not illegal, immoral, or impossible of performance, the recipient, by accepting the pardon, accepts such conditions, a breach of which avoids the pardon and subjects him to rearrest and reincarceration to serve the balance of his unexpired term, though the time for which he was sentenced has expired; the essential part of the sentence being the punishment, and not the time when it shall begin or end.

Appeal from Superior Court, New Hanover County; Connor, Judge.

Application by Joe Yates for writ of habeas corpus. Writ denied and defendant appeals. Appeal dismissed.

Appeal by defendant from judgment on writ of habeas corpus. In October, 1919, the defendant was tried and convicted in recorder's court of the city of Wilmington for violation of the prohibition laws, and sentenced

to the roads for a term of 12 months. He had served about 42 days of his term, when on December 10, 1919, Gov. Bickett granted the following "parole":

"To the Sheriff of New Hanover County:

"Upon the recommendation of the prosecuting attorney, the judge of the recorder's court of New Hanover county, and other representative citizens, the prisoner Joe Yates, now serving a sentence on the roads of New Hanover county, is hereby paroled for the balance of his term upon condition of good behavior and remaining a law-abiding citizen, and upon the further condition that should he violate the foregoing condition he shall receive no credit of his sentence for the time he is out on parole."

Between December 10, 1919, and December 2, 1921, the defendant was charged with repeated breaches of the criminal law. On December 2, 1921, Gov. Morrison issued the following "revocation of parole":

"To the Sheriff of New Hanover County, Greeting:

"I hereby revoke the parole of Joe Yates, granted December 10, 1919, upon satisfactory information that terms of said parole have been violated. You are hereby commanded to take the prisoner and to recommit him, in order that he may serve the remainder of his term, with no time allowed for previous good behavior, if any such time was entered to his credit.

"The prisoner was tried in the recorder's court of the city of Wilmington, on October 28, 1919, it being charged in the warrant that he violated the state prohibition law by operating a monkey rum still and making monkey rum. The judgment of the Court was that he serve 12 months in jail to be assigned to work on the county roads of New Hanover."

On December 4, 1921, the clerk of the superior court of New Hanover issued a capias for the defendant, and upon his arrest the defendant applied to Judge George W. Connor for a writ of habeas corpus. His honor heard the petition during the December term, 1921, of New Hanover, and, adjudging that the defendant was in lawful custody, refused to release him. The defendant excepted and appealed.

J. C. King and Herbert McClammy, both of Wilmington, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

ADAMS, J. [1] In Holley's Case Hoke, J., said:

"Our statute law has made no provision for appeal from a judgment in habeas corpus proceedings, except in cases concerning the care and custody of children. Revisal, § 1854; C. S. 2242. Therefore it is, that when on such a hearing a question of law or legal inference is presented, and the judgment therein involves the denial of a legal right, it may be reviewed by certiorari, under and by virtue of the power

conferred on this court by the last clause of section 8, article 4, of our Constitution: 'And the court shall have power to issue any remedial writs necessary to give it general supervision and control over the proceedings of the inferior courts.' In *re Holley*, 154 N. C. 164, 69 S. E. 872; *State v. Lawrence*, 81 N. C. 523; *State v. Herndon*, 107 N. C. 934, 12 S. E. 268; *In re Croom*, 175 N. C. 455, 95 S. E. 908; *In re Fountain*, 182 N. C. 49, 108 S. E. 342.

[2] For this reason the defendant's appeal must be dismissed; but as the record presents a question of public importance and general interest we will regard it as one of the exceptional cases that warrant consideration of the defendant's contention upon the merits. In *re Sermon's Land*, 182 N. C. 127, 108 S. E. 497; *Cement Co. v. Phillips*, 182 N. C. 440, 109 S. E. 257.

[3] The Constitution confers upon the Governor the power to grant reprieves, commutations, and pardons, except in cases of impeachment, upon such conditions as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Const. art. 3, § 6. In the exercise of the authority granted in the provision last cited the General Assembly has prescribed certain statutory duties which are to be observed by the applicant. Every application for pardon must be made to the Governor in writing, stating the grounds upon which executive clemency is sought, and must be signed by the applicant, or by some person in his behalf; and the Governor may grant a pardon subject to such conditions, restrictions, and limitations as he may consider proper and necessary. C. S. §§ 7642, 7643. When the prisoner violates the conditions which he must observe or perform, the Governor, "upon receiving information of such violation," shall forthwith cause him to be arrested and detained until proper examination can be made; and if it appears by his own admission or by such evidence as the Governor may require that he has violated the condition of his pardon, the Governor shall order him remanded and confined for the unexpired term of his sentence. C. S. § 7644.

[4] It is worthy of note in this connection that neither the Constitution nor the statute law authorizes a "parole," unless the word be construed as importing some form of conditional pardon. The advisory board of parole created by section 7749 merely determines whether in their judgment a person confined in the state prison is a proper subject of parole under a conditional pardon. Section 7752 et seq. We therefore regard it clear that Gov. Bickett's order must be interpreted as a pardon on condition that the defendant should comply with the terms imposed. So the instant and only question is this: Did Gov. Morrison have the legal right to revoke Gov. Bickett's conditional

pardon after the time fixed in the original sentence had expired?

"It seems agreed that the King may extend his mercy on what terms he pleases, and, consequently, may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend." Bacon's Abr. 412.

Under the modern law the power to grant a conditional pardon is generally subject to the limitation that the conditions imposed must not be illegal, immoral, or impossible of performance. The conditions contained in the parole granted by Gov. Bickett cannot be impeached on either of these grounds; and the defendant by accepting the pardon accepted also the conditions subsequent, a breach of which avoided the pardon and cancelled his right to further immunity from punishment. In *re Williams*, 149 N. C. 436, 68 S. E. 108, 22 L. R. A. (N. S.) 238; *Fuller v. State*, 122 Ala. 32, 26 South. 146, 45 L. R. A. 502, 82 Am. St. Rep. 1. In other words, when such breach by the defendant was duly determined and his conditional pardon thereby avoided, the defendant at once became subject to rearrest, although the time for which he had been sentenced had expired. Any other process of reasoning would disregard the primary fact that the essential part of the sentence is the punishment and not the time when the punishment shall begin or end. This doctrine is clearly stated in *State v. Horne*, 52 Fla. 125, 4 South. 388, 7 L. R. A. (N. S.) 719. There the defendant was convicted in 1898 of assault with intent to murder, and sentenced to five years' imprisonment; in 1901 a conditional pardon was granted; and in 1906 "long after the term of years of his original sentence had expired," the Governor of the state revoked the pardon, and the defendant was recommitted to prison. The defendant contended that his imprisonment was illegal, and the lower court discharged him on the ground that the alleged breach of the conditions occurred after the period of his sentence had expired. The Supreme Court reversed the judgment, and, among other things, said:

"The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, is not a part of the sentence at all. The essential portion of the sentence is the punishment, including the kind of punishment and the amount thereof, without reference to the time when it shall be inflicted. The sentence, with reference to the kind of punishment and the amount thereof, should, as a rule, be strictly executed. But the order of the court with reference to the time when the sentence shall be executed is not so material. Expiration of time without imprisonment is in no sense an execution of the sentence. *Hollon v. Hopkins*, 21 Kan. 638; *Dolan's Case*, 101 Mass. 219; *State v. Cookerham*, 24 N. C. (2 Ired. L.)

204; *Ex parte Bell*, 56 Miss. 282; *Re Edwards*, 43 N. J. Law, 555, 38 Am. Rep. 653, note."

And further:

"The defendant in error accepted the conditional pardon, thereby securing his release from imprisonment, and he is bound by its legal conditions and limitations. The provisions of the pardon are, in effect, that if, at any time during his life, the defendant in error shall fail to observe its conditions, the pardon shall be null and void, and he shall be arrested to serve out the remainder of his sentence of imprisonment that he has not already actually suffered. The violation at any time of the conditions of the pardon renders it by its terms null and void, and the status of the defendant in error is as though he had never received the conditional pardon. If, when the conditions of the pardon are violated, a portion of the quantum of imprisonment fixed by the sentence has not been suffered or served, the party should be returned to serve the remainder of his time of imprisonment, as stipulated in the terms of the pardon; and, besides this, the pardon by the breach of its conditions, is rendered in law void; and, if the sentence of imprisonment has not been fully executed, the law imposes the obligation to complete the service of imprisonment fixed in the judgment of conviction and sentence of punishment. The pardon may, as one of its restrictions and limitations, designate the time for the observance of its conditions; but, when the conditions are violated, the pardon becomes void in law, and the party is subject to the unsatisfied portion of the sentence as though no pardon had been granted."

In *State v. Barnes*, 32 S. C. 14, 10 S. E. 611, 6 L. R. A. 743, 17 Am. St. Rep. 832, the same question arose, and McIver, J., said:

"While it is quite true that the term of two years' imprisonment, to which the defendant had been sentenced in 1883, has long since expired, yet it is equally true that the defendant has not yet suffered imprisonment for that length of time; and as the pardon which he pleads has been adjudged insufficient to relieve him from suffering the whole punishment originally imposed upon him, it follows, necessarily, that he is still liable to be required to complete the term of imprisonment originally imposed, just as if he had escaped during that term. And such is the clear result of the authorities, both English and American."

These and other decisions fairly illustrate the principle which we think should be applied in the case at bar. There are others which apparently are in accord with the defendant's contention, but our researches have convinced us that the conclusion we have reached is supported by the better reasoning and authority. *Fuller v. State*, 122 Ala. 32, 28 South, 146, 45 L. R. A. 502, 82 Am. St. Rep. 1; *State v. McIntire*, 46 N. C. 1, 59 Am. Dec. 576; *Ex parte Hawkins*, 61 Ark. 321, 83 S. W. 106, 30 L. R. A. 736, 54 Am. St. Rep. 209; *State v. Chancellor*, 1 Strob. (S. C.) 347, 47 Am. Dec. 557; *State v.*

Smith, 1 Bailey (S. C.) 283, 19 Am. Dec. 679.

In our opinion the defendant cannot maintain his defense of exemption from rearrest on the ground that the breach of his parole took place after the expiration of the time for which he was originally sentenced.

The appeal is dismissed.

(183 N. C. 262)

PATE v. GAITLEY et al. (No. 291.)

(Supreme Court of North Carolina. April 5, 1922.)

1. Landlord and tenant §197—Lessee held liable for rent notwithstanding lessor's execution of deed to lessee pursuant to option given lessee to purchase land before date on which rent fell due.

Lessee, having expressly agreed to pay lessor the rent for certain year at the time when lessor gave him an option to purchase the land and also at the time that lessor gave lessee a deed pursuant to lessee's exercise of the option, was liable to lessor for such rent, though the deed was executed prior to the date when the rent for such year fell due according to the lease.

2. Evidence §419(5), 432—Frauds, statute of §158(3)—Vendor may prove nonpayment of purchase price and amount thereof notwithstanding statute of frauds or inconsistent recitals in deed.

In a suit for the purchase price of land, the vendor may prove by parol the amount thereof, the terms of payment, and its nonpayment, though deed contains a recital or acknowledgment contrary to the real transaction, since such recital constitutes only prima facie evidence of the payment of purchase price and may be rebutted by parol testimony, notwithstanding the statute of frauds or the rule against parol evidence varying the terms of written instrument.

Appeal from Superior Court, Robeson County; Kerr, Judge.

Action by Harmon Pate against R. T. Gaitley and others. Judgment for plaintiff, and defendants appeal. No error.

McIntyre, Lawrence & Proctor, of Lawrence, for appellants.

Johnson & Johnson and McLean, Varser, McLean & Stacy, all of Lumberton, for appellee.

STACY, J. The defendants leased from the plaintiff a valuable farm, located in Robeson county and containing about 200 acres, for the years 1918 and 1919; and, as rent for said farm, it was stipulated and agreed in a written contract between the parties that the defendants should deliver to the plaintiff, "at Parkton, N. C., on or before the 15th day of October, of each year, during the life of said lease, fifteen bales of middling lint cotton,

averaging 500 pounds to the bale." Later, and during the continuance of said lease, the defendant R. T. Gaitley took a written option from the plaintiff, whereby he acquired the right to purchase the farm in question at and for the price of \$15,000. This option was exercised on or about September 10, 1919, at which time the plaintiff executed and delivered to the said defendant a warranty deed, with full covenants, conveying to him the locus in quo; same being the originally demised premises.

At the time of the execution of the option, and again upon the signing and delivery of the deed, conveying the property in question to the defendant, it was specifically agreed and understood between the parties that the rent, as previously stipulated, for the year 1919, should be reserved and paid to the plaintiff by the defendants in accordance with the terms of the rental contract. The jury have found that this understanding and agreement existed not only before the execution of the said option and deed, but that the same, as alleged in the complaint, was "specifically reiterated, repeated and agreed to at the time of the execution of the said option and execution and delivery of said deed, all of which was fully assented to and agreed to by the defendant R. T. Gaitley, and he did then and there repeat his promise to pay said rent for the year 1919, in accordance with the said written lease."

But the said defendant, R. T. Gaitley, now contends that, as he held a deed for the land and was the owner thereof, at the time the 1919 rent fell due, he is no longer liable to the plaintiff therefor, but that said rent passed to him under his deed, as owner of the property. For this position he relies upon the following decisions: *Mixon v. Coffield*, 24 N. C. 301; *Lewis v. Wilkins*, 62 N. C. 307; *Kornegay v. Collier*, 65 N. C. 69; *Rogers v. McKenzie*, 65 N. C. 218; *Lancashire v. Mason*, 75 N. C. 459; *Holly v. Holly*, 94 N. C. 674.

[1, 2] We do not think this position can avail the defendant in the face of the jury's finding that he had agreed otherwise and that such constituted a part of the consideration given for his option and deed. It is well settled that a vendor, in a suit for the purchase price of land, may prove by parol the amount thereof, the terms of payment, and its nonpayment, notwithstanding the deed may contain a recital or acknowledgment contrary to the real transaction between the parties. *Faust v. Faust*, 144 N. C. 383, 57 S. E. 22; *Grabow v. McCracken*, 23 Okl. 613, 102 Pac. 84, 23 L. R. A. (N. S.) 1218 and note, 18 Ann. Cas. 503. Such recital is only prima facie evidence of the payment of the purchase price, and may be rebutted by parol testimony. *Barbee v. Barbee*, 108 N. C. 581, 13 S. E. 215

In *Michael v. Foll*, 100 N. C. 179, 6 S. E. 264, 6 Am. St. Rep. 577, the deed recited a consideration of \$500, but the court admitted parol evidence to show that, at the time of the conveyance, the grantee agreed with the grantor that he should have one-half of the proceeds of the sale of the mineral interest in the land, if such sale were made during his lifetime, and that such entered into and became a part of the consideration and inducement for the transaction. To like effect is *Manning v. Jones*, 44 N. C. 368.

The admission of this character of evidence is not at variance with the rule against changing or adding to the terms of a written instrument by parol, nor is it prohibited by the statute of frauds. *Harper v. Harper*, 92 N. C. 300. The deed is not in controversy. It was executed by the plaintiff in performance of his part of the contract for the sale of the land, and it is but meet that the defendant should likewise comply with his agreement in regard to the amount that should be paid. The statute of frauds was not intended to shelter or to shield frauds, but to prevent them. 39 Cyc. 171; *McNinch v. Trust Co.*, 183 N. C. —, 110 S. E. 663, and cases there cited.

In the instant case, the sale of the land is an accomplished fact; the deed has been executed and delivered; title has passed; but this ipso facto did not have the effect of relieving the defendant from his obligation to pay what he had agreed to pay. The contract in regard to the rent added no new covenant to the deed, nor did it contradict or explain any one that was incorporated in it. On the other hand, the plaintiff specifically affirms the deed and is now seeking to recover the full purchase price of the land. The suit is based upon an independent contract outside of, but in no wise in conflict with, the covenants appearing in the deed. "The recital of the amount of the consideration or of its receipt can be contradicted in an action to recover the purchase money, but that is because this is no part of the conveyance." *Campbell v. Sigmon*, 170 N. C. 351, 87 S. E. 118, Ann. Cas. 1918C, 40.

As the rent-cotton was evidently intended to be paid out of the crops grown upon the farm in question, it would seem that the reservation might be justified, also, under the doctrine announced in *Flynt v. Conrad*, 61 N. C. 191, 93 Am. Dec. 588, and other cases to like import; but, as the fact does not affirmatively appear—the written lease not being set out in the record—we deem it unnecessary to discuss this suggested phase of the case.

We have found no error in the trial, and the judgment of the superior court will be upheld.

No error.

(183 N. C. 251)

ARMOUR FERTILIZER WORKS v. SIMPSON. (No. 285.)

(Supreme Court of North Carolina. April 5, 1922.)

1. Sales \S 358(1)—In action on note for fertilizer, defendant may show delay in shipment, with knowledge of purpose for which fertilizer was to be used.

In an action on a note for fertilizer, which defendant claimed was not promptly delivered as agreed, evidence that plaintiff's agent was acquainted with the quality of defendant's soil, and informed of the purpose for which the fertilizer was to be used, was improperly excluded.

2. Sales \S 358(1)—In action on note for fertilizer delayed in shipment, defendant may show relative production with and without fertilizer, or usual effect of delayed planting when fertilizer is used.

A purchaser of fertilizer, claiming delay in shipment, may show, when sued on a note given therefor, the relative production of his land with and without the fertilizer, and the usual effect under ordinary conditions of delayed planting when fertilizer is used, and evidence as to cultivation and tillage, the crop planted, when planted, quality of the soil, and the condition of the weather and the seasons may be considered.

3. Courts \S 107—Speculative and conjectural elements, having no foundation for proof, excluded in applying former decisions.

In applying former decisions, all purely speculative and conjectural elements, which have no foundation for proof, should be excluded.

4. Sales \S 176(6)—No waiver of breach by execution of note for purchase price where loss could not then be ascertained.

A purchaser of fertilizer, the shipment of which was negligently delayed, did not waive such breach of the contract by executing a note for the fertilizer when delivered, where the loss subsequently sustained could not be ascertained or estimated at such time.

Appeal from Superior Court, Cumberland County; Kerr, Judge.

Action by the Armour Fertilizer Works against George F. Simpson. Judgment for plaintiff, and defendant appeals. Reversed.

Civil action tried before Kerr, Judge, and a jury at the October term, 1921, of Cumberland. Plaintiff sued to recover the amount alleged to be due on a note executed by defendant for fertilizer. Defendant admitted the execution of the note, and pleaded plaintiff's breach of contract in failing promptly to deliver the guano. There was evidence for defendant tending to show that the order was given plaintiff's agent in February; that a contract was made for delivery in March; that plaintiff had delivered other fertilizer in Cumberland county in March upon an order given in February; that plaintiff's ship-

ment was made about the 1st of May and received a few days later; and that in consequence of the delay in making the shipment the defendant's crop was damaged to the extent of \$700 to \$900. The defendant pleaded a counterclaim for such loss. The note was executed after the fertilizer had been accepted by the defendant. At the close of the defendant's evidence the court held that the defendant could not recover on the counterclaim, and rendered judgment in favor of the plaintiff for the amount of the note. Defendant excepted and appealed.

Bullard & Stringfield, of Fayetteville, for appellant.

Cook & Cook, of Fayetteville, for appellee.

ADAMS, J. [1] The defendant admitted the execution of the note, and introduced several witnesses, who testified in his behalf. Their evidence tended to show that the plaintiff's agent was acquainted with the quality of the defendant's soil, and informed of the purpose for which the guano was to be used, and that the plaintiff through inadvertence in misplacing or losing the defendant's order delayed the shipment from March until May. We think the evidence should have been submitted to the jury.

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Hadley v. Baxendale*, 9 Exch. 353.

[2] If the purchaser of guano may show a breach of warranty as to its quality by the effect of its use upon his crops (*Carter v. McGill*, 168 N. C. 507, 84 S. E. 802), why may he not by proper evidence show the relative production of land with and without the fertilizer, or the usual effect under ordinary conditions of delayed planting when fertilizer is used. Evidence as to cultivation and tillage, the crop planted, the time of planting, the quality of the soil, and the condition of the weather and the seasons may, under proper instructions, be considered by the jury. *Carter v. McGill*, supra; *Tomlinson v. Morgan*, 166 N. C. 560, 82 S. E. 953; *Herring v. Armwood*, 130 N. C. 177, 41 S. E. 96, 57 L. R. A. 958; *Spencer v. Hamilton*, 113 N. C. 49, 18 S. E. 167, 37 Am. St. Rep. 611; *Neal v. Hardware Co.*, 122 N. C. 105, 29 S. E. 96, 6 Am. St. Rep. 697; *Gatlin v. Railroad*, 179 N. C. 433, 102 S. E. 779.

[3] In material respects *Ober v. Katzen-*

stein, 160 N. C. 440, 76 S. E. 476, is distinguishable from the case under consideration; but in that case it is said that when the vendor knows that the fertilizer is for the purchaser's crops and fails to deliver it, and the purchaser because of the lateness of the season is unable to purchase it elsewhere, he is entitled to damages. In the present case there was evidence that the plaintiff's agent repeatedly told the defendant that the shipment would be made.

But in applying the decisions, as suggested in *Carter v. McGill*, 171 N. C. 775, 89 S. E. 28, all purely speculative and conjectural elements which have no foundation for proof should be excluded.

[4] We cannot hold as an inference of law that the defendant waived his alleged defense by the execution of the note; for, according to his contention, the loss he claims subsequently to have suffered could not then be ascertained or estimated.

The judgment of his honor in dismissing the defendant's counterclaim is reversed, and this will be certified to the end that the court may determine the matters in controversy in accordance with law.

Reversed.

(183 N. C. 271)

AYCOCK v. GILL. (No. 112.)

(Supreme Court of North Carolina. April 5, 1922.)

1. Contracts \S 128(1)—Agreement to stifle prosecution of any kind is void.

Since the concealment of a felony is an indictable offense, which is greatly aggravated by compounding the felony, that is, by an agreement not to prosecute, and, in the case of offenses less than felony, the concealment or compounding, though not indictable, is contrary to public policy, an agreement to stifle a prosecution of any kind is void and unenforceable.

2. Contracts \S 128(1)—Agreement to use influence to procure mitigation of punishment is illegal.

An agreement by one who had procured the arrest of plaintiff's nephew on a criminal charge to use his influence to induce the court to be lenient is contrary to public policy, and a note given by plaintiff for the amount of defendant's claim in consideration of that agreement is illegal, and cannot be enforced.

Appeal from Superior Court, Wayne County; Daniels, Judge.

Action by J. J. Aycock against J. E. Gill, for the cancellation of a promissory note. Judgment for plaintiff on admissions in the answer, and defendant appeals. Affirmed.

This action was brought for the cancellation of a promissory note for \$400 made by

the plaintiff to the defendant, upon the ground of duress, and because it was given upon a promise to suppress a criminal prosecution, or to mitigate the punishment of the plaintiff's nephew for the crime of false pretense. The court gave judgment for the plaintiff upon admissions in the answer, holding that the note was not enforceable, but was "invalid, null, and void," as against public policy, and ordered that it be delivered up by the defendant to be canceled.

Plaintiff's nephew, J. D. Hinnant, had been arrested under a warrant of a justice of the peace, issued at the request of the defendant, for false pretense. The answer admitted that, at the request of the deputy sheriff and Hinnant, J. E. Gill drove Hinnant and deputy sheriff and police officer from Zebulon, N. C., to Fremont, N. C., in order that Hinnant might arrange for his bond, and not be committed to jail, Gill stating to Hinnant and the deputy sheriff that he would charge the sum of \$20 for the round trip; that, arriving at Fremont, Hinnant talked to his uncle, the plaintiff, J. J. Aycock, and to another uncle named Aycock, whose initials this defendant does not now recall; that J. J. Aycock informed the sheriff and the defendant, Gill, that he had raised J. D. Hinnant, and was very much concerned about him; that the plaintiff, J. J. Aycock, asked the defendant, Gill, would he release his nephew, Hinnant, if he (the said Aycock) would sign a note guaranteeing the payment of the debt that Hinnant owed the defendant, Gill, which then amounted, including the expense of the automobile trip, to \$398.95; that the defendant, Gill, informed the plaintiff, Aycock, that he could not agree to discharge his nephew, Hinnant, but that, if the plaintiff, Aycock, desired to guarantee the payment of the debt, he, the said Gill, would state to the court that the same had been settled, and would request the court to be as lenient as possible with said Hinnant; that, after some discussion, the plaintiff, Aycock, signed a note, together with said Hinnant, payable to the order of the defendant, J. E. Gill, on December 1, 1920, for \$398.95, with interest from its date, July 27, 1920.

The defendant appealed from the judgment.

J. Faison Thomson, of Goldsboro, and W. G. Massey, for appellant.

Langston, Allen & Taylor, of Goldsboro, for appellee.

WALKER, J. The defendant, it is true, denied that there was any duress employed in obtaining the note in question, or that the consideration of it was against public policy, and also denied that he had done anything to stifle a criminal prosecution, and in support of this general denial he stated what was done, which is above set forth. It will not be necessary to inquire if there was any

legal duress exercised by the defendant to procure the note, as, if the note is void because the consideration of it is illegal, being against public policy, it is not enforceable, whether obtained by duress or not.

[1] The cases in this court have settled the general principle involved in this case. *Blythe v. Lovingsgood*, 24 N. C. 20, 37 Am. Dec. 402; *Garner v. Qualls*, 49 N. C. 223; *Vanover v. Thompson*, 49 N. C. 485; *Lindsay v. Smith*, 78 N. C. 328, 24 Am. Rep. 463; *Corbett v. Clute*, 137 N. C. 546, 50 S. E. 216. In *Thompson v. Whitman*, 49 N. C. 47, it is decided that the concealment of a felony is an indictable offense, and that the offense is greatly aggravated by compounding the felony; that is, "by an agreement not to prosecute or make known what has come to the knowledge of the party." In offenses less than felony, this compounding or concealment is not indictable, but it is, nevertheless, against the policy of the law and the due course of justice, and a court of law will not lend its aid to enforce any such contract or agreement. In *Garner v. Qualls*, 49 N. C. 223, the same doctrine is held, the court declaring that no executory contract, the consideration of which is contra bonos mores, or against the public policy, or the laws of the state, can be enforced in a court of justice. The consideration there was the compounding, or suppressing, a prosecution for an alleged forgery. The bond was declared void, although the act may never have been, in the view of the law, a forgery. In *Ingram v. Ingram*, 49 N. C. 188, the court declared that an agreement among persons interested in an estate not to bid against each other at the administrator's sale is void, as being against the public policy. It may be now, therefore, pronounced a settled principle "that contracts founded upon agreements to compound felonies or to stifle prosecutions of any kind" are void, and cannot be enforced. The court said, by Pearson, J., in *Thompson v. Whitman*, supra:

"His honor was of opinion that the consideration of the bond sued on was not against public justice. In this there is error. According to the view we take of the case, Taylor was not at liberty to take care of his private interest by accepting an indemnity, and thereby depriving the state of an active prosecutor; which is one of the means relied on for the conviction of offenders. The testimony of Taylor, when contrasted with that of Martin before the committing magistrates, in reference to the same transaction, suggests the fear that this douceur had taken effect. When the person directly interested is appeased before the trial, he is under strong temptations to favor the offender."

There are many cases decided by this court to like effect as those already cited, which it is not necessary to consider, as they all settle the principle above stated in the same way.

[2] The defendant contends that his ad-

missions do not bring this case within the principle above stated, as he did not agree to stifle a criminal prosecution or to do anything contrary to the public policy, but only agreed, as the consideration for the note given by the plaintiff to him, that he would intercede with the court in behalf of the plaintiff's nephew, and induce it to be lenient with him. But we are of opinion that even that consideration was illegal, and rendered the note void. It has been held that agreements to use influence, or tending to encourage the use of influence, with the prosecuting attorney in respect to criminal prosecutions are illegal. 9 Cyc. p. 502, and note 33, where the cases will be found; *Merwin v. Huntington*, 2 Conn. 209; *Rhodes v. Neal*, 64 Ga. 704, 37 Am. Rep. 93; *Shaw v. Reed*, 30 Me. 105; *Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346; *Ormerod v. Dearman*, 100 Pa. 561, 45 Am. Rep. 391; *Barron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684; *Wight v. Rindskopf*, 43 Wis. 344. Bonds or promises in consideration of "ease or favor" to prisoners held under criminal process are illegal. The case of *Buck v. Bank*, 27 Mich. 293, 15 Am. Rep. 189, is so much like this one, and the decision of it was made by a court of such eminence, the opinion being by Judge Cooley, that we may well rest our decision of this case upon it, as it covers fully the questions we have here to determine. The syllabus of that case thus states the substance of the decision:

"B. having robbed the plaintiff, the defendant, a relative of B.'s, was induced to execute to plaintiff promissory notes in consideration of a promise by the plaintiff to petition the court to mitigate the punishment of B. Held, that the notes were against public policy, and not enforceable by the plaintiff."

After reciting the evil tendencies of a contrary rule, Judge Cooley says:

"If the real inducement to the defendants to give the notes was the assurance of the officers that they would sign, or be more likely to sign, a petition for favor to R. M. Buck, then it is obvious that the transaction, stripped of whatever, in a legal point of view, was immaterial, was simply this: One party was to give a pecuniary consideration, and the equivalent was, that another would sign, or promise to sign, or be more likely to sign, a petition for the mitigation of a criminal punishment. It is too plain for argument that such a transaction is not only wanting in the requisites of a legal contract, but that in its tendency it is immoral and pernicious. * * * Such consequences can only be precluded by an inflexible rule of law, that services or assistance of any kind or any description, calculated or intended to influence the action of a court, except in the open and public modes of argument and evidence which the law provides for and allows, can never be a legal consideration for the promise of a pecuniary return.

"We do not stop to point out that assistance from pecuniary motives to lighten the punishment of a criminal is the same in nature and

only different in degree from assistance from the like motives to shield him from punishment entirely. We prefer to put this case entirely upon the tendency such an understanding as the defendants set up, must have to encourage deception of the judge, and to mislead him in the facts upon which his judicial action should be based. * * * The highest considerations of public policy demand that the pecuniary interests of individuals should not be recognized as legitimate motives to influence the action of official persons, and that in the case of courts most especially, every avenue should be carefully guarded against the intrusion of such motives. Caution is especially required in the case of parties injured by crime, who apply to avert or mitigate the penalty, because the court would be likely to give exceptional weight to their suggestions."

It was said in *Lindsay v. Smith*, 78 N. C. at page 381 (24 Am. Rep. 463), to be a matter of the gravest public concern that all infractions of the criminal law should be detected and punished. A party cannot take care of his private interest by depriving the state of a witness or an active prosecutor, which is the means relied on for the conviction of offenders; much less can he pollute the very fountains of criminal justice by suppressing an indictment already instituted against him. And it has been said that anything inconsistent with the impartial course of justice will not be upheld, even if the intent of the parties is not fraudulent, and although no evil resulted in the particular case. 1 Mod. Amer. Law, p. 125. It is the temptation to do wrong where money is to be received for the service that does the harm, as it is likely to prevent, obstruct, or prejudice the due administration of justice. In this case it was not purely voluntary and gratuitous service that was to be performed, but it was to be done under the stimulus of a consideration the promisor should receive for mitigating the punishment.

It would seem that, in this case, the object of the defendant, if not his sole object, was to collect his claim against Hinnant through resort to a criminal prosecution, so that he might later, by the use of duress, induce the plaintiff to come to the relief of his nephew, who was being prosecuted, as he did by giving the note upon the illegal promise that J. E. Gill would induce the court to act with leniency toward the nephew.

If the defendant, J. E. Gill, had his debt against Hinnant secured, and had promised, as a consideration therefor, that he would use his influence to mitigate the punishment of Hinnant, the result would be that his interest in the further prosecution of the case would be greatly diminished, if not totally withdrawn, and he would cease to fulfill his duty in the vindication of public justice, or the enforcement of the law. The state, as said in *Thompson v. Whitman*, supra, would thereby be "deprived of an active prosecu-

tor," and instead would be met by passive indifference.

As was said in a somewhat similar case:

"Although this case comes, as we think, under familiar principles of law, it is yet somewhat peculiar and novel in its facts; and in this decision we do not intend to trench upon the rights of respondents, or of their friends and counsel in their behalf, in the use of all legitimate means of defense." *Barren v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684.

Our conclusion is that the court was right in the judgment it rendered upon the pleadings.

Affirmed.

(183 N. C. 307)

J. E. LANE & CO. v. CENTRAL ENGINEERING CO. et al. (No. 330.)

(Supreme Court of North Carolina. April 12, 1922.)

1. Evidence §445(1)—Oral changes in contract made subsequent to execution are admissible.

An oral agreement varying a written contract is admissible in evidence if it was made subsequent to the original contract.

2. Municipal corporations §354—Company receiving benefit from change in contract is estopped to deny liability therefor.

A contractor having a contract for the construction of city streets, which was modified after originally made by changing the specifications of stone required so as to make the expense of producing the stone greater, who requested a subcontractor to furnish stone in accordance with the changed specifications, and received and used such stone in the performance of its contract, is estopped by receiving the benefit under the change to deny the validity of the change or its liability for the increased cost.

3. Municipal corporations §376—Requirement that defendant city pay amount due codefendant to plaintiff to apply on judgment against codefendant held proper.

In an action by a subcontractor against the principal contractor and the city, where judgment for extra expense incurred by reason of change in the contract was rendered against the principal contractor, and the city admitted it still owed money to the principal contractor, a judgment requiring the city to pay the amount it admitted it owed to the subcontractor to be applied on the judgment against the principal contractor was proper.

Appeal from Superior Court, Alamance County; Daniels, Judge.

Action by J. E. Lane, trading as J. E. Lane & Co., against the Central Engineering Company and the City of Burlington. Judgment for plaintiff, and defendants appeal. Affirmed.

In 1917 the city of Burlington contracted with its codefendant, the engineering company, to build certain streets, and the latter company contracted with the plaintiff to furnish the stone for that purpose, the stone to be furnished according to plans and specifications of the city which were made part of the contract between them. Thereafter the defendant engineering company agreed with the city for certain changes in the contract which necessitated changes in the stone to be furnished by plaintiff, and the plaintiff alleges that such changes were made with the understanding and agreement that the plaintiff was to receive additional compensation for the extra expense of furnishing different sized stone from that specified in the original contract. The plaintiff further alleged that the city of Burlington allowed the defendant engineering company additional compensation because of such changes in the contract, and that the plaintiff notified the city of Burlington of its claim against the engineering company before the city settled with the engineering company, and that because of such changes there was due the plaintiff the sum of \$2,965.51. Both the defendants answered, and denied the allegations of the plaintiff in regard to the changes in the contract and in regard to the promise to pay additional therefor, and the engineering company went further and set up a counterclaim in the sum of \$300 and interest against the plaintiff because the engineering company had to go into the open market and buy stone, which the plaintiff was to furnish, on an occasion when the plaintiff's plant broke down for which it had to pay an increased price of \$300.

The jury found on the issues submitted that the Central Engineering Company was indebted to the plaintiff in the full amount claimed, \$2,965.51, for which the court entered judgment, deducting the counterclaim of \$300, and, it appearing that the sum in the hands of the city of Burlington still due and unpaid to the engineering company amounted to \$2,413.50, on motion of the plaintiff, and with the assent of the city of Burlington, judgment was entered that said sum of \$2,413.50 be paid by the city to be credited upon the amount above adjudged due the plaintiff by the defendant engineering company.

Carroll & Carroll, of Burlington, for appellants.

Parker & Long, of Graham, for appellee.

CLARK, C. J. This cause was ably argued upon both sides, but we think that the matters in controversy were almost entirely for the consideration of the jury, who have found the facts in accordance with the contention of the plaintiff, and that judgment was properly entered against the engineering company for the full amount claimed by

plaintiff subject to the counterclaim of \$300.

[1] The defendant engineering company claimed that there was not sufficient allegation of a change in the contract, and that the evidence concerning such changes was incompetent because they varied a written contract. We think, however, the allegations are clearly stated, and the decisions are settled that the change varying a written contract was competent as it was made subsequent to the original contract. *Freeman v. Bell*, 150 N. C. 148, 63 S. E. 682; *Mfg. Co. v. McPhail*, 181 N. C. 208, 106 S. E. 672.

[2] Bishop, who represented the defendant engineering company in requesting the change of the stone to a smaller size, stated that the plaintiff would be reimbursed for the extra expense incurred. He was superintendent in charge of the work in Burlington on behalf of the company. The company accepted the work and is chargeable for the value of the same even if there was no express promise. It is estopped by receiving benefit under the change in the contract to deny its validity and the company's liability therefor.

[3] The city of Burlington having admitted that it had in hand \$2,413.50, balance due the engineering company for the work done, and submitted its readiness to pay this amount in its hands to the person determined by the verdict, judgment was properly rendered that the city pay over that amount to the plaintiff to be credited upon the judgment rendered against the engineering company.

We think the issue submitted was sufficient to present every phase of the questions in controversy which indeed have been practically passed upon in *Powell v. Lumber Co.*, 168 N. C. 632, 84 S. E. 1032, and need not be repeated in this opinion.

No error.

(183 N. C. 758)

STATE v. EVANS. (No. 323.)

(Supreme Court of North Carolina. April 5, 1922.)

1. Intoxicating liquors \S 238(1)—Evidence of manufacture held sufficient for jury.

In a prosecution for manufacturing liquor, evidence held sufficient for the jury.

2. Witnesses \S 277(3), 337(4)—Cross-examination of defendant as to contents of coat found near still held competent to impeach defendant's character and disprove alibi.

In a prosecution for manufacturing liquor, cross-examination of defendant as to whose picture was in the pocket of his coat, found near the still, and as to whom a letter found therein was from, whether he had deserted his wife, and similar questions, to which he replied that the picture was his wife's, that he had

not deserted her, but that they had been divorced, *held* competent to impeach his character, and to shake his denial of being at the still.

3. Criminal law §729 — Solicitor's remark contradicting defendant's denial of collateral matter designed to impeach character held not prejudicial.

In a prosecution for manufacturing liquor, the solicitor's remark, after defendant denied that his wife was taking care of his children, that "it is so," *held* not prejudicial, where the court interposed and the solicitor withdrew the remark and apologized.

4. Criminal law §1171(3) — Solicitor's remark that he would like to read letter found in defendant's coat held not prejudicial.

In a prosecution for manufacturing liquor the solicitor's remark, in answer to a question by defendant's counsel as to whether he thought he had a right to read a letter found in defendant's coat near the still, or examine defendant about it, that he would like to read it, *held* not prejudicial, where it did not appear that he offered to read it, or made any statements or suggestions as to its contents; the jury's verdict turning on whether the evidence identified defendant as the man seen running from the still.

5. Criminal law §304(2), 1171(1)—Repetition of remarks, ruled out as not based on evidence, held not harmless; judicial notice taken that liquor is carried across state lines for sale.

Though it is a matter of common knowledge that illicit liquor is continually carried across state lines for sale, a solicitor's remark to the jury that "all of us know that men manufacture liquor in one state and carry it 250 miles into another state to sell it," after the court had ruled out similar remarks as to matters not in evidence, was not harmless error, though it may have had no influence on the verdict.

Appeal from Superior Court, Granville County; Devin, Judge.

Houston M. Evans was convicted of manufacturing liquor, and he appeals. New trial ordered.

The defendant was convicted on an indictment for manufacturing liquor. The testimony for the state was that Officers Hutchins, Hobgood, Walters, Bowling, and Newton, on the afternoon of June 28, 1921, went out on Bearskin creek, in Granville county, and found a still being operated by a white man and a negro. When the officers got within about 20 steps of them, both ran. The white man dropped a coat, which he had in his hand. He was small and slight, and about the same size as the defendant. In the coat which was dropped was found a photograph, which the defendant on the stand admitted was a picture of his wife, and letters from her to him, and a subpoena from a Virginia court to him, and a letter from a Virginia lawyer. This coat was dropped by the

white man, who was about the same size as defendant, as he ran away from the still, which he was assisting in operating. The defendant attempted to explain the presence of his coat at this still by testifying that on June 23 he and a man named Chandler rode over from South Boston, Va., to Oxford, and while on the way the coat dropped off the door of the car on which it was lying. The defendant was corroborated on this point by testimony of two men, Chandler and Green, who also testified, in corroboration of defendant's alibi, that they were fishing together at Barnett's pond, in Person county, on that date, June 26.

The state in reply introduced a justice of the peace, a county policeman, and a deputy sheriff, all from South Boston, who testified that the character of the defendant and Chandler and Chrismus was bad. It was admitted by the defendant that he had been convicted in Virginia for having liquor, but he claimed that he had appealed. Verdict of guilty, judgment, and appeal.

D. G. Brummitt, of Oxford, for appellant.
The Attorney General and the Assistant Attorney General, for the State.

CLARK, C. J. [1,2] The motion for nonsuit was properly denied. The defendant made exceptions to the question by the solicitor as to whose picture it was which was found in the pocket of the coat, which he admitted was his, and he was asked, to impeach the witness, questions as to whom the letter was from, and whether he had not deserted his wife, and similar questions. The witness admitted that the picture was that of his wife, denied that he had deserted her, and said that they had been divorced. These and other questions along that line were competent to impeach the character of the defendant, and to shake his evidence in denial of being at the still, and as to the attempt to prove an alibi.

[3] At one point in the cross-examination, when the solicitor asked the defendant if his wife was not taking care of his children, and he denied it, the solicitor said, "It is so." Counsel for the defendant, in arguing the case before the court, stated that this was said very loudly, while the Assistant Attorney General represented it as having been said in a low tone, as a "side" remark. The record does not show which was right as to this. The jury are presumed to be men of intelligence and can hardly ever be influenced by such byplay. Certainly there was no error committed by the court, for he instructed the jury not to consider it, and the solicitor both withdrew the remark and apologized. State v. Saleeby, 110 S. E. 844, at this term.

It was a collateral matter in a cross-examination to impeach the defendant, who had put his character in evidence by going upon

the stand, and the jury must have fully understood that they were to acquit or convict the defendant upon the evidence as to the commission or innocence of the offense with which he was charged. Such colloquies between counsel and witnesses, on cross-examination, whether in civil or criminal actions, are not orderly and should always be avoided. It could hardly have had any effect as the solicitor, in a few minutes, was arguing to the jury that the statement of witness "was not so." Besides, the judge interposed, and the solicitor apologized.

[4] The solicitor further asked the defendant if he received the letter, which was found in his pocket, "from your lawyer in Virginia." The defendant's counsel objected to any reading or examination of these letters, and asked if the solicitor thought he had a right to read that letter to the jury, or examine the witness about it. It does not appear from the record that the solicitor had offered to read the letter, or made any statement or suggestion as to its contents; but on this suggestion from the defendant's counsel the solicitor countered by turning to the jury and smiling said that he would like to read it. We do not see that this remark could have had any bearing with the jury in any way. Their verdict necessarily must have turned upon whether the evidence identified the defendant as the man who was found at the still engaged in manufacturing.

[5] The solicitor further asked if the defendant had not been convicted in a liquor case in Virginia. The defendant admitted that he had been, but denied his guilt, and said that the case had been appealed, and testified that he never made any liquor, and never sold any. The solicitor in his argument to the jury mentioned a case in Roxboro, in which it was shown that a negro from there continually went to South Boston for blockade liquor. Defendant's counsel objected, upon the ground that there was no evidence connecting the defendant with the transaction. The court sustained the objection, saying, "The solicitor must confine himself to the evidence." The solicitor further stated in his speech that men who live in one state go 100 miles into another state to get liquor, and that a still had been established on the border land between the two states by a negro from Apex. The defendant's counsel again objected, and the court held that it "was not proper for the solicitor to argue to the jury matters not in evidence, or state particular facts in other cases," and instructed the jury not to consider the same. But the solicitor, it appears, then said,

"Well, gentlemen of the jury, you all know of that affair, and all of us know that men manufacture liquor in one state and carry it 250 miles into another state to sell it."

The defendant's counsel objected to this remark. Doubtless it is a matter of common knowledge that illicit liquor is continually carried across state lines for sale, but we cannot say that the conduct of the solicitor in repeating this remark, after the court had ruled out such remarks as to matters not in evidence, was harmless error. It may have had no influence upon the verdict of the jury, but certainly the solicitor should not have repeated the remark after the court had ruled, and properly, that such statements should not be made by the solicitor.

There was no exception to the judge's charge, but for the reason just given we think that the defendant is entitled to a new trial.

(183 N. C. 199)

MINTON v. EARLY et ux. (No. 128.)

(Supreme Court of North Carolina. March 22, 1922.)

1. Constitutional law \S 83(3)—Landlord and tenant \S 320 — Statute, making criminal abandonment of land by tenant without paying advances by landlord, held void.

C. S. \S 4480, providing that a tenant who abandons a tenancy or crop without paying advances made by the landlord shall be punished by fine and imprisonment, without requiring allegation or proof of fraud either in the inception or breach of the contract, is void, as contrary to Const. art. 1, \S 16, prohibiting imprisonment for debt except in cases of fraud.

2. Statutes \S 84(2)—Part of statute imposing civil liability on one employing defaulting tenant held void as depending on void part of statute as to criminal liability.

The part of C. S. \S 4480, which provides that one employing a tenant with knowledge of the tenant's abandonment of a crop without paying advances by his landlord shall be liable to the landlord depends on a portion of the statute making the tenant criminally liable for such abandonment, which is unconstitutional, and is thereby rendered void.

3. Constitutional law \S 43(1) — Answering over after demurrer overruled held not to waive objection to constitutionality of statute.

In an action under C. S. \S 4480, for employing a tenant who had abandoned a crop without paying advancements made by plaintiff, the objection to the constitutionality of the statute was not waived because defendant answered over after overruling his demurrer.

4. Justices of the peace \S 43(2)—Action for more than \$50 damages for persuading tenant to leave landlord cannot be maintained in justice court.

An action under C. S. \S 4480, for unlawfully persuading a tenant to violate his contract with his landlord without paying advances made by the landlord is one in tort, and may not be brought for more than \$50 in a justice's court.

5. Justices of the peace \S 60—Objection that tort action for more than \$50 could not be maintained in justice's court is not waived by answering over.

In an action under O. S. \S 4480, for persuading a tenant to leave his landlord without paying advances made by the landlord, the objection that the action, being for more than \$50, was not within the jurisdiction of a justice's court, was not waived by answering over, but could be presented by motion to dismiss, demurrer *ore tenus*, or might be acted on by the court *ex mero motu*.

Appeal from Superior Court, Bertie County; Calvert, Judge.

Action by C. M. Minton against John A. Early and wife. On appeal from a justice's court, judgment was rendered dismissing the action, from which plaintiff excepted and appealed. No error.

The action purporting to be under section 4480, Consolidated Statutes, is instituted by plaintiff, a former landlord, against defendants, on averment that one Jack Outlaw, after agreeing to make a crop on certain lands of plaintiff for 1918, and receiving advancements for said purpose as plaintiff's tenant to the amount of \$79.82, wrongfully and willfully abandoned said crop without paying plaintiff for said advancements. And that defendants, with full knowledge of said abandonment, and after being forbidden so to do, employed said tenant to work for them and moved him on their lands, contrary to law as contained in section 4480 of the Consolidated Statutes. Defendant, reserving the right to move to dismiss for lack of jurisdiction and for that the statute on which the claim is based is unconstitutional, made answer, denying the acts alleged against defendant, and denying any and all knowledge of any breach of contract by the alleged tenant, and at spring term thereafter moved to dismiss case for that the statute is unconstitutional. Motion overruled. Cause continued.

At the trial term, the jury having been impaneled, the record states that the defendants again demurred because it appears that the action lies only in tort, and that the justice had no jurisdiction of same, the demand being for more than \$50, and the justice's judgment being for more than that sum. Upon such demurrer and motion, judgment was rendered, dismissing the action, and plaintiff excepted and appealed.

Winston & Matthews, of Windsor, for appellant.

Alex Lassiter, of Aulander, and John W. Davenport, of Windsor, for appellees.

HOKB, J. [1] The action is based upon section 4480 of the Consolidated Statutes, and, if this were a valid law, we see no reason why an action *ex contractu* could not be

maintained for the jurisdictional amount of \$200, on the same principle we uphold in allowing a recovery for a statutory penalty; debt being maintainable for a "sum certain or easily reducible to certainty from fixed data or per agreement." *Katzenstein v. Railroad*, 84 N. C. p. 688; 2 *Waite's Action and Defenses*, p. 109; 1 *Chitty's Pleadings*, 108, 109; 8 *Encyclopedia of Law* (2d Ed.).

But in our opinion the statute referred to, imposing as it does the punishment of fine and imprisonment for abandoning a tenancy or crop, without paying for the advances made by the landlord, and without requiring any allegation or proof of fraud, either in the inception or breach of the contract, is in violation of our constitutional provision, article 1, \S 16, which inhibits "imprisonment for debt * * * except in cases of fraud." This has been virtually held in *State v. Williams*, 150 N. C. 802, 63 S. E. 949, wherein the court decides, the present Chief Justice delivering the opinion, that without averment of fraud, a bill of indictment under this section, then section 3366, Revisal, should be quashed. And for the same reasons, the clause of the statute making it indictable for a landlord to fail and refuse to furnish advancements as per agreement is an invalid provision; for without either averment or proof of fraud both are ordinary breaches of contract, for which the parties charged may only be held for the civil liability.

A similar decision appears in *State v. Griffin*, 154 N. C. 611, 70 S. E. 292, where a conviction, under section 4281, Consolidated Statutes (Revisal, \S 3431), for obtaining money, etc., under a promise to begin certain work and willful breach, was set aside for lack of any proof of fraud in the transaction other than the obtaining of the advances under the promise to begin the work and a failure to comply.

And the same general principle is approved and applied by the Supreme Court of the United States in *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191, a decision which this court recognized as controlling in the *Griffin Case*, *supra*.

[2] The parts of this statute which attempt to fix criminal liability on the tenant or cropper, who has merely broken his contract, being therefore invalid because in contravention of the constitutional guaranties protecting the liberty of the citizen, the clause which imposes, or attempts to impose, civil liability on any one employing such tenant or cropper with knowledge of such breach, connected with and dependent as it is upon the former, both in express terms and substance, must also be avoided. *Keith v. Lockhart*, 171 N. C. 451-458, 88 S. E. 640, Ann. Cas. 1918D, 916, citing *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U.

S. 463-501, 28 Sup. Ct. 141, 52 L. Ed. 297; *Riggsbee v. Durham*, 94 N. C. 800; Black on Constitutional Law, p. 63. In *Riggsbee's Case*, the principle adverted to is stated as follows:

"While some provisions in a statute may be unconstitutional and void, others may remain and be enforced, but the rule does not apply, when the constitutional and unconstitutional parts of the statute are conducive to the same object, and the dislocation of the unconstitutional part would so affect its operation that the act would fail in an essential part."

The position finds support in the fact that there is doubt if the Legislature could impose a liability of this kind upon one employing another, who has merely incurred civil liability by a breach of his contract. This right of a citizen to contract and deal with another is itself among the liberties and vested rights protected by constitutional guaranties, and should always be carefully upheld by the courts. *Smith v. Texas*, 233 U. S. 630, 34 Sup. Ct. 681, 58 L. Ed. 1129, L. R. A. 1915D, 677, Ann. Cas. 1915D, 420; *Allegeyer et al. v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; 6 R. C. L. p. 269.

In *Smith v. Texas*, supra, Associate Justice Lamar, speaking to the question, said:

"Life, liberty, property and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

[3] For the reasons stated, the action cannot, in our opinion, be maintained upon the statute, and the judgment of the lower court dismissing the same must on that ground be upheld, and the position is not waived because the defendant has answered over after demurrer overruled. *Garrison v. Williams*, 150 N. C. 674, 64 S. E. 783, and authorities cited.

[4] The plaintiff has supplemented his declaration on the statute by the averment that—

"Defendants willfully and unlawfully persuaded, induced, and assisted said Jack Outlaw to violate his contract with plaintiff, and it is contended in the argument before us that by reason of this additional averment, with evidence tending to support it, the plaintiff could sustain a recovery as in a common-law action for wrongfully enticing his tenant from his position and employment, to plaintiff's damage."

The action is said to have originated or to have been originally maintained on the first English statute of laborers, and while it has been recognized as existent since the repeal of that statute, the cause of action, so far as examined, has been restricted to a willful or malicious enticement from the personal service of another. Hale on Torts, pp. 264, 265, and authorities cited.

The decisions of this state would seem to be against the maintenance of such an action in the case of tenant or cropper without a valid statute to that effect. *State v. Etheridge*, 169 N. C. 263, 84 S. E. 264; *Swain v. Johnson*, 151 N. C. 93, 65 S. E. 619, 28 L. R. A. (N. S.) 615; *State v. Hoover*, 107 N. C. 795, 12 S. E. 451, 10 L. R. A. 726; *Jones v. Stanly*, 76 N. C. 355; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780. But we are not now required to make direct decision on the question, for all the cases are agreed that such an action is for a tort, and, this being a case on appeal from a justice's court, the jurisdiction may not be extended to claims in excess of \$50. *Singer Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14; citing *Stacey Cheese Co. v. Pipkin*, 155 N. C. 394, 71 S. E. 442, 37 L. R. A. (N. S.) 606, and other cases.

[5] In this aspect of the matter, the judgment of his honor is clearly correct, and this, like the former position, going to the jurisdiction of the court, is not waived by answer over, but may be presented by motion to dismiss, demurrer *o tenus*, or may be acted on by the court *ex mero motu*. *Garrison v. Williams*, supra.

We find no reversible error presented, and the judgment dismissing the action is affirmed.

No error.

CLARK, C. J., concurs in result.

(183 N. C. 769)

STATE v. HAUSER et al. (No. 345.)

(Supreme Court of North Carolina. April 12, 1922.)

1. Larceny \S 40(6)—Defendant charged with larceny of diamond could be convicted on proof of theft of brooch in which diamond was set.

Defendant, charged with larceny of a diamond, could be convicted on proof that she stole a brooch with a large diamond set in the center thereof surrounded by pearls and small diamonds.

2. Larceny \S 40(9)—Defendant, who stole wife's diamond, could be convicted under indictment charging diamond to be property of husband.

Where husband and wife lived together, and husband had charge of wife's affairs and of the property in the house in which they lived, a

defendant who stole wife's diamond could be convicted under indictment charging the diamond to be the property of the husband, notwithstanding that Constitution recognizes the wife's rights in her individual property.

3. Receiving stolen goods \Rightarrow 4—Defendant who sold stolen diamond knowing it to have been stolen by another guilty of receiving stolen goods whether he received it from such person to sell or stole it from her.

One who sold a diamond knowing it to have been stolen by another could be convicted of receiving stolen property regardless of whether he received it from such other person to sell it for her, or stole it from her.

Appeal from Superior Court, Forsyth County; Harding, Judge.

Kate Hauser was convicted of larceny, and Curtis Gentry was convicted of receiving stolen property, and they appeal. No error.

The defendants were charged with stealing one diamond of the value of \$700, the property of M. P. Orr, and for receiving the same knowing it to be stolen. The defendant Kate Hauser was found guilty of larceny of the stone, and Curtis Gentry guilty of receiving the same knowing it to be stolen. Judgment. Appeal by both defendants.

Holton & Holton and H. M. Ratcliff, all of Winston-Salem, for appellant Hauser.

C. W. Stevens, of Winston-Salem, for appellant Gentry.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. [1] The indictment charged the larceny of one diamond of the value of \$700, the property of M. P. Orr. The evidence for the state, if believed, is conclusive that Kate Hauser was guilty of larceny of the diamond, which was a large diamond set in the center of a brooch surrounded by pearls and small diamonds. She stole the brooch, and it was later recovered in the same form as stolen. There was no separation of the diamond from the brooch. The defendant's counsel contends, however, that larceny of a diamond being charged in the bill and the proof being that it was set in the brooch was a fatal variance. If the defendant stole the diamond, it makes no difference whether it was attached to the brooch or in a bag or box or lying about loose. State v. Harris, 64 N. C. 128, in which the charge was for larceny of "50 lbs. of flour," and the proof showed theft of a sack of flour. This was approved in State v. Nipper, 95 N. C. 655, and in State v. Kiger, 115 N. C. 750, 20 S. E. 456. In this last case the charge was theft of so many gallons of brandy, and the proof was of so many barrels of brandy, which was held sufficient.

[2] The defendant further takes the objection that the indictment charged that the diamond was the property of M. P. Orr, and

that it appeared in the evidence that it was the property of his wife; but the two were living together as husband and wife, and he had charge of her affairs and of the property in the house, and therefore had possession with her of legal effects. He therefore had possession, which was equivalent to a special property therein, notwithstanding that the Constitution recognizes the wife's rights in her individual property. State v. Wincroft, 76 N. C. 38; State v. Matthews, 76 N. C. 41; Bishop, New Criminal Procedure, p. 1687.

[3] The other defendant, Curtis Gentry, besides raising the two questions which are above raised on behalf of Kate Hauser, insisted there was no evidence in the case that he received the diamond knowing it to be stolen; but there was evidence, if believed, from which it appears clearly that Kate Hauser carried the brooch to Curtis Gentry's house. She was a colored nurse, and the testimony is that the brooch was worth about \$600. He sold it for \$50. The testimony is that she spent the night at his house, and the next morning the brooch was missing. Kate Hauser testified that he stole it from her. The conflict in the evidence on this point is not material, for, whether he received it to sell for her, knowing it to have been stolen, or stole it from Kate Hauser, he evidently knew that she had obtained the brooch unlawfully, and it could be charged either as her property or as the property of the true owner. Wharton, § 1825, and Ward v. People (N. Y.) 3 Hill, 396, both cited in State v. Wincroft, 76 N. C. 40. Being the same article, the larceny or receiving was against the rights of the owner, and could be charged as parts of the same illegal asportation in the same bill.

There are some other exceptions, but we do not think that they present questions that require discussion. We have, however, fully examined them, and, after hearing the learned argument of the counsel, we find no error.

(183 N. C. 775)

STATE v. STRANGE. (No. 347.)

(Supreme Court of North Carolina. April 12, 1922.)

1. Criminal law \Rightarrow 1001—Ordering accused into custody at a subsequent term on judgment pronounced at a prior term not error.

Where defendant had pleaded guilty of unlawfully receiving liquor at a prior term, and judgment thereon had been suspended during good behavior, in default of which defendant was to work on the roads for 12 months, upon a finding at a subsequent term that defendant had not been of good behavior, ordering him into custody under sentence pronounced at the prior term was not error.

2. Criminal law \S 144(16)—Where evidence relates to only one of several counts in an indictment, a general verdict is presumed to be returned on that count.

Where there are several counts in an indictment and there is evidence relating only to one, a general verdict will be presumed to have been returned on the count to which the evidence applies.

Appeal from Superior Court, Surry County; Long, Judge.

Seborn Strange was convicted of having liquor in his possession for the purpose of sale, of unlawfully receiving liquor, and of the unlawful transportation of liquor, and he appeals. No error.

Criminal action tried by Long, J., and a jury at the October term, 1921, of Surry. The defendant was prosecuted on an indictment containing four counts charging him (1) with the unlawful sale of liquor, (2) with having liquor in his possession for the purpose of sale, (3) with unlawfully receiving liquor, and (4) with the unlawful transportation. His honor instructed the jury upon the evidence relating to the second, third, and fourth counts. There was a general verdict of guilty.

The defendant at a previous term had pleaded guilty of unlawfully receiving liquor, and judgment had been suspended upon payment of costs; the defendant having given bond to appear at each criminal term for two years and show his good behavior, in default of which a capias was to issue and the defendant was to be worked on the roads for twelve months. This case is No. 40. At the October term, 1922, he was convicted of retailing in No. 46, and in No. 21 there was a verdict of guilty as above stated. In No. 40 his honor found that the defendant had not been of good behavior and ordered him into the custody of the sheriff under the sentence pronounced at the former term to the end that the sentence should be executed. In No. 46 the defendant was sentenced to 12 months on the roads, the service to begin at the expiration of the sentence in No. 40; and in No. 21 the prayer for judgment was continued.

The defendant excepted and appealed.

J. H. Folger, of Mt. Airy, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

ADAMS, J. [1] The defendant assigns as error "his honor's pronouncing judgment" in the case in which the defendant had pleaded guilty at a previous term. But the record shows that his honor, instead of pronouncing judgment, ordered the defendant into custody under the judgment previously rendered, upon finding that he had not complied with its terms. This procedure is sus-

tained by the decisions of this court. *State v. Everitt*, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848; *State v. Greer*, 173 N. C. 759, 92 S. E. 147; *State v. Hoggard*, 180 N. C. 678, 103 S. E. 891.

[2] The defendant contends, in the second place, that there was no sufficient evidence to support his honor's instruction as to the unlawful transportation of the liquor. If this should be granted, still in support of two other counts there was ample evidence, and the jury returned a general verdict. Where there are several counts in an indictment and there is evidence relating only to one, a general verdict will be presumed to have been returned on the count to which the evidence applies. *State v. Long*, 52 N. C. 24; *State v. Cross*, 106 N. C. 650, 10 S. E. 857; *State v. Toole*, 106 N. C. 736, 11 S. E. 168; *State v. Gilchrist*, 113 N. C. 673, 18 S. E. 319; *State v. May*, 132 N. C. 1021, 43 S. E. 819; *State v. Gregory*, 153 N. C. 646, 69 S. E. 674.

We find no error, and this will be certified.

No error.

(183 N. C. 763)

STATE v. HOOKER. (No. 161.)

(Supreme Court of North Carolina. April 5, 1922.)

1. Habeas corpus \S 113(1)—Judgment in proceeding by person committed for contempt reviewable only on certiorari.

In habeas corpus proceeding by petitioner who had been committed for contempt of court, the judgment was not appealable, since the action in such case can be reviewed only on writ of certiorari.

2. Habeas corpus \S 82(1)—Scope of inquiry on petition by person held under final sentence stated.

On petition for writ of habeas corpus by person held under a final sentence of a court, the only questions open to inquiry are whether on the record the court had jurisdiction of the matter, and whether, on the facts disclosed on the record, and under the law applicable, the court has exceeded its powers in imposing the sentence complained of.

3. Contempt \S 66(7)—Final sentence committing a person for contempt of court can be reversed only for lack of jurisdiction of court imposing sentence.

Where one has been convicted and sentenced for contempt of court under C. S. §§ 978, 981, 983, the final sentence can be reversed or modified only for lack of power or jurisdiction of the court imposing the sentence.

4. Contempt \S 35—Constitutional provision restricting punishment to be imposed by justices of the peace held not applicable to contempt proceedings.

Under C. S. §§ 978, 981, 983, authorizing justices of the peace to impose a fine not to

exceed \$250 for contempt of court, the mayor's court vested with the jurisdiction of a justice of the peace was empowered to impose a fine of \$200 for contempt, notwithstanding Const. art. 4, § 27, restricting the punishment to be imposed by the justice of the peace, since such constitutional provision applies only to the ordinary administration of the law in the trial of criminal cases, and not to contempt proceedings.

5. Contempt ¶35—Justices of peace would have inherent power to punish for direct contempt in absence of statute.

If C. S. §§ 978, 981, 983, authorizing justices of the peace to punish persons for direct contempt by both fine and imprisonment, were invalid as violative of Const. art. 4, § 27, restricting the punishment to be imposed by justices of the peace, the court, in the absence of such statute, would have the inherent power to punish for direct contempt.

6. Contempt ¶72 — Judgment inflicting imprisonment enforced though portion imposing fine is invalid.

If judgment of the mayor's court fining a person \$200 for direct contempt, and sentencing him to imprisonment for 30 days, was invalid in so far as the fine was concerned because violative of Const. art. 4, § 27, the portion of the judgment providing for imprisonment would be enforced.

7. Habeas corpus ¶11(1)—Prisoner detained under sentence in part valid not liberated until valid portion of sentence has been served.

A prisoner who is detained by virtue of a sentence in part valid and part otherwise need not be liberated on habeas corpus until he shall have served the valid part of his sentence.

Appeal from Superior Court, Pitt County; Lyon, Judge.

Petition by S. T. Hooker against the State for habeas corpus. From an adverse judgment, the petitioner appeals. Modified and affirmed.

On said hearing it was made to appear that D. M. Clark, Esq., mayor of the town of Greenville, and as such clothed by statute with the jurisdiction of a justice of the peace, on the 12th day of September, 1921, was engaged in hearing causes in his office in Greenville, N. C., and, having disposed of one case, and taken up another, for a moment stepped just outside of the back door to get his spittoon, when he was approached and abused and assaulted by the petitioner on his action as mayor in having issued a criminal warrant for petitioner's son; that on rule and capias issued said mayor adjudged said petitioner guilty of contempt of court, sentenced him to jail for 30 days, and imposed a fine of \$200, and petitioner was committed and held in custody under said judgment, when present proceedings were instituted.

In more direct reference to the occurrence, his honor, confirming the action of the mayor in this respect, finds the facts and conclusions of law as follows:

"That, on the same morning that S. D. Hooker was put in the lockup, to wit, August 12, 1921, the mayor held court in his private office for the disposition of two emergency cases; that he had disposed of one case, and was in the act of taking up and disposing of the second case, when he stepped outside of his back door to get a spittoon; he had turned to go back into his office when he was called by the respondent, S. T. Hooker, who at the time was in the rear of the office of J. C. Lanier; he said in his usual tone of voice, 'Come here a minute, Clark'; the mayor took the respondent to be rational, and approached the respondent at a point within a few feet from his office and in the rear of the office of J. C. Lanier, the two offices adjoining; he was met by the respondent, S. T. Hooker, S. D. Hooker, and J. C. Lanier; the respondent faced the mayor, and commenced to accost him in a very angry, menacing, and threatening manner, asking the mayor, 'What in the hell did you issue a warrant against my son, S. D. Hooker, for?' then and there denouncing the mayor, calling him a liar, a common street loafer, a leech upon the community, and a son of a bitch, shoving him off with a push on the shoulder, at the same time opening a pocket knife, which he held behind him in a position ready to strike; the knife was taken from the respondent by a police officer, Stokes, who had come out of the mayor's office, attracted by the loud, abusive language of the respondent to the mayor.

"The mayor did not attempt to strike or resist the attack or the language of the respondent, using no loud, abusive, or profane words, simply saying, 'I don't care to have any argument. The matter can be settled in court.' The mayor then walked back to his office, the respondent following him, and continuing to abuse, slander, curse, and denounce him.

"The denunciatory and abusive language and the assault of the said S. T. Hooker was contemptuous, and interfered with the mayor, and prevented him from the proper and lawful discharge of his official duties, and was had and done for the purpose of intimidating the mayor in the performance of his duties in the trial of the said S. D. Hooker, and said conduct was committed while the court was actually sitting for the transaction of business."

And upon these and other findings the court entered judgment as follows:

"Upon the foregoing facts it is considered, ordered, and adjudged by the court that the acts and conduct of the respondent were contemptuous, and brought contumely and insult upon the court, and were committed in the presence of the court, and it is further considered and adjudged that the said S. T. Hooker was in contempt of said court.

"It is further ordered and adjudged that the findings of D. M. Clark, mayor, be and the same are hereby fully sustained, and it is ordered and adjudged that the said S. T. Hooker be and

he is hereby adjudged to be on contempt of the court of D. M. Clark, mayor.

"If further appearing that the judgment of the court exceeded the jurisdiction of the mayor, in that he could only fine the said Hooker \$50 or imprison him 30 days, it is therefore considered, ordered, and adjudged that this cause be remanded to the mayor of the town of Greenville, to the end that judgment be entered herein pursuant to law, by said mayor, D. M. Clark."

From which said judgment the petitioner appealed.

J. C. Lanier and H. W. Whedbee, both of Greenville, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. Our decisions hold that, except in cases concerning the care and custody of children, no appeal lies from a judgment in habeas corpus proceedings, but the action of the judge must be reviewed, if at all, by writ of certiorari, which rests in the sound discretion of the appellate court. In *re* Blanche McCade (N. C.) 111 S. E. 3, at the present term, citing among other authorities, in the *Matter of Lee Croom*, 175 N. C. 455, 95 S. E. 908; In *re* Tinner Holley, 154 N. C. 163, 69 S. E. 872.

[1] Under these, and other decisions to like effect, this appeal, therefore, should be dismissed but for the fact that the Attorney General, waiving notice, has consented that the cause be heard and determined as on writ of certiorari if such course meets the approval of the court. The court having so determined, and considering the cause in that aspect, it appears that the defendant has been found guilty of direct contempt of the mayor's court of the city of Greenville, in violent abuse and direct assault on the mayor, while engaged in the administration of public justice and in the exercise of jurisdiction with which he is clothed, and for such conduct is held in custody under a sentence by the mayor, imposing imprisonment for 30 days and a fine of \$200, and sues out this writ of habeas corpus to inquire and determine as to the legality of his detention.

It is held with us that the writ of habeas corpus cannot be made to serve the purpose of an appeal or writ of error. And our statute on the subject provides: "That on a hearing of this character the prisoner shall be remanded when it appears that he is held in custody:

(1) By virtue of a process issued by a court or judge of the United States in a case where such judge or court has exclusive jurisdiction.

(2) By virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction or of any execution issued upon such judgment or decree.

(3) For any contempt, specially and plainly

charged in the commitment by some court, officer, or body having authority to commit for the contempt charged.

(4) That the time during which such party may be legally detained has not expired.

[2] And, in the application and construction of these principles, and the statutory provisions cited, it is the accepted position that, where one is held under a final sentence of a court, a commitment of contempt or other, the only questions open to inquiry are whether on the record the court had jurisdiction of the matter, and whether, on the facts disclosed in the record, and under the law applicable to the case in hand, the court has exceeded its powers in imposing the sentence complained of. In *re* Lee Croom, 175 N. C. 455, 95 S. E. 908; In *re* Tinner Holley, *supra*.

Speaking to the question in *Holley's Case*, *supra*, the court said:

"And in determining this question of power the court is confined, as heretofore stated, to the record proper and the judgment itself. It is not permitted that the testimony or the rulings thereon should be examined into nor that matters fairly in the discretion of the presiding judge should be reviewed or that judgments erroneous in the ordinary acceptance of the term should be questioned. The hearing is confined to the record, and judgment and relief may be afforded only when on the record itself the judgment is one clearly and manifestly beyond the power of the court, a statement of the doctrine supported in numerous and authoritative decisions here and elsewhere"—citing *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N. S.) 603; In *re* Schenck, 74 N. C. 607; In *re* Swan, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207; *Ex parte Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274.

This being the recognized principle that prevails in a hearing and case of this kind, our statute on contempts being chapter 17, § 978, Cons. St., et seq., constitutes the acts and conduct of defendant as established in this case a direct contempt, authorizes punishment by imprisonment not to exceed 30 days or fine not to exceed \$250, or both, in the discretion of the court (C. S. § 981), and in express terms confers power to impose it on every justice of the peace, referee, commissioner, clerk of the superior, inferior, or criminal court, or the judges of superior and Supreme Court, board of commissioners, or corporation commissioner, when "sitting for the trial of causes or engaged in official duties" (C. S. § 983).

[3] Defendant having been convicted and sentenced under the provisions of the statute, this is a final sentence from which no appeal lies in the ordinary acceptance of the term, and, where under the authorities cited, and others, of like kind, can only be reversed or modified for a lack of power or jurisdiction of the court imposing the sentence. In *re* Croom, *supra*; *State v. Little*, 175 N. C. 743,

94 S. E. 680; In re Brown, 168 N. C. 417, 84 S. E. 690; Ex parte McCown, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N. S.) 603.

[4] It is urged for petitioner that this sentence is beyond the power of the mayor's court which is only vested with the jurisdiction of a justice of the peace, and whose powers, therefore, under article 4, § 27, of the Constitution are restricted to a fine of \$50 or imprisonment for 30 days, but the court is of the opinion that the limitations of this article and section apply and were designed to apply to the ordinary administration of the law in the trial of criminal causes, and were not intended to affect the inherent or statutory powers possessed by these courts, and conferred upon them as necessary to enable them to transact business and maintain a proper "respect for their authority." This is undoubtedly the Legislature's construction of the section of the Constitution referred to, for, as we have said, the statute in express terms confers the power to punish *and* fine to the amount stated on justices of the peace, as well as on courts of record, and there are decisions here and elsewhere which strongly favor this view. In re Griffin, 98 N. C. 225, 3 S. E. 515; State v. Lyon, 98 N. C. 575; People v. Tool, 35 Colo. 225, 86 Pac. 224, 229, 231, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198; 6 R. C. L., title Contempt, § 43.

In Griffin's Case, *supra*, speaking of the distinction and some of the differences that exist between proceedings for contempt and the ordinary administration of the criminal law, Chief Justice Smith said:

"The one belongs to the general administration of the [criminal] law, the other is an exercise of judicial authority inherent in the court, and indispensable in the exercise of its functions. If the act which shows the contempt constitutes also a criminal offense, it may be prosecuted and punished as such, notwithstanding the contempt has also been punished."

And in State v. Lyon, in which it was held that a justice of the peace in proper cases had the power to require an adequate bond to keep the peace, and no appeal would lie, though the result might, in its practical operation, work an imprisonment far beyond the 30 days' limitation on a justice's jurisdiction, Merrimon, Judge, said:

"This view is not in conflict with the provision of the Constitution (article 4, § 27), and the statute [on the subject]. These provisions have reference to criminal cases wherein the magistrate gives judgment against a party charged with a criminal offense, and imposes on him a punishment" therefor.

[5] And in no event would the petitioner be entitled to his discharge on the facts of the present record. Even if the statute authorizing justices to both fine and imprison

for direct contempt of court were held invalid as violating the constitutional restrictions on their criminal jurisdiction, these courts have with us, and without any statute, the inherent power to punish for direct contempt, when engaged in the administration of the state's justice, and in the exercise of the jurisdiction and powers conferred upon them by the law. In re Deaton, 105 N. C. 50, 11 S. E. 244; Scott v. Fishblate, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696; State v. Aiken, 113 N. C. 651, 18 S. E. 690.

[6] And, this being true, though the fine of \$200 were invalid, the portion of the judgment inflicting an imprisonment for 30 days would be well within the constitutional provisions, and must be enforced according to its terms.

[7] It is the established principle in cases of this character that, when a prisoner is detained by virtue of a sentence in part valid, and part otherwise, he may not be liberated on habeas corpus till he shall have served the valid portion of his sentence (In re Holley, *supra*, citing U. S. v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; Ex parte Erdmann, 88 Cal. 579, 26 Pac. 372); a position directly recognized and approved in subsection 4 of our statute on habeas corpus as above quoted, "that the prisoner shall be remanded when it appears that the time during which he may be legally detained has not expired."

This will be certified that the judgment of the mayor's court be enforced as entered.

Modified and affirmed.

CLARK, C. J., did not sit.

(183 N. C. 281)

FRY v. SOUTHERN PUBLIC UTILITIES CO. et al. (No. 441.)

(Supreme Court of North Carolina. April 5, 1922.)

1. Master and servant §305—Custom of boys to ride on ice wagons admissible to rebut contrary instructions.

In an action for the death of plaintiff's son while riding on an ice wagon colliding with a street car, where defendant claimed it had given instructions to prohibit boys from riding on the steps of its wagons, evidence on behalf of plaintiff that it was the custom of the boys, not objected to by the drivers of the wagons, to ride upon the steps, was admissible to show that, if the order was given, it had been abrogated, or at least waived.

2. Master and servant §305—Waiver of safety rule presumed from customary violation.

Where the customary violation of a safety rule has continued so long that the master either knew of it, or by the exercise of ordinary care could have known of it, and he acquiesced

in it, he is presumed to have consented to its repeal or to have waived obedience to it.

3. Master and servant \S 305—Waiver of owner's rule prohibiting children from riding on ice wagons shown.

Evidence that for many years it had been the custom for small children to ride upon defendant's ice wagons, and that defendant's officers knew of such custom, which was permitted, and even encouraged, by those in charge of the wagons, held sufficient to show a waiver of the rule prohibiting children from riding on the wagons.

4. Negligence \S 22½—Evidence of custom of children to ride in violation of ordinance competent.

The fact that the custom of children to ride upon ice wagons was contrary to a city ordinance does not render evidence of a custom permitting them to ride inadmissible in an action against the owner for the death of a boy while so riding.

5. Negligence \S 85(7)—Ordinance against riding on vehicle held not violated by child.

Where the evidence showed that boys were permitted to ride upon ice wagons with the consent of those in charge thereof, and were even encouraged to do so, it was not unlawful for a boy to ride upon the steps of a wagon notwithstanding an ordinance prohibiting any one from riding on a vehicle without the consent of the driver.

6. Negligence \S 136(29)—Contributory negligence of boy 12 years old for jury.

In an action for the death of a boy who was 1 month and 7 days under 12 years of age, an instruction that a boy under 12 years of age could not be guilty of negligence was erroneous, since the negligence of a boy of that age is a question for the jury, and not a question of law.

7. Negligence \S 85(1)—Age element of contributory negligence.

The youth of an injured person is a circumstance to be considered with other factors in determining contributory negligence, since a very young person is not held to the same degree of care as an adult; but, except in cases of extreme youth, that factor alone is not sufficient to negative contributory negligence.

8. Negligence \S 136(25)—Contributory negligence, as proximate cause of injury to child riding on vehicle, held for jury.

In an action for the death of a 12 year old boy, the question whether his contributory negligence, if any, in riding on the steps of an ice wagon, was the proximate cause of his injury, was a question for the jury, where there was evidence that the driver of the wagon knew he was there and recklessly drove onto a street car track in front of an approaching street car without any signal or without looking to see if the track was clear.

9. Negligence \S 83—Last clear chance rule stated.

Where defendant by exercising due care can discover plaintiff's peril resulting from plain-

tiff's negligence in time to avoid injuring him, defendant is liable for failure to do so.

10. Appeal and error \S 930(1)—Verdict must be construed in light of evidence and charge.

The verdict must always be construed in the light of the evidence and the charge of the court, especially resolving all inferences in favor of the successful party.

11. Negligence \S 100—Contributory negligence no defense to wanton injury.

Where the acts of defendant which caused the death of plaintiff's intestate were willful or wanton, that is, without regard to the consequences of the act and indifferent to the rights of others, contributory negligence is no defense.

12. Negligence \S 100—Violation of traffic ordinance not of itself willfulness.

The driver's act in crossing a street at a place contrary to the ordinance would not of itself constitute willfulness against which the contributory negligence of a person killed thereby would be no defense, but that fact may be considered as one of the facts in evidence tending to show the act was willful.

13. Master and servant \S 306—Willful negligence of wagon driver imputable to owner.

Where the driver of defendant's wagon was guilty of culpable negligence, against which contributory negligence would be no defense, the defendant itself may be liable to the plaintiff upon the principle of respondeat superior.

14. Appeal and error \S 1003—Supreme Court does not weigh the evidence.

The Supreme Court does not undertake to decide a case on the evidence, but leaves its weight and sufficiency to the jury.

Clark, C. J., dissenting in part.

Appeal from Superior Court, Mecklenburg County; Lane, Judge.

Action by W. A. Fry, as administrator of the estate of Perry Fry, against the Southern Public Utilities Company and the Standard Ice & Fuel Company. Judgment for plaintiff against the Standard Ice & Fuel Company, and that defendant appeals. New trial.

This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the defendant's (Standard Ice & Fuel Company's) negligence.

On June 28, 1919, plaintiff's son and intestate, Perry Fry, was instantly killed in a collision between an ice wagon of the Standard Ice & Fuel Company and a street car of the Charlotte Street Railway Company, at a point on Tryon street about 50 feet south of the intersection made by Tryon and Ninth streets in the city of Charlotte. On that day Perry Fry was under 12 years of age, his exact age being 11 years, 10 months, and 23 days.

The railway company was repairing its tracks on North Tryon street from Seventh

to Ninth streets, and had dug up the concrete from between the rails and placed it in a pile, about 2 feet wide at the bottom and 18 inches to 2 feet in height, at the end of the cross-ties along the east side of the track, which had so narrowed the driveway on the right or east side of the street that there was room for only one vehicle to travel at a time from Seventh to Ninth street. This pile of concrete extended from Seventh street to Ninth street, with the exception of an open space about 30 feet in length just south of and about 50 feet distant from Ninth street. It was in this open space that the collision occurred.

It was Saturday afternoon about 4:30 o'clock, and the ice wagon, having completed its work for the day on Seventh street, came out of Seventh into Tryon and proceeded northward on Tryon on its return to the ice plant, traveling on the east side of the street between the piled up concrete and the curbstone of the sidewalk. O. L. Hill, the white man in charge of the wagon, and whose duty it was to ride on the rear step of the wagon, had abandoned the wagon at Seventh street, intrusting its safe return to the plant to the negro driver, Will Ferguson, and a half-grown negro helper, Robert Kinston. The latter, who was riding in the front seat with the driver, was so engrossed in eating his delayed midday lunch that he had no knowledge of the collision or its attendant circumstances, except that the impact thereof threw him out of the wagon.

Somewhere between Seventh street and the point of collision, a very congested section of the city, Perry Fry, and another small boy of about the same age, got on the rear step of the ice wagon; young Fry riding on that end of the step nearest the car tracks. This step was 14 inches from the ground. Before reaching the open space the driver heard boys' voices behind his wagon, and on looking back saw young Fry riding upon the rear step. When the wagon came to the open space in the pile of cement 50 feet south of Ninth street, the horses without warning were driven upon the street car track in a diagonal course toward West Ninth street, and very near an approaching street car. The front wheels of the ice wagon were upon the car track when the street car, also running north, struck the hub of the left front wheel of the wagon, knocking the front of the wagon away from the tracks and throwing the rear of the wagon in toward the street car. Young Fry was thrown from the rear of the ice wagon under the street car between the trucks, and when the car was stopped within its own length he was lying under the rear trucks of the street car. The left horse was down on the track with its feet in the fender of the car. Young Fry was dead when removed from under the street car.

It had been the custom for many years for little children to ride upon the rear step of defendant's wagons for the pleasure of the ride as well as to get ice. This custom was known to the defendant and had been constantly permitted by the drivers of its wagons. There was danger in children thus riding on the wagons of this defendant which was also known to the defendant.

The city of Charlotte had before the time of this fatality adopted the following ordinance, which was then in force:

"No vehicle shall be turned unless a signal shall previously be given by the whip or hand indicating the direction in which the turn is to be made. The driver of any vehicle, upon a track in front of a street car, shall, upon signal from the driver or motorman of said car, turn to the right of the track. The vehicles moving slowly shall keep as close as possible to the curb on the right of the street, allowing more swiftly moving vehicles free passage to their left. A vehicle overtaking another shall pass on the left side of the overtaken vehicle, and shall not pull over to the right until entirely clear of the vehicle passed. A vehicle, when turning to the left to enter an intersecting street, shall slow down to a speed of five miles per hour, and shall not turn until it shall have passed beyond the center of such intersecting street."

There was testimony that defendant had knowledge of this custom of small children riding on its wagons, and also that it had actual knowledge, through its driver, that the small Fry boy was on its wagon some time before the collision occurred which resulted in his death. Will Ferguson, the driver, testified:

"As I was driving down Tryon street that afternoon, between Eighth and Ninth streets, there was an opening just ahead of the left side where no broken concrete and rock had been piled upon or in the street. I heard a boy's voice behind my wagon say, 'Come on up! Come on up!' and I looked around through the wagon and saw this little white boy who got killed standing on the rear step."

The driver did not stop to put the boy off, nor did he tell him to get off. He drove his wagon through the open space 50 feet from the street intersection and upon the car track and close to the approaching street car.

W. J. Dellinger testified that, when the wagon looked like it was going to cross, "the street car was not far south of that open space; they were right close together." R. F. Rankin testified, "The street car and the ice wagon were very close together when I noticed the ice wagon," before the collision. Willie Wilson, who was on the street car, testified that the "car was somewhere about the middle of the block" when the horses started upon the tracks. R. A. Galloway testified that the horses' heads were about 6 feet from the open space when the car was about the middle of the block. Neal Elliott,

the motorman, testified, that the car was only 15 feet away when the horses started upon the track. M. T. Kelley, Fred Stewart, and W. P. Chambers testified that the street car was 20 feet away when the horses started to cross the track. Not only was the wagon driven upon the car tracks in close proximity to the approaching car, but in turning to cross the tracks the driver did not hold out his hand or give any signal of his intention to cross. Neal Elliott, the motorman, testified, "The driver did not throw out his hand or warn me." Fred Stewart, who was standing at the corner of Ninth street in front of the wagon and in a position to see the actions of the driver, testified:

"Saw the ice wagon and the driver when the horses started across the track. The driver just started across there, and the street car hit the front wheel. Did not see the driver throw out his arm; he did not throw out anything. He did not look."

This witness further testified:

"The driver of the ice wagon was not paying any attention to anybody or anything. He did not look to the side of him, nor behind him, nor do anything except to drive the horses across there at a slow trot; he moved across diagonally."

The driver of the wagon testified that, just as he reached this open space, an automobile passed on his right next to the curb, and that as a result his horses shied and thus got upon the car tracks. Nowhere do we find in the record any evidence which supports the testimony of the driver in this regard. The eyewitnesses introduced by both the plaintiff and the defendant, except the driver, said the horses were driven upon the tracks and that no automobile passed the ice wagon at or near the time of the collision. C. G. Terrell, the only eyewitness introduced by the defendant, except the driver, testified:

"The horses were responsive to the driver. They moved as if they were being moved by the driver."

And again the defendant's same witness testified:

"When I saw the horses start to turn across the track, the street car was between the center of the block and Ninth street. The street car was not ringing any bell, and from that time on the horses proceeded diagonally across the track in the open space and the street car came right after them."

Nor was there sufficient room between the concrete piled up along the rails and the curb for an automobile to pass the ice wagon. W. J. Dellinger testified:

"There was plenty of room to go along for one, but I don't hardly believe there was room for two."

R. F. Rankin testified:

"There was only one passway. This obstruction on the side of the street would not permit but one car to go through there. An automobile could not pass the ice wagon as it was going down there."

J. D. Johnson, a police officer, testified:

"Two automobiles could not have passed in there from Seventh street down to Ninth street with the material piled up there to the right of the rail."

The evidence in the record appears to contradict the driver, and shows that no automobile did pass the ice wagon. W. J. Dellinger, who was driving in an automobile in the same direction with the wagon and about a block and a half behind the ice wagon, testified:

"Saw no automobile behind the ice wagon. Could not see the front of ice wagon. There was not any vehicle to the side or behind it from the time I first saw it and the collision occurred. There was not any automobile passed the ice wagon after I saw it. I did not see an automobile come and go by this ice wagon and cause the horses to shy across the track; none passed the ice wagon. No automobile between me and the ice wagon; nothing but the ice wagon and the street car in front of me."

R. F. Rankin, who was in the automobile with Dellinger, testified:

"There was no car or other vehicle between me and the ice wagon when I saw it. No car passed the ice wagon about the time of the collision or before. I was going down the street behind the street car and the ice wagon. If there had been an automobile between me and the ice wagon, I certainly would have seen it."

Even the negro helper, Robert Kingston, riding in the front seat with the driver, saw no automobile pass the ice wagon.

A perusal of the record will tend to show, as the jury evidently found, that Hill, the man in charge of the wagon, had abandoned it at Seventh street; that the driver drove across the street 50 feet south of the intersection in violation of an ordinance of the city of Charlotte; that in doing so he failed to give any signal or warning of his intention to cross in violation of the ordinance; and that without looking or listening, and knowing that young Fry was in a position of danger on the back of his wagon, as the evidence tends to show and the jury found, he drove across the street in dangerous proximity to an approaching street car. There was at all events sufficient evidence to carry this question of fact to the jury.

Other material facts will be noticed in the opinion of the court.

The judge charged the jury, as to the fifth issue, as follows:

"If you find, by the greater weight of the evidence, that the street car in question was being operated at a lawful rate of speed, and that

the motorman had given all necessary and proper signals of the approach of the car to the ice wagon in question, and also of his approach to the Ninth street crossing, notwithstanding which facts the driver of the ice wagon, after he saw, or by the exercise of ordinary care could have seen, the approach of the street car, negligently and recklessly without signal or warning of any kind, and without looking or listening, drove his wagon upon, or dangerously near, the said street car track in such close proximity to the approaching street car as to render it impossible for the motorman in charge of said car to avoid a collision with the wagon, either by slackening the speed of his car, or stopping the same, after he saw a collision was imminent, and that the driver knew the perilous situation of the ice wagon, then the court charges you that the driver of the ice wagon would be guilty of willful negligence, and, if you find such negligence was the proximate cause of the intestate's death, then you will answer the third issue, 'Yes.'"

And the judge further charged the jury, on the fourth issue, as follows:

"If the jury find by the greater weight of the evidence that, with knowledge of the fact that the boy was riding on the rear step of the ice wagon, said driver willfully and wantonly drove his wagon across the said car track, without either looking or listening for the approach of a car or giving any signal or warning of his intention to drive the wagon on or across the track, and shall further find by the greater weight of the evidence that the motorman in charge of said street car saw, or by the exercise of ordinary care could have seen, this boy on the rear steps of the ice wagon, if you find he was there, notwithstanding which he willfully operated said car at a speed between 20 and 30 miles an hour between Eighth and Ninth streets, in violation of the ordinance of the city of Charlotte, and that the aforesaid willful and negligent acts of the motorman and driver of the car and wagon were the sole and only concurring proximate causes of the plaintiff's intestate's death, then you will answer the fourth issue, 'No,' independently of whether the plaintiff's intestate was a trespasser upon the ice wagon at the time of the collision or not."

The jury returned the following verdict:

"(1) Was the plaintiff's intestate killed by the joint and concurrent negligence of the defendants as alleged in the complaint? Answer: No.

"(2) If not, was the plaintiff's intestate killed by the negligence of the defendant Southern Public Utilities Company, as alleged in the complaint? Answer: No.

"(3) If not, was the plaintiff's intestate killed by the negligence of the defendant Standard Ice & Fuel Company, as alleged in the complaint? Answer: Yes.

"(4) Did the plaintiff's intestate by his own negligence contribute to his death? Answer: No.

"(5) What damages, if any, is the plaintiff entitled to recover? Answer: \$5,000."

Judgment on the verdict and defendant (Standard Ice & Fuel Co.) appealed.

Jas. A. Bell and Edgar W. Pharr, both of Montgomery, for appellant.

E. T. Cansler and D. B. Smith, both of Charlotte, for appellee.

WALKER, J. (after stating the facts as above). [1-3] If the first assignment of error is sufficiently stated under our rules, we are of the opinion that it is without any substantial merit. It was competent to prove the custom of small boys to jump upon the rear step of the wagon to ride and get bits of ice for several reasons, and, among them, to answer the contention of defendant that instructions had been given to the drivers not to permit riding on the wagon by small boys. If such order was given, the plaintiff surely was entitled to show that it had been constantly violated, for a long time, with the knowledge of the drivers and those in charge of the wagon, from which the jury could well infer that the owner of the wagon had notice of its nonobservance and that it was an order of the company more honored in the breach than in the observance, and, in legal contemplation, it had been abrogated or, at least, waived. *Biles v. R. R. Co.*, 139 N. C. 528, 52 S. E. 129; *Haynes v. R. R.*, 143 N. C. 154, 55 S. E. 516, 9 L. R. A. (N. S.) 972; *Smith v. R. R. Co.*, 147 N. C. 603, 61 S. E. 575; *Bordeaux v. R. R. Co.*, 150 N. C. 528, 64 S. E. 439; *Railway Co. v. Mobley*, 6 Ga. App. 33, 64 S. E. 300; *P. L. Co. v. Whetzel*, 118 Va. 161, 86 S. E. 898; *Robinson v. R. R.*, 71 W. Va. 423, 76 S. E. 851; *Railroad Co. v. Reagan*, 96 Tenn. 128, 33 S. W. 1050. It has been held generally that if a rule is made for the safety of the servant or others, but its customary violation has continued so long that the master either knew of it, or could by the exercise of ordinary care have found it out, and acquiesced in it, he is presumed to have consented to its repeal, or to have waived obedience to it. *Smith v. R. R. Co.*, supra; *Biles v. R. R. Co.*, 143 N. C. 78, 55 S. E. 512. But so far as the rule or order to the drivers in this case is concerned, it does not appear to have been observed at all, and boys were allowed to ride on the rear step of the wagon at their pleasure, even when the manager of it, who had left on this occasion, was there. All this evidence, and more, is sufficient to show, at least, the tacit consent of the driver and manager to such a course of conduct by them, and the jury have doubtless so found. If this be so, and it can hardly be disputed, the act of this young boy was not within the prohibition of the city ordinance forbidding it only when it is without the consent of the driver, or person controlling its movements and management.

As this is a question of capital importance in the decision of the case, we will refer to some of the evidence bearing upon it: For many years it had been the habit, and custom, for small children to get upon and ride

upon the rear of defendant's ice wagons, both for the pleasure of riding and for the purpose of getting small pieces of broken ice. In doing so they rode from door to door and frequently for considerable distances out of the neighborhood in which they lived. So general had been this practice, and so long continued, that one witness in referring to it said, "It has always been." This custom was known to the officers and agents of the defendant company, or by the exercise of ordinary care they should have known it, and in legal contemplation the defendant did know of this custom. But aside from this legal presumption, actual knowledge of this custom, it seems, was brought home to the defendant, its officers and agents. C. L. Hill, the man in charge of this particular wagon, testified: "Little fellows 6 years old up to 11 and 12 had this habit of getting on the wagon." J. A. Eagle, assistant manager of the defendant company, in testifying with regard to this custom, said he had observed it "ever since he had been in the ice business." C. R. Moore, manager of the defendant company, said he knew of the existence of the custom "in a limited way." More than that, the defendant's driver knew of the custom, permitted it to grow up, and even encouraged it, offering the inducement of cool rides and bits of cracked ice.

[4] But the defendant contends that the admission of the evidence as to this custom was error, upon the general ground that it was an illegal custom and that it grew up in violation of an ordinance of the city of Charlotte, which declares:

"That no one shall ride or jump on to any vehicle without the consent of the driver thereof; and no person, when riding shall allow any part of his body to protrude beyond the limits of the vehicle, nor shall any person hang on to any vehicle whatsoever."

If that position were sound, then any defendant could escape the consequences of his wrongful act by the mere device of alleging and proving that his conduct had been unlawful.

[5] But even if the position of the defendant be a correct one, then it is equally true, as the record clearly shows, that this custom had grown up with the consent of the drivers of the defendant's wagons; and, therefore, it was not forbidden by the ordinance. In *Ferrell v. Cotton Mills*, 157 N. C. 528, 73 S. E. 142, 37 L. R. A. (N. S.) 64, and many other cases to like effect, evidence was admitted to show the custom or habit of small children to play upon premises where they were technical trespassers. If in those cases evidence was competent which proved a custom, in violation of the laws against trespass, then certainly in this case evidence of a custom in violation of an ordinance of the city of Charlotte was competent. Having permitted this custom to

grow up, this defendant cannot take shelter behind his own wrong. "A habit of doing a thing is naturally of probative value as indicating that on a particular occasion a thing was done as usual; and, if clearly shown as a definite course of action, is constantly admitted in evidence." 1 Greenleaf's Ev. (16th Ed.) § 14 J.

[6] Leaving this subject, we come to the next material question in the case. Having concluded there was evidence that young Fry did not violate the ordinance, or that there was evidence that he did not and the jury so found, was he guilty of contributory negligence? We take this matter up now before considering the issue as to defendant's negligence, as it is more nearly related to, and connected with, the one just before discussed. The jury found that he was not guilty of any negligence himself which contributed to his injury and death; but the defendant contends that this answer of the jury was induced by an error of the judge in his charge to them, which, they say, is that, "as young Fry was under 12 years of age, he could not be guilty of negligence." He was one month and seven days under twelve. This, we think, was error. The error consisted in charging the jury that, as the boy was under 12 years of age, he was incapable of committing the alleged negligent act which it is claimed contributed to his injury. The responsibility of an infant for contributory negligence is not necessarily a question of law, and some expressions in our reports apparently to the contrary are misleading and contrary to the accepted and approved principle which governs in such cases. The question was so fully discussed, with a copious citation of the well-considered cases, in *Alexander v. City of Statesville*, 165 N. C. 527, 81 S. E. 763, that much further comment would seem to be useless. It was there held, as stated in the seventh headnote, that, while a child of tender years is not held to the same degree of care as one of mature years in avoiding an injury arising from the negligent act of another, it is ordinarily a question of fact for the jury to determine, in his action to recover damages therefor, whether under the circumstances, and considering his age and capacity, he should have avoided the injury complained of by the exercise of ordinary care; and in that case, it appearing that the plaintiff was a bright boy of about 7 years of age, it was held that the court properly left the issue of contributory negligence to the jury.

We cannot approve all that was said, with respect to this question, in *Baker v. Railroad Co.*, 150 N. C. 562, 64 S. E. 506, 29 L. R. A. (N. S.) 846, 17 Ann. Cas. 351; and *Foard v. Power Co.*, 170 N. C. 48, 86 S. E. 804, though expressions will be found therein which seem to agree with the view herein stated. In *Alexander v. Statesville*, supra, we followed

the rule as adopted by the Supreme Court of the United States in *Railroad Co. v. Gladmon*, 15 Wall. (82 U. S.) 401, 21 L. Ed. 114, and *Railroad Co. v. Stout*, 17 Wall. (84 U. S.) 657, 21 L. Ed. 745. Gladmon's Case has been followed by this court in *Manly v. R. R.*, 74 N. C. 655; *Murray v. R. R.*, 93 N. C. 92; *Bottoms v. R. R.*, 114 N. C. 699, 19 S. E. 730, 25 L. R. A. 784, 41 Am. St. Rep. 799. In *Bottoms' Case*, the court refers to Gladmon's Case and *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, as stating the correct rule, and takes this passage from the *Robinson Case*, "All," says Judge Redfield, in delivering the opinion, "that is required of an infant plaintiff in such a case [where a child was injured in a highway] being that he exercise care and prudence equal to his capacity." The passage which we have taken from Gladmon's Case was quoted by Chief Justice Smith, with full approval, in *Murray v. R. R.*, supra, as containing a correct statement of the rule applicable in such cases. Numerous other cases are cited in *Alexander v. Statesville*, supra, at page 536 of 165 N. C., at page 766 of 81 S. E. It was held in *Westerfield v. Lewis*, 43 La. Ann. 63, 9 South. 52 (cited in the *Alexander Case*), that the rule which exempts a child of tender years from responsibility, while, it may not operate justly in every possible case, on the whole promotes the ends of justice, and the court followed the authorities which held that a child of the age of appellant is prima facie exempt from responsibility, but also held that testimony is admissible to show the contrary, citing many authorities. We said in the *Alexander Case* that, upon the question of plaintiff's contributory negligence, the judge properly confined his charge to the second issue, which separately and independently involved an inquiry into that matter, as to the plaintiff's age and his incapacity arising out of his tender years, and it may be said that the question of contributory negligence, on his part, is not to be determined alone by the fact of his youth, except in extreme cases; but other considerations enter into the question, as, for instance, his degree of capacity or intelligence. Some boys are brighter, smarter, more precocious, and more capable than others who are much older, and better able to take care of themselves.

[7] The youth of the person must be considered, of course; but, with the qualifications already made, it is not the only test, and the presumption of incapacity to protect himself is not always a conclusive one. In *Rolin v. Tobacco Co.*, 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335, 8 Ann. Cas. 638, this court said:

"It is hardly necessary to add that contributory negligence on the part of the minor is to be measured by his age and his ability to discern and appreciate the circumstances of dan-

ger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess. 'As the standard of care thus varies with the age, capacity and experience of the child, it is usually, if not always, when the child is not wholly irresponsible, a question of fact for the jury whether a child exercised the ordinary care and prudence of a child similarly situated; and if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law exacts for determining what is ordinary care in a person of full age and capacity'"—citing *Am. C. & F. Co. v. Armentraut*, 214 Ill. 609, 73 N. E. 766; *Plumley v. Birge*, 124 Mass. 57, 28 Am. Rep. 645; 7 A. & E. Enc. 409.

Labatt on Master and Servant (Ed. 1904) § 348, says that the essential and controlling conception by which a minor's right of action is determined with reference to the existence or absence of contributory fault is that his capacity is the measure of his responsibility. If he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to that danger. For the exercise of such measure of capacity and discretion as he possesses, he is responsible. And quoting from *Gladmon's Case*, supra, this court further says:

"The rule of law in regard to the negligence of an adult, and the rule in regard to that of an infant of tender years, is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of 8 years of age less caution would be required than one of 7, and of a child of 7 less than one of 12 or 15. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."

[8, 9] But if it be admitted that the boy was guilty of contributory negligence, the question whether it was the proximate cause of his death remains to be determined by the jury, under proper instructions from the court. Where defendant, by exercising due care, can avoid the consequences of plaintiff's negligence, or he can discover plaintiff's peril in time to avoid injuring him, he is liable on his failure so to do. *Cullifer v. A. C. L. R. Co.*, 168 N. C. 309, 84 S. E. 400. The doctrine of the last clear chance applies where the defendant, after he discovers plaintiff's peril or, in the exercise of ordinary care, should have discovered it, negligently fails to avoid the accident. *N. S. R. Co. v. White's Adm'r*, 117 Va. 342, 84 S. E. 646.

The jury have found, with evidence to warrant the finding, that the driver knew the boy was on the rear step of the wagon, and had given him permission to ride there, and that, notwithstanding this knowledge, he drove onto the track, in front of the fast approaching street car, and his wagon was struck by the same, and this caused the intestate's injury and death. The driver of the defendant testified that some one drove an automobile between him and the curb of the sidewalk, which frightened his horses and caused them to turn, and drag his wagon onto the track; but there was evidence to the contrary, and especially by a witness who was riding in his automobile and a little behind the ice wagon, and who stated that he was in full view and that no such thing occurred, and the jury, under the evidence and the instructions of the court, not only found that the driver's testimony was not true, but that, on the contrary, he drove both "negligently," and "recklessly" upon the track. This appears from the instruction of the court on the third issue, as set forth in our statement of the case and the verdict. He also drove on the track "willfully and wantonly," as appears from the instruction of the court upon the fourth issue. There was evidence that the wagon was driven upon the track, in violation of a city ordinance which provided that the driver, in order to cross over to the other side of the street, should make his turn at the intersection of Tyron and Ninth street, or, if he intended to go as far north as Tenth street, then at the intersection of Tyron with Tenth street, and that, by the ordinance, he should have turned in on the north side of Ninth, or of Tenth, street, depending upon where he expected to make the crossing. The plaintiff contends, therefore, that he was acting, not only negligently, recklessly, willfully, and wantonly, but criminally, as he was violating the ordinance.

[10] We must construe the verdict always in the light of the evidence and the charge of the court, and especially as resolving all inferences in favor of the successful party. *Aldrich v. Railway Co.*, 95 S. C. 427, 79 S. E. 316. We have held repeatedly that the verdict must be interpreted, "and allowed significance," by reference to the pleadings, testimony, and the charge of the court. *Owens v. N. S. L. Ins. Co.*, 178 N. C. 373, 92 S. E. 168; *Taylor v. Stewart*, 175 N. C. 199, 95 S. E. 167; *Fidelity Bank v. Wysong*, 177 N. C. 284, 98 S. E. 769.

[11] If we follow these decisions and interpret this verdict by proper reference to the pleadings, evidence, and charge, there can be no doubt as to what was the conclusion of the jury, which is that the driver of the wagon, regardless of any contributory negligence of the boy, acted not only negligently, when he had the chance to save him,

but willfully, recklessly, and wantonly, and against such conduct as this finding implies the contributory negligence of the boy is no protection, or bar to the plaintiff's recovery. If the party injured is himself ever so negligent, the one who caused that injury is liable to him for the ensuing damages, if he was aware of the dangerous situation and caused the damage willfully, wantonly, or even recklessly, that is, if he did so without regard to the consequences of his act and being indifferent to the rights of others. It is said in a standard treatise:

"The doctrine that contributory negligence will defeat recovery has no application where the injury is the result of the willful, wanton and reckless conduct of defendant. * * * In order that one may be held guilty of willful or wanton conduct, it must be shown that he was conscious of the surroundings, and was aware, from his knowledge of existing conditions, that injury would probably result from his conduct, under the circumstances, and with reckless indifference to consequences, he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result." 29 Cyc. 509, 510.

And in *Brendle v. Spencer, Receiver*, 125 N. C. 474, 34 S. E. 634, this court held:

"It is settled that contributory negligence, even if admitted, is no defense to willful or wanton injury. The finding of such injury by the jury eliminates all question of negligence on both sides. The defendant company is responsible for the willful and wanton injury occasioned by its employee, while on duty, in its service."

[12] We do not mean to say that the driver's act in crossing at the wrong place contrary to the ordinance, if he did so, would, of itself, constitute willfulness; but it may be considered as one of the facts, or circumstances in evidence, tending to show that his act was willful, as being entirely regardless of the law and the safety of others. We have held that where a statute, or an ordinance, is violated, it is such a distinct legal wrong that, if it be the proximate cause of the injury to another, it will then constitute an actionable wrong, or tort; but the jury must find the facts essential to the application of this principle. *Stone v. Texas Co.*, 180 N. C. 546, 105 S. E. 425, 12 A. L. R. 1297, where the matter is fully discussed.

[13] We finally conclude that there was some evidence from which the jury could find that the driver of the wagon was guilty of culpable negligence, or a distinct legal wrong as hereinbefore defined by us, and the defendant itself may therefore be liable to the plaintiff upon the principle of respondeat superior; the driver being its servant, and his illegal acts being imputable to the defendant. If knowing that the boy was on the wagon, and he was there by the driver's consent, or permission, the defendant would have to answer for his negligence if he exposed the

boy to impending danger in crossing the track too near to the approaching street car, and especially so if the act of crossing the track under the circumstances was forbidden by the ordinance, and was the proximate cause of the injury to the boy which caused his death.

[14] This court will not undertake to decide the case upon the evidence, but will leave its weight and sufficiency to the jury. It may be that the defendant's construction of the evidence is the correct one, and that the plaintiff's is not. The court must not be understood as intimating any opinion at all upon the weight of the evidence, or any of it, but as leaving its sufficiency to establish the contention of the plaintiff, or that of the defendant, entirely to the jury, with proper directions from the court.

The error of the judge, as to the contributory negligence of the boy, is of sufficient importance to have been prejudicial to the defendant, and because of it a new trial must be had, in order that the case may be submitted again to the jury under proper instructions.

New trial.

CLARK, C. J. (concurring in part). In this case the plaintiff's intestate, a boy 11 years, 10 months, and 23 days old, jumped up behind an ice wagon passing through the streets of Charlotte and was killed in a collision between the ice wagon and the car of the Charlotte Street Railway Company. There was an ordinance of the city of Charlotte which made his conduct a misdemeanor, and there was a standing order by the Standard Ice & Fuel Company, the owners of the wagon, against such conduct, and the boy had no permission by the company, or permission of the driver, to ride on the wagon on that occasion. At the trial of the case there were two patent errors which require a new trial:

(1) The judge charged the jury that the plaintiff's intestate "could not be guilty of contributory negligence because under 12 years of age."

(2) The case should have been nonsuited on the further ground that the defendant owed no duty to the boy, who was illegally riding on the rear of the wagon in violation of the city ordinance and standing orders of the defendant company, except that it should not injure him wantonly or willfully, which is not even suggested.

As to the first proposition: The boy jumped upon the defendant's wagon, with full legal notice that he was forbidden to do so by an ordinance of the city, and the owners had constantly forbidden them to do so. Furthermore, the court in this case charged the jury:

"If you shall find by the greater weight of the evidence in the case that the plaintiff's in-

testate at the time he was killed was under 12 years of age, then there was a presumption of law that the boy was incapable of so understanding and appreciating danger from the alleged negligent acts or conditions produced by others as to make him guilty of contributory negligence."

A presumption of law is irrebuttable, and therefore this charge was in effect that if the boy was under 12 years of age he could not be guilty of contributory negligence. The decisions of the courts, without exception, are all to the contrary of this. Whether a boy of that age could be guilty of contributory negligence or not depends upon the findings of fact by the jury under proper instructions as to the capacity of the boy and the duty which the defendant owed to the boy under those circumstances. See *Jacobs v. Koehler*, 208 N. Y. 416, 102 N. E. 519, L. R. A. 1917F, 7, and annotations thereto, pages 10 to 164, on "Contributory Negligence of Children"—very exhaustive.

It is impossible to reconcile the charge in this case with the ruling by which the plaintiff, a younger boy, was nonsuited in *Butner v. Brown*, 182 N. C. 692, 110 S. E. 64 (last term), because he was held conclusively guilty of contributory negligence. In this case a boy a year older was held by the trial judge incapable of contributory negligence. In both cases, a jury trial of this issue is denied, but for absolutely opposite reasons. By no process of reasoning can the two decisions be reconciled. There are probably in this state more than 50,000 milk wagons, grocery and other store wagons, express wagons, and other vehicles employed in the discharge of similar duties. All their owners can do to prevent such accidents as this is to prohibit boys engaging in the sport from riding behind their wagons, as was done on this occasion. This prohibition was supplemented, in this instance, by the public ordinance of the city of Charlotte, of which the public are presumed to have notice. The company assumed no duty towards the boy, for it was not a common carrier. It did not injure him by any intentional act on the part of any of its employees.

If, under these circumstances, the owners of these thousands of vehicles engaged in the necessary traffic of our streets are to be made insurers of the safety of all boys who are injured while riding on the rear of their wagons—for it is insurance if there is a legal presumption that a boy of that age cannot be guilty of contributory negligence—then this decision will have added immensely to the liability of all persons or companies engaged in that, or any similar, business.

It is not too strong to say that there can be found no statute nor any decision which will justify the charge, which the court gave, that a boy of that age, "as a presumption

of law," could not be guilty of contributory negligence. Aside from the fact that the contrary was held in the Butner Case at the last term and in numerous other cases, in *Baker v. R. R.*, 150 N. C. 562, 64 S. E. 506, 29 L. R. A. (N. S.) 846, 17 Ann. Cas. 351, this subject was fully discussed and it was determined by a unanimous court as to the inquiry, "At what age must the responsibility of an infant for contributory negligence commence?" that upon all the authorities, "an infant, so far as he is personally concerned, is held to such care and prudence as is usual among children of the same age; and if his own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the infant to the possibility of an injury, the latter cannot recover." The Supreme Court of the United States has subsequently held the same to be sound law.

In *Wilson v. R. R.*, 66 Kan. 183, 71 Pac. 282, the court held that where a boy 12 years of age was swinging or jumping from one freight car to another, and fell and was injured, he was guilty of contributory negligence as a matter of law.

In *Jollimore v. Connecticut Co.*, 86 Conn. 314, 85 Atl. 373, it was held that a bright boy 11 years of age, who was playing in the streets and was killed by a street car, was guilty of negligence as a matter of law.

In *Moran v. Smith*, 114 Me. 55, 95 Atl. 272 it was held that a child 8 years old, who attempted to run across the street in the face of an approaching automobile and who was struck and injured, was guilty of contributory negligence.

In *Baker v. R. R.*, 150 N. C. 565, 64 S. E. 508, 29 L. R. A. (N. S.) 846, 17 Ann. Cas. 351, above cited, this court, in discussing the question of contributory negligence and whether it was a question for the court or the jury, says:

"The responsibilities of infants are clearly defined by text-writers and courts. At common law, 14 was the age of discretion in males and twelve in females. At 14 an infant could choose a guardian and contract a valid marriage. After 7 an infant may commit a felony, although there is a presumption in his favor, which may, however, be rebutted. But after fourteen an infant is held to the same responsibility for crime as an adult."

And then this opinion adds almost in the same words of the late case of *Board v. Power Co.*, 170 N. C. 48, 86 S. E. 804, as follows:

"We find in the books many cases where children of various ages, from seven years upwards, have been denied a recovery because of their own negligence."

In *Alexander v. Statesville*, 165 N. C. 528, 81 S. E. 763, it was held by Mr. Justice Walker that the question whether a child is guilty of contributory negligence is a

question for the jury upon the evidence as to his age and capacity, and in that instance held that there, where the plaintiff was a boy 7 years old, the court properly left the question of contributory negligence to the jury. To the same effect, *Raines v. R. R.*, 169 N. C. 189, 85 S. E. 294, L. R. A. 1918C, 1052. But in this case the judge relieved the jury of deciding that question by telling them that as a matter of law "a child under 12 years of age could not be guilty of contributory negligence." He lacked a month and 7 days of being 12 years old.

Secondly. Irrespective of the erroneous charge in regard to the boy under 12 being incapable of contributory negligence, this case presents the question of the responsibility of the owner of a wagon, or other ordinary vehicle in common use upon the streets for lawful purposes to a trespasser, or bare licensee upon such vehicle.

The settled principles applicable are:

(1) The plaintiff's intestate at the time of his injury, upon this evidence, was a trespasser on the defendant's wagon and, as such, exposed himself to any risk incident to his position. The defendant did not willfully or wantonly injure him, nor was he purposely injured by the acts of its employees. As to negligence in the collision between the defendant's wagon and the street car, that was a matter between those companies and in no wise affected the duty of the defendant to the intestate.

(2) Even if the intestate had been on the wagon with the implied consent of the defendant company, he was there solely for his own pleasure and purposes and was at most a bare licensee. He was not injured by any defect in the construction or use of the ice wagon, and there was no breach of duty towards him by the defendant company. No phase of the evidence presents any aspect of wilful or wanton conduct to the plaintiff's intestate.

Thirdly. In this case, whether the defendant or the street car company was negligent in causing the collision is a matter which does not affect the liability of the defendant towards the boy.

He was forbidden to ride on the wagon by the authorities of the company and by an ordinance of the city and did so at his own peril. No employee of the defendant company injured him, and there is an entire absence of allegation or evidence that he was willfully or wantonly injured by the defendant or any of its employees.

The plaintiff's intestate was "intelligent for his age"; was prepared to enter the fifth grade in school, showing he had advanced in the city schools, year by year. The evidence is that there was no obstruction between the wagon and the on-coming car. The intestate knew necessarily the danger of a collision between the street car and the

wagon. It cannot be said that a 12 year old boy of normal intelligence did not realize the danger he assumed in jumping upon the wagon. There was no difficulty about his getting off the wagon as easily as he got on, and the only reasonable explanation of his remaining on is that he was negligent of the danger he was assuming.

Neither is this case like *Pierce v. R. R.*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316, where the boy jumped on the rear of a shifting engine and was knocked off by the fireman throwing a piece of coal at him. The deceased in this case was not injured by any act of any employee of the defendant company. Nor is it the case where the boy was attracted by a novelty as in the "attractive nuisance" cases, nor yet is it an instance where the boy was permitted to ride on the wagon by the custom or consent of the management of the defendant company. On the contrary, it is in evidence that the defendant had given the strictest orders that boys should not be so permitted to ride on their wagons and the city of Charlotte had passed an ordinance forbidding them to do so and making it a misdemeanor. The defendant had done everything in its power to prevent the deceased committing this trespass and to prevent boys from exposing themselves to the danger of so doing.

Thompson on Negligence, §§ 946 and 949, discussing the question as to who are trespassers or bare licensees, say:

"One entering the premises of another with his consent, but without his invitation, and not in the discharge of any public or private duty, is a bare licensee within the rules governing this branch of the law of negligence."

The fact that the plaintiff's intestate was a boy 12 years of age is not an exception to this rule. Judge Thompson says in the same work (section 1025):

"The generally accepted rule does not impose upon the owner or occupier of premises the duty to exercise a greater degree of care in anticipation of their invasion by trespassing children. No distinction is made between trespassers as to their age. Both children and adults take the premises as they find them."

In *Peterson v. R. R.*, 143 N. C. 265, 55 S. E. 618, 8 L. R. A. (N. S.) 1240, 118 Am. St. Rep. 799, where the plaintiff went upon a railroad train at a stop for the purpose of buying fruit from the fruit vendor on the train, and was hurt by the negligent movement of the train, Connor, J., declared the relation and obligation of the parties to be as follows:

"Where the plaintiff went into the train at the station for the sole purpose of purchasing fruit without invitation or inducement, but simply by the silent acquiescence of defendant's agents, he was a mere permissive licensee, and took the risk incident to the movement of the train, and, in the absence of any wanton injury,

the motion for nonsuit should have been allowed."

In this instance, it is clear that the intestate was simply a trespasser, but, if he were a licensee, Judge Connor, in *Peterson v. R. R.*, 143 N. C. 265, 55 S. E. 620, 8 L. R. A. (N. S.) 1240, 118 Am. St. Rep. 799, thus lays down the well-established rule:

"A licensee who enters upon premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstruction or pitfalls. He goes at his own risk and enjoys the license subject to its concomitant perils."

This case is much stronger for the defendant. If it were a fact that the intestate had seen other boys riding on the steps of the ice wagon, it was not an implied permission to him to so ride. Certainly it was not an invitation or inducement. The boy was not on the step by any invitation or offer to give him ice or to take a ride. The riding on the wagon was positively against the rules of the defendant company, and the driver testified without contradiction, "My instructions without exception were to keep all persons off the wagon." Indeed, every driver who went upon the stand testified that he did the best he could to keep boys off. In *Briscoe v. Power Co.*, 148 N. C. 407, 62 S. E. 600, 19 L. R. A. (N. S.) 1116, where the intestate was a boy 13 years of age and fell into a well of hot water not properly covered over, the court held him to be a trespasser or at most a bare licensee, and uses this expression:

"If the exception is to be extended to this case, then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must at his peril make his premises child-proof."

There is absolutely no evidence in this case to justify the submission of the issue of wanton or willful negligence or reckless negligence, and the court erred in refusing the request to charge the jury that there was no evidence of willful or wanton negligence on the part of the defendant.

There is no evidence, in this case, that the intestate had ever before ridden on the wagon, and the evidence is that all its drivers tried to keep the children off the wagons and that the instructions from the company to do this were emphatic and repeated. Besides, as already stated, the ordinance of the city of Charlotte made it a misdemeanor for any one to "ride or jump onto any vehicle without the consent of the driver thereof," or for any person to "hang onto any vehicle whatsoever." Viewing the evidence in its strongest light against the plaintiff, the motion for nonsuit should have been allowed. There was no evidence of breach of duty towards the plaintiff's intestate, nor

was there any such negligence as would entitle the plaintiff to judgment.

In *Butner v. Brown*, 182 N. C. 692, 110 S. E. 64, at last term, this court sustained a nonsuit where a boy 11 years of age was injured by the operation of an unguarded cog-wheel in the defendant's mill, though the uncontradicted evidence was that the boy, and others of like age, had been permitted without objection for years to enter the mill at will, and that there was no notice or warning given that they should not do so, and the boy lost his arm because the defendant had not guarded the dangerous machinery which, by the consent of the defendant's operator and its own custom, he and other boys had been permitted, without objection, to approach by visiting the mill at all times. Yet there a nonsuit was sustained, but in this case there was no defect in the machinery or car and the intestate was not hurt thereby.

This case is one of wide and far-reaching importance. The court erred in allowing admission of testimony about a custom which had been declared (if it existed) by the city ordinance to be unlawful and in refusing to the defendant's prayers for instructions and in the charge as given, and especially in refusing to allow the defendant's motion for nonsuit upon the ground that upon the evidence the intestate because under 12 years of age "could not be guilty of contributory negligence."

On a careful perusal of the record, it is a reasonable inference that the question really tried by the jury was solely whether the defendant ice company or the street car company was proximately liable for the collision, leaving out the real issue whether the ice company, in either event, was liable to the plaintiff's intestate, who was a trespasser and, besides, was guilty upon the plaintiff's own showing of contributory negligence in violating the town ordinance and the prohibitions of the defendant company.

(183 N. C. 263)

COUNCIL et al. v. SANDERLIN et al.

SANDERLIN et al. v. COUNCIL et al.

(No. 289.)

(Supreme Court of North Carolina. April 5, 1922.)

1. *Franks*, statute of §61—"Profit à prendre" is created by grant, and cannot be created by parol.

"Profits à prendre," examples of which are the right to take timber from the land of another, or coal, or to fish in water belonging to another, or to shoot over land, or to take game

or wild fowl, is created by grant, and cannot be created by parol.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series. Profit à Prendre.]

2. Game §3—Right to hunt, belonging to individual distinct from other lands, has character of an estate in land.

Reservation of a right to hunt over lands granted to another, if owned distinct from an ownership in other lands, has the character of an estate in the land, and the right may be assigned or inherited.

3. Game §3—Right of hunting or fowling passes by grant or lease.

The right of hunting or fowling on another's lands or water may be acquired by grant or lease from the owner, either with or without the soil, and the right passes by grant or lease of the land, unless expressly reserved.

4. *Perpetuities* §4(3)—Rule against perpetuities held not to apply to right to hunt over lands granted to another.

The right to hunt over lands granted to another, reserved to the grantor in the grant, is not subject to the rule against perpetuities, since the interest is a present interest.

5. *Injunction* §34—Injunction is proper remedy to protect hunting privileges.

Injunction, as well as an action for damages, is the proper remedy to protect an exclusive hunting privilege and the common right to hunt on public waters.

6. *Evidence* §461(5)—Admission of hunting rights reserved by plaintiff held to have no effect, except as a recognition of the intent of the reservation.

In a suit against a lessee of lands to enjoin interference with the rights of plaintiffs to hunt and protect game thereon, reserved by plaintiffs when they granted the lands, a letter, written to one of plaintiffs by the lessor, one of the mesne grantees of the premises, stating that he had always recognized plaintiffs' rights to hunt and protect game on the land, has no legal effect, except as a recognition of the meaning and intent of the reservation if it had been ambiguous.

7. Game §3—Reservation of hunting rights in grant of land construed.

A reservation by grantors for themselves, their heirs and assigns, of the right to hunt on land granted, and power to protect game thereon against all persons except the grantees, their executors, administrators, and assigns, was a reservation of the right to hunt in fee simple, with power given the grantors to protect the game thereon against being hunted by persons except the grantee, etc., and a lease by one deriving title from the grantee, giving the lessee the right of hunting and protecting game, was invalid.

Appeal from Superior Court, Bladen County; Connor, Judge.

Suit by J. P. Council and another for a restraining order against W. T. Sanderlin

and others, and suit by defendants against plaintiffs. Causes consolidated, and from a decree dissolving the restraining order against plaintiffs and making the restraining order against defendants permanent, defendants appeal. Modified and affirmed.

The plaintiffs conveyed to the Southern Chemical Company, July 10, 1902, a tract of 1,319 acres on Lake Waccamaw in Bladen county, in fee simple, with the following reservation:

"But the said J. P. Council and J. A. Council reserve for themselves, their heirs and assigns, the right to hunt on any of the above-described lands as may remain uncleared and uncultivated, and the power to protect the game on said land against the trespass of all persons except the Southern Chemical Company, their executors, administrators and assigns."

It is found as a fact by the court that the plaintiffs have never abandoned their rights under the reservation, or exception, above mentioned, but have continuously exercised said rights since the execution of said deed, and that the lands in question are chiefly what is known as Savannah lands, and, under present conditions, of little value for anything other than hunting purposes.

On December 22, 1902, the Southern Chemical Company conveyed to the Southern Products Company the above tract of land, with the above clause that the conveyance is subject to the existing rights of J. P. Council and J. A. Council to hunt over the above-described lands that may remain uncleared and uncultivated, and with the power to protect game in said land against trespass, as particularly specified in the above deed from Council and Council to said Chemical Company. On January 1, 1903, J. A. Pickett, acting under power of attorney from the Southern Products Company, conveyed the said land to the Worth Company by a mortgage to secure a loan. The lands were sold under mortgage to Matt J. Heyer on May 3, 1906, and soon thereafter said Matt J. Heyer conveyed the land to J. A. Pickett (the present owner thereof), and on November 11, 1921, Pickett and wife conveyed to the defendant W. T. Sanderlin and H. M. McAllister, by way of lease for five years, the "right of hunting and protecting the game and all wild life on said lands and the right to exclude all persons from entering upon said lands with firearms or dogs or other devices used in the capture of wild life."

The above deeds were all duly probated and recorded. This is a proceeding or restraining order, which was made permanent, to prohibit Sanderlin and McAllister from interfering with the plaintiffs' hunting rights on said land. Said defendants allege that the reservation, in the Council deed above, of the hunting privilege, is void, and that

the plaintiffs are trespassing on the rights of Sanderlin et al., and sought a restraining order against plaintiffs from hunting, or trespassing, upon said lands. The causes were consolidated, and upon the facts found the restraining order against Council and others was dissolved, and it was made permanent against the defendants, who appealed.

E. F. McCulloch, of Elizabethtown, Lyon & Johnson, and Johnson & Johnson, of Lumberton, for appellants.

Sinclair, Dye & Clark, of Fayetteville, and R. S. White, of Elizabethtown, for appellees.

CLARK, C. J. The plaintiffs conveyed the land in fee simple in 1902, reserving the hunting privileges thereon, and the court finds in this proceeding, as a fact that the plaintiffs have never abandoned their rights under said reservation, but have continuously exercised same since the execution of the deed of July 10, 1902, and the court held as a matter of law that the plaintiffs "have the exclusive right to enter upon the uncleared and uncultivated portions of the lands in question, in person, and with invited guests and have the power to protect the game thereon, except such injury thereto as may be caused by the owner in the use of said land for purposes other than hunting," and made permanent the restraining order in behalf of said Council et al.

The sole point presented, therefore, is as to the validity and construction of such reservation in a conveyance of the realty. In *State v. Gallop*, 126 N. C. 979, 35 S. E. 180, this court fully discussed the right of hunting, and held that the ownership of game is in the people of the state, and the right to hunt and kill game may be granted, withheld, or restricted by the Legislature, and that game does not become private property until reduced to possession. But it further held that landowners can prevent others from hunting on their land in virtue of their right to keep trespassers off the land or under statutory enactment. *State v. Gallop* has been often cited and approved. See citations thereto in 2 Anno. Ed. It is under the authority of this principle that our laws for the preservation of game have been enacted. Under the game laws applicable to that county there are only two months in the year during which game can be hunted. The legislative restriction is valid against the owners of the hunting privilege, and the rest of the world besides. The question here presented is whether the owner of real estate in conveying the same can dissever from the title to the land, and retain in himself and his heirs and assigns, either solely or jointly with the grantee in the deed, the hunting privilege. The law is summed up with much fullness in the able

and interesting brief filed by the plaintiffs' counsel.

Beginning with the earliest English cases, it has been held uniformly that a shooting privilege is a profit à prendre, and in *Davies' Case*, 3 Mod. 248, it was held that one might acquire a prescriptive right over the lands of another. A right to shoot and take game is a profit à prendre, and was held to be an interest in land within the statute of frauds. *Webber v. Lee*, 51 L. J. Q. B. 485. It has also been held in numerous cases in England that the right granted by deed to kill and take game was an incorporeal hereditament which Blackstone styles the right of venary. 2 Bl. Com. 415. In *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656, it was held that the exclusive right to shoot and fish upon the lands of another, when not granted in favor of any dominant tenement, is not an easement, but a profit à prendre, and the grantee of such right, though not the owner of the soil, has such interest in land as would entitle him to maintain an action of trespass, under a statute authorizing such an action in respect of lands by the owner thereof.

In *Shooting Club v. Barber*, 150 Mich. 571, 114 N. W. 399, it was held that a right to shoot over the lands of another, acquired in connection with purchase of a lot carved therefrom, is not a mere revocable license, but an interest which will support an action for specific performance.

There are also numerous cases not necessary to cite that a clause in a lease of land, reserving to the lessor the right of "shooting and sport" over land, is not limited to game in a strict sense, but confers the right to shoot such animals as are ordinarily understood to be a subject of such sport.

In *Wickham v. Hawker*, 7 Mees. & W. 63, it is held that a grant to one and his heirs and assigns of the liberty to hunt on the grantor's land was a grant, and not a mere revocable license. A deed for shooting privileges on land is a grant of a profit à prendre. *Isherwood v. Salene*, 61 Or. 572, 123 Pac. 49, 40 L. R. A. (N. S.) 299, Ann. Cas. 1914B, 542, citing numerous cases.

In 12 R. C. L. 698, 690, the law is thus summed up:

"Acquisition of Hunting Rights in Premises of Another.—Though one person has no natural right to hunt on the premises of another, it is clear that a right to do so may be acquired by a grant from the owner. Or the owner can convey his premises and reserve to himself the hunting and fowling rights thereon. An owner of lands may convey exclusive hunting rights thereon to others so as to bar himself from hunting on his own premises. He may make a lease of the hunting privileges, giving the lessee the exclusive right to kill game or water fowl on the premises, and at the same time reserve to himself the pasturage rights on the premises. The right to hunt on another's prem-

ises is not a mere license, but is an interest in the real estate in the nature of an incorporeal hereditament, and as such it is within the statute of frauds, and requires a writing for its creation. Nor is the right of one person to hunt for fowl on premises owned and in the possession of another an easement, for, strictly speaking, an easement implies that the owner thereof shall take no profit from the soil. The right is more properly termed a profit à prendre. Unless the grant otherwise determines the rights of the parties, the owner of the hunting privileges may assign his rights to another, but he cannot give a pass or permit to another so as to allow the latter to exercise hunting privileges on the premises."

To same purport, 9 R. C. L. 744.

[1, 2] Profit à prendre is created by grant; it cannot be created by parol. If enjoyed by reason of holding certain other estate, it is regarded in the light of easement appurtenant to an estate; whereas, if it belongs to an individual (as in this case), distinct from any ownership of other lands, it takes the character of an estate in the land itself, rather than that of an easement therein. Furthermore, such right may be assignable or inheritable, which is not the case with an easement in gross. Examples of profit à prendre are the right to take timber from the land of another, or coal or to fish in water belonging to another (9 R. C. L. 744), or to shoot over land or to take game or wild fowl (14 Cyc. 1143, note 29).

[3] The right of hunting or fowling on another's lands or water may be acquired by grant or lease from the owner, either with or without the soil and with such restrictions or limitations as the owner may see fit to impose. This right, being a right of profit in the land, passes by grant or lease of the land, unless expressly reserved. *Lee v. Mallard*, 116 Ga. 18, 42 S. E. 372; *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146; *Matthews v. Treat*, 75 Me. 594.

In *Ingram v. Threadgill*, 14 N. C. 61, it is said:

"The Pedee river, at the place where the trespass is alleged to have been committed, is not a navigable river, but a private one. And the owners of the land on each side of it have a right to the middle of it. The same may be said of rivers which divide nations. *Handly v. Anthony*, 5 Wheat. 374.

"Although these franchises of fisheries are not granted by the state as lands are by law granted, yet when the lands adjoining such rivers are granted, the right of fishing vests in such grantees, and gives them the right of fishing to the middle of the stream in the water opposite their land; but not the right of fishing in water above or below the banks which belong to them."

This case is cited in *State v. Glen*, 52 N. C. 828, where it is said:

"As the riparian proprietor of the land on both sides of the stream, he is clearly entitled to the soil entirely across the river, subject

to an easement in the public for the purposes of the transportation of lime, flour and other articles in flats and canoes. He is also, as such proprietor, entitled to the exclusive right of fishing entirely across the stream."

This was said as to the Yadkin river where it was nonnavigable.

[4] The rule against perpetuities has no application to such interests over the lands of others because they are present, and not future, interests. Gray, Perpetuities, § 279.

[5] Not only is an injunction, as well as an action for damages, a proper remedy for the protection of an exclusive hunting privilege, but if a member of the public is denied his common right to hunt on public waters, the interference with this right may be enjoined. 9 R. C. L. 691, and cases there cited.

[6] In this record, there is in evidence a letter from J. A. Pickett, one of the mesne grantees of the premises and lessor of defendants, written in 1903 to the plaintiff, in which he stated:

"I have given no one the right to hunt on your preserves, nor have I myself fired a gun on the property, and would not have gone on the premises or gone with any of my neighbors to hunt thereon without your [plaintiff's] permission, except as to the little plots of peas and buckwheat," as Council's reservation of the shooting privilege did not include the cleared or cultivated portions, and that he had "always recognized Council's right."

This, however, has no legal effect except as a recognition of the meaning and intent of the reservation, if the same had been ambiguous, upon the familiar principle that when a contract is ambiguous in its terms a construction given to it by the parties thereto and by their actions in regard thereto, before any controversy has arisen as to its meaning, made with knowledge of its terms, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court.

[7] The words of the conveyance to be construed are as follows (after granting the premises in fee to the Southern Chemical Company):

"But the said J. P. Council and J. A. Council reserve for themselves, their heirs and assigns, the right to hunt on any of the above-described lands as may remain uncleared and uncultivated, and the power to protect the game on said land against the trespass of all persons except the Southern Chemical Company, their executors, administrators and assigns."

We understand the meaning of this conveyance to be a reservation of the right of hunting, the profits à prendre, to the grantors in fee simple as to such part of the premises as remain "uncleared and uncultivated," and so long as they so remain, with power given the grantors to protect the game thereon against being hunted by any

persons except the Southern Chemical Company, their executors, administrators, and assigns.

The decree, entered by the court in this cause, provides that—

The plaintiffs "have the exclusive right to enter upon the uncleared and uncultivated portions of the lands in question, in person, and with invited guests, and have the power to protect the game thereon, except such injury thereto as may be caused by the owner in the use of said land for purposes other than hunting."

We think that the above decree is a proper construction of the reservation, except in the use of the word "exclusive," and that a proper construction of the deed, including the reservation, is that the grantees also had the right to hunt upon the premises, and so have their successors, as owners of the land; that is, that the grantors have a fee-simple right of hunting, and that their grantees have the same right so long as they are owners of the premises. As such, they have a base and qualified right in the hunting privilege, but without the right to extend such privilege to others. The grantees of the land and their assigns of the lands have the right to hunt on the premises themselves, while owners thereof, jointly with the fee-simple privilege of hunting reserved by the reservation to the grantors. The use of the words giving the grantors the right to protect the game on said land against trespass of "all persons except the Southern Chemical Company, their executors, administrators and assigns," must necessarily be limited to the grantees of the land and the assignees of the ownership thereof. If not so limited it would clearly be destructive of the reservation to the grantors of protection of the game. This is evidenced by the attempted lease for five years by the present owners of the land to the defendants, Sanderlin and McAllister, of the "right of hunting and protecting the game" and all wild life on said lands and the right to exclude all persons from entering upon said lands with firearms or dogs or other devices used in the capture of wild life." This attempted lease is invalid, for it is not connected with the ownership of the land and under it the grantees attempted even to exclude the plaintiffs, who unquestionably have the hunting privilege in fee simple.

The court properly granted an absolute injunction against the defendants Sanderlin and McAllister, and sustained the validity of the claim of the plaintiffs as against them. We think, however, that the owners of the land have the right to hunt over the same themselves but without power of leasing said privilege or granting it to others. 12 R. C. L. 890; Bingham v. Salene, 15 Or. 208, 14 Pac. 523, 3 Am. St. Rep. 152. The word "exclusive," therefore, should be strick-

en out of the decree, which, as thus modified, will be affirmed.

We have quoted largely in this opinion from the learned and well-considered brief of the plaintiff, and, as a matter of more than usual interest to the public and the profession, we insert here from that brief the following incident which occurred very near to, if not upon, these very premises, on the banks of Lake Waccamaw, 188 years ago, as follows:

"On the 18th day of July, 1734, a traveler, lured by the flowing descriptions that he had heard of Waccamaw Lake, set out from a point on the Cape Fear river to visit that spot. In making the journey he passed quite near to, if not through, the hunting preserve of the plaintiff. This soldier of fortune, writing of the trip, says in part: 'We came to a large cane swamp, about half a mile through, which we crossed in about an hour's time, but I was astonished to see the innumerable sights of mosquitoes, and the largest that I ever saw in my life, for they made nothing to fetch blood of us through our buckskin gloves, coats and jackets. As soon as we got through that swamp we came to another open pine barren, where we saw a great herd of deer, the largest and fattest I ever saw in those parts; we made shift to kill a brace of them, which we made a hearty dinner on. We rode about two miles farther when we came to another cane swamp, where we shot a large she-bear and two cubs. The swamp was so large that it was with great difficulty we got through it. When we got to the other side it began to rain very hard, or otherwise, as far as I know, we might have shot ten brace of deer, for they were almost as thick as in the parks in England, and did not seem to be in the least afraid of us, for I question much whether they had ever seen a man in their lives before, for they seemed to look on us as amazed. We made shift as well as we could to reach the lake the same night, but had but little pleasure; it continued to rain very hard, we made a large fire of lightwood, and slept as well as we could that night. The next morning we took a particular view of it, and I think it is the pleasantest place that I ever saw in my life. It is at least eighteen miles around, surrounded with exceedingly good land, as oak of all sorts, hickory and fine cypress

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swamps. There is an old Indian field to be seen which shows it was formerly inhabited by them, but I believe, not within these fifty years, for there is scarce one of the Cape Fear Indians, or the Waccamaws, that can give any account of it. There is plenty of deer, wild turkey, geese, and ducks, and fish in abundance; we shot sufficient for forty men though there were but six of us.'" Sprunt's Chronicles of the Cape Fear, 43.

To which the brief appropriately adds:

"All must agree that these worthy gentlemen, near 200 years ago, upon the very game preserve the right to a part of which is involved in this appeal, set a bad example by shooting enough game for 40 men when only 6 could benefit thereby. Sad to record, this bad example has been so universally followed that the once magnificent American game, like its quondam denizens of the pristine forests, the American Indian, has become almost extinct. The look of amazement detected by the stranger in 1734, in the appealing eyes of the beautiful deer of the Waccamaw section as they looked, perhaps for the first time, upon man, has given place to a glint of horror and despair as the few survivors rush headlong for the haven of rest maintained by the plaintiff. They have learned to know that there they may rest in peace save for one month in each year, and that even during this time they will occasion far more fright to the inexperienced hunters, to whom they so suddenly appear, than they need entertain for themselves.

"The plaintiff, big of body, of mind and of heart, living by the side of the beautiful Waccamaw, is no more a lover of the hunt than of the hunted. Nature speaks strongly to him, and he is a lover of all wild life. Always has he labored for the enactment and enforcement of wise and beneficent laws intended to prevent the complete extermination of the game which once so richly abounded in his section. Doubtless there is more game on the preserve maintained by him, and for miles around it, than in any other part of the state; yet, had it not been for his persistent efforts, the hide and horns of a deer would be to-day an object of great curiosity in all that section. So that not only by the law of the case is his position sustained, but by a wise policy as well."

Modified and affirmed.

(118 S. C. 492)

PINCKNEY et al. v. KNOWLES et al.
(No. 10842.)

(Supreme Court of South Carolina. Feb. 27, 1922.)

Boundaries §40(2)—Evidence held to take to the jury the question whether the land in controversy was part of an island conveyed to defendants.

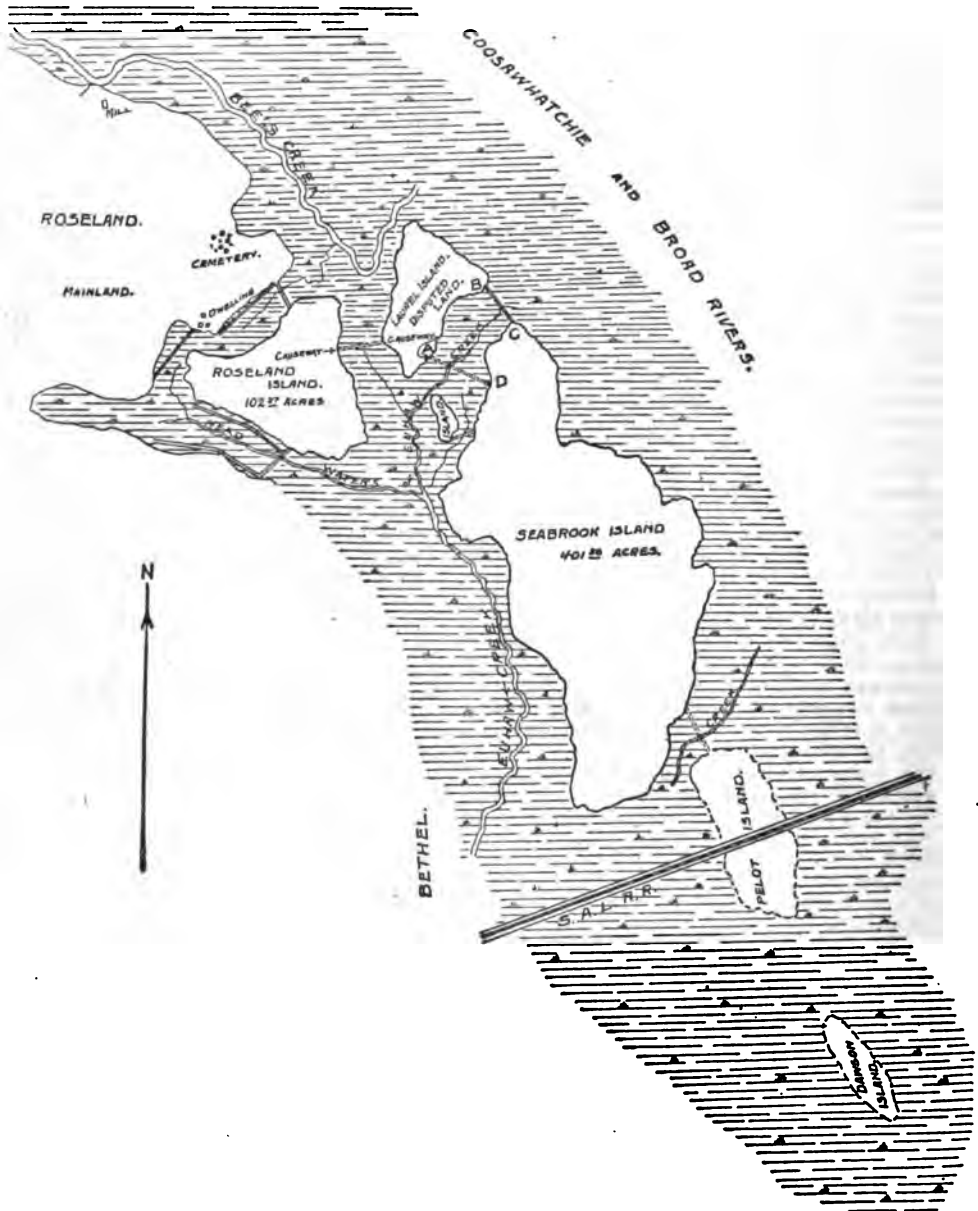
In an action to recover possession of a tract of land, evidence held sufficient, though conflicting, to take to the jury the question whether the land in controversy was part of an island conveyed by plaintiffs' predecessors in

title to defendants, and not another island which was part of a plantation leased to defendants, so that it was not error to refuse to direct a verdict for plaintiffs.

Appeal from Common Pleas Circuit Court of Jasper County; S. W. G. Shipp, Judge.

Action by Leonora C. Pinckney and another against Elizabeth Knowles and others, to recover possession of a tract of land. Judgment for defendants, and plaintiffs appeal. Affirmed.

The plat hereinafter referred to, reduced in size, is as follows:



W. N. Heyward, of Ridgeland, and Rutledge, Hyde & Mann, of Charleston, for appellants.

John P. Wise, of Ridgeland, and George Warren, of Hampton, for respondents.

FRASER, J. This is an action to recover possession of a tract of land. The plaintiffs call the land in dispute "Laurel island." The defendants claim that there is no such island. The plaintiffs claim as heirs at law and grantees of the other heirs at law of Abram Huguenin. The defendants claim under deeds from Abram Huguenin to an island called Seabrook island. The defendants claim that the so-called "Laurel island" is a part of Seabrook island.

At the close of the testimony the plaintiff moved for a direction of verdict in their favor. The motion was refused. The jury found for the defendants, and plaintiffs appealed.

The description of the land under the deed under which the defendants claim is as follows:

"Also one tract called Seabrook island containing three hundred and fifty acres of highland and forty acres marsh land, more or less, bounded north by Coosawhatchie and Broad-rivers; east by Pelot Islands; south by Euhaw creek and west by Roseland."

Under an order of the court a survey was made. The plat is entirely too large. The scale should be reduced to the size of the brief. Let a plat of reduced size be reported. It is very manifest the question is one of location.

Taking the description in the deed and the plat, it is evident that the description is indefinite. Coosawhatchie and Broad rivers are not north, but northeast; Pelot island is not east, but southeast. The plat shows Euhaw creek on the west, rather than the south. If, as plaintiff contends, only the lower portion is Seabrook island, then the northern boundary is not the rivers, but one arm of Euhaw creek. Further, there was testimony that there were, and still are, remains of two dams (as lettered by this court) extending from A to D on the west, and B to C on the east; that the land inclosed in A B C D was formerly planted; that in time of very low water no water covers this space, and the old rows of former cultivation can still be seen. There is also evidence that soon after Mr. Knowles bought Seabrook island he put valuable improvements on that portion now called "Laurel island." The plaintiff claims that Knowles leased Roseland plantation from Huguenin, and that same island is a part of Roseland plantation, and that neither he nor the defendants who claim under him can dispute the claim of the Huguenin title to any part of Roseland plantation. That does

not help the plaintiffs at all, because the question still is, Was Laurel island a part of Roseland plantation or Seabrook island?

There are five reasons given for claiming that Laurel island was a part of Roseland plantation, but they all assume that Laurel island, so called, was a part of Roseland plantation, and, as we have seen, that was the point at issue. That was a matter of fact to be determined by the jury, and there was no error in submitting the case to the jury. There was much conflict of testimony, but that made it a case for the jury.

The judgment is affirmed.

GARY, C. J., and COTHRAN, J., concur.

(153 Ga. 167)

McARTHUR v. THOMPSON. (No. 2820.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

Injunction \Rightarrow 153, 176—Order held to grant interlocutory injunction unless bond given; when court found irreparable damages, it was error to make an order on defendant's failure to give bond.

On an interlocutory hearing of an equitable petition to enjoin the cutting of timber to which the plaintiffs claimed title, the order of the court provided that the temporary restraining order previously granted be dissolved on condition that the defendant make and execute a bond conditioned to pay the plaintiff whatever sum he might eventually recover against defendant, and on failure to make such bond that the interlocutory injunction prayed for be granted.

(a) A proper construction of such order is that the interlocutory injunction be granted unless the defendant give the bond specified.

(b) As the court decided that the plaintiff was entitled to an injunction because the damages would be irreparable, it was error to grant it upon condition of the failure of the defendant to give the bond required. *Stewart v. Davis-Sears Lumber Co.*, 132 Ga. 205, 68 S. E. 817, and authorities cited.

Error from Superior Court, Toombs County; R. N. Hardeman, Judge.

Action by W. B. McArthur against J. L. Thompson. Judgment denying an interlocutory injunction on conditions, and plaintiff brings error. Reversed.

A. S. Way, of Reidsville, and E. J. Giles, of Lyons, for plaintiff in error.

E. C. Collins, of Reidsville, for defendant in error.

GILBERT, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 849)

GEORGIA IRON ORE CO. v. JONES.
(No. 2689.)

(Supreme Court of Georgia. Feb. 28, 1922.)

(Syllabus by the Court.)

1. Mines and minerals \Rightarrow 55(2), 71, 121—Deed to minerals controls subsequent deed of surface as to manner of working mines; grantee of minerals authorized to exercise rights conveyed in such way as was reasonably necessary; enjoyment of rights by lease from grantee of minerals held not to affect grantee of surface.

On March 4, 1890, A. J. Burke executed a deed to E. W. Marsh, which was duly recorded on the 21st day of April next ensuing. The deed conveyed "all of the iron ore and manganese of every kind that now are or may hereafter be found on all of lot of land 305 in the tenth district and fourth section of Walker county, Georgia, now owned by," etc. The deed also conveyed "the privilege and right of entering upon said lands and mining and transporting therefrom the ores and materials aforesaid and taking therefrom said minerals, and also the right of ingress and egress to and from this land for the purpose of raising, mining, collecting, and removing and transporting therefrom each and every of the articles aforesaid, and all of the timber and water that may be required for mining purposes." On March 13, 1908, J. H. Nunnally, as trustee and receiver of the estate of E. W. Marsh, executed a lease to the Marsh Mining Company, a corporation, which was duly recorded. The lease referred to numerous tracts of land, and among others purported to convey the above-described mineral interest in the whole of the lot No. 305 in the tenth district and fourth section of Walker county. On November 1, 1901, A. J. Burke executed a deed to C. E. James, which was duly recorded. The deed purported to convey the south half of the same lot 305 in the tenth district and fourth section of Walker county, and contained the recital: "But all coal, iron ore, and minerals and full mining rights reserved as being heretofore sold." By successive conveyances Mrs. Francis S. Jones became the grantee of the property as described in the deed above mentioned, viz. from Burke to James. Consequently A. J. Burke was the common grantor of the Marsh Mining Company and Mrs. Jones; the former having the older recorded deed, which related only to the mineral interest, and the latter the junior deed, which conveyed the soil, subject to the prior conveyance of the mineral interest. On September 27, 1917, Mrs. Jones instituted an action for damages and injunction against the Georgia Iron Ore Company, who were mining the property in controversy under a lease from the Marsh Mining Company, on the basis that the defendant was engaged in improperly work-

ing the land for the purpose of mining the minerals. *Held:*

The deed under which the plaintiff holds from the common grantor being junior, and by its terms subject to the older deed from the common grantor to the defendant's predecessor in title, the rights granted and expressed in the older deed will control as to the manner in which the defendant is authorized to work the land in operating the mines, viz. "the privilege and right of entering upon said lands and mining and transporting therefrom the ores and materials aforesaid and taking therefrom said minerals, and also the right of ingress and egress to and from this land for the purpose of raising, mining, collecting, and removing and transporting therefrom each and every of the articles aforesaid, and all of the timber and water that may be required for mining purposes." Under this grant the defendant had the authority to exercise the rights thus conveyed, in such way as would be reasonably necessary to enable it to mine the designated minerals, or in other words to enjoy the thing granted.

(a) Any enlargement of authority included in the immediate lease to the defendant, to which the plaintiff was not a party, would not affect the case, for the reason that the trustee could convey no greater estate than Marsh had received from the common grantor, and consequently the court did not err in failing to construe the terms of the lease from the Marsh Mining Company to Georgia Iron Ore Company.

2. Mines and minerals \Rightarrow 125 — Instruction held properly refused, as imposing greater burden respecting manner of mining than was imposed by deed.

It was erroneous to charge the jury that if they "should find that the defendant mined this ore in a scientific way, that is, if they mined in the best and most reasonable way to obtain the ore from the ground, although the mining of the ore may have damaged the plaintiff's property, the defendant would not be liable therefor," because the use of the terms "in a scientific way" and "in the best and most reasonable way" placed a greater burden on the defendant than was imposed by the deed.

Error from Superior Court, Walker County; Moses Wright, Judge.

Action by F. S. Jones against the Georgia Iron Ore Company. Judgment for plaintiff, and defendant brings error. Reversed.

Finlay & Campbell, of Chattanooga, Tenn., and Henry & Jackson, of La Fayette, for plaintiff in error.

R. M. W. Glenn and David F. Pope, both of La Fayette, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur.

(153 Ga. 73)

TAYLOR et al. v. SOLOMON et al.
(No. 2528.)

(Supreme Court of Georgia. March 1, 1922.)

*(Syllabus by the Court.)*1. Assignments for benefit of creditors ⇨363
—Surplus after payment of debts reverts to assignor.

Where an assignment is made by an insolvent debtor for the benefit of creditors, any surplus remaining in the hands of the assignee after the payment of debts would revert by operation of law to the assignor. *Carey v. Giles*, 10 Ga. 9, 30; *Lay v. Seago*, 47 Ga. 82, 86; 2 Ruling Case Law, 712, § 64.

2. Banks and banking ⇨77(6) — Intervening petition in receivership suit seeking to establish right to deposit not demurrable.

None of the grounds of demurrer are meritorious, and the judgment of the court overruling the same was not erroneous.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Suit between one Schofield and others and the Exchange Bank of Macon, in which W. G. Solomon, executor, and others sought to file an intervening petition, which was opposed by R. J. Taylor and others, receivers. Judgment for interveners on demurrer, and receivers bring error. Affirmed.

W. G. Solomon, executor, filed a petition seeking to intervene in the case of Schofield et al. v. Exchange Bank of Macon, pending in Bibb superior court, alleging that on November 18, 1894, C. H. Solomon executed to D. M. Nelligan, as assignee, a deed of assignment which was duly recorded, and which conveyed his entire stock of merchandise, notes, accounts, choses in action, etc., for the benefit of creditors; that the assignor died on August 30, 1895; that petitioner believes the debts due to preferred creditors were paid in full, and that, these owing to unpreferred creditors, all of whom were firms or corporations nonresident of Georgia, were settled or satisfied by the assignee; that the assignee removed from Georgia about the year 1898, and, as petitioner is informed and believes, subsequently died, without leaving any record of his administration of the property and funds covered by said assignment; that, after the appointment of receivers for the bank in 1907, petitioner learned that the bank held on deposit to the credit of Nelligan as assignee of C. H. Solomon, \$974.42; that dividends aggregating 90 per cent. of their balances have been paid to depositors, and payment of an additional 3 per cent. has been ordered; that under the order of court providing for the payment of this dividend, which order at the time of the filing of the intervention was being published in the newspapers of the city of Macon, any claim to the dividends due upon the above-mentioned bal-

ance would be barred within 90 days from the date of the passage of the order, November 12, 1920, and the fund would be subject to distribution among creditors of the bank who had been diligent in asserting and proving their claims; that petitioner was named executor of the will of C. H. Solomon, but the will had not been probated, and he had not qualified as executor, and the estate, being inconsiderable, had been distributed by agreement between petitioner, two other brothers, and a sister of C. H. Solomon; that, because of the death of the assignor and assignee, and the lack of any record of the administration of the property assigned, together with the failure of the creditors of C. H. Solomon to lay claim to the above-mentioned balance or to bring suit on the bond of the assignee, the law will presume, after the lapse of the long period of time, that the trusts of the assignment have been satisfied, and that the assignee duly performed the duties imposed upon him; that, if there were any creditors who had not been paid, they had been guilty of such laches and negligence as would constitute a bar to any claim they might have to the balance mentioned; that petitioner, as executor of the will of C. H. Solomon, is entitled to the liquidating dividends due upon said balance as reversionary interest belonging to the estate of said testator, and that petitioner is without an adequate remedy at law. He prayed: (1) That a successor to the deceased assignee of C. H. Solomon be appointed; (2) that the receivers of the Exchange Bank of Macon be directed to pay to such successor all dividends due upon said balance; (3) that the court decree the said balance to be, in equity, the property of the estate of C. H. Solomon, and by appropriate order provide for the payment of same to petitioner as executor of the will of C. H. Solomon, upon probate of the will, or to such administrator with the will annexed as might be appointed; (4) that the receivers of the bank be required to show cause why the prayers of the petition should not be granted; and (5) for general relief.

The defendants demurred to the petition on the grounds: (1) The prayers are not pertinent or germane to the cause in which petitioner seeks to be made a party; (2) the petition is multifarious and uncertain, and seeks to combine prayers for inconsistent and conflicting relief; (3) the petitioner has a complete and adequate remedy at law in the appointment of a receiver or assignee as successor to the deceased assignee; (4) the respondents (receivers of Exchange Bank) are not necessary or proper parties to an action for the appointment of such successor or receiver; (5) respondents are not interested in any controversy between petitioner, as executor of the will of C. H. Solomon, and any receiver or assignee so appointed, and it is

not proper or equitable that they should be required to answer the allegations of the petition showing cause why any sums received by the assignee should not be paid to intervenor, and they should not be charged with the responsibility of saying that payments are made under proper order of court; (6) the relief prayed is not pertinent to the case in which respondents were appointed receivers of the Exchange Bank of Macon; and (7) there is no equity in the petition.

The petition was amended by setting up that the will of C. H. Solomon had been probated in the court of ordinary of Bibb county, and that petitioner had qualified as executor, and praying that he be permitted to prosecute his petition for intervention, and be granted the relief prayed in his official capacity. Respondents then demurred on the ground that—

"Proper parties plaintiff are not made, in that the beneficiaries of the assignment have not been made parties to said application, and no beneficiary of said assignment is applying for relief."

Error was assigned upon the judgment of the court overruling the demurrers.

A. L. Miller and Jones, Park & Johnston, all of Macon, for plaintiffs in error.

Walter T. Johnson, of Macon, for defendants in error.

PER CURIAM. Judgment affirmed. All the Justices concur.

(152 Ga. 787)

MITCHELL COUNTY et al. v. PHILLIPS et al.

PHILLIPS et al. v. MITCHELL COUNTY et al.

(Nos. 2612; 2613.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Counties \S 181, 183(1)—Delay in issuing bonds held not to abrogate authority; tax for sinking fund but not for interest should be assessed during years when issuance and sale delayed.

Where an election is held by a county to determine whether or not a debt for a given amount and purpose shall be created by the issuance of bonds for that amount, and the result of the election is in favor of the issuance of the bonds, and the bonds are validated in the manner prescribed by law, the fact that the county commissioners fail, during the first and second years after the authority is given to issue the bonds, to exercise it, does not have the effect of abrogating the authority to make the issue; and it is their duty to make provision for the payment of interest and principal, and for the purpose of paying the latter,

to create a sinking fund by the assessment of a tax, which should be collected even during the years before the bonds are sold, in case of a delay in selling the bonds. But where such a delay is for a period of one, two, or more years, inasmuch as interest will not be paid during the years elapsing before the bonds are sold, no tax should be assessed and levied for such period of time.

2. Taxation \S 79—Cotton sold on December 31st but not delivered for several days properly assessed to sellers on January 1st.

Under the agreed statement of facts, the court did not err in refusing to enjoin the assessment of the tax upon the cotton which the plaintiffs in error contended was not theirs at the date upon which the liability for tax became fixed. Civil Code 1910, \S 4126; Flannery v. Harley, 117 Ga. 483, 43 S. E. 765.

3. Taxation \S 327—Statute as to examination and correction of returns not repealed.

It is the duty of the board of county tax assessors "to examine all the returns of both real and personal property of each taxpayer, and if in the opinion of the board any taxpayer has omitted from his returns any property that should be returned or has failed to return any of his property at a just and fair valuation, the said board shall correct such returns, assess and fix the just and fair valuation to be placed on said property and shall make a note thereof and attach the same to such returns." Park's Ann. Code, \S 1116(k). This provision of our statute relating to the duties of the board is not repealed by the act approved July 31, 1918 (Acts 1918, p. 232), relating to tax collections from delinquents.

4. Taxation \S 538—Tax cannot be recovered when paid voluntarily and without protest.

The tax paid by the plaintiffs under the assessment and levy for the year 1919 for the purpose of paying interest on the bonds was not recoverable in this action, the same having been paid voluntarily and without protest, so far as the petition shows. First National Bank of Americus v. Mayor, etc., of Americus, 68 Ga. 119, 45 Am. Rep. 476; Hoke v. City of Atlanta, 107 Ga. 416, 33 S. E. 412.

5. Decision in another case adhered to.

The question as to the legality of the increased assessment for the purpose of taxation of the property of the plaintiffs by the board of county tax assessors was decided adversely to the contention of the plaintiffs (who are plaintiffs in error in the cross-bill of exceptions) in the case of Ogletree v. Woodward, 150 Ga. 691, 105 S. E. 243, which this court declines to reverse upon a review made in accordance with a request of counsel for the plaintiffs. See, also, the case of Washington Exchange Bank v. Barnett (Ga. Sup.) 111 S. E. 46.

Error from Superior Court, Mitchell County; R. C. Bell, Judge.

Suit by Mrs. J. H. Phillips and others against Mitchell County and others. Judgment granting an injunction, and defendants bring error, and plaintiffs bring a cross-bill

of exceptions. Affirmed in part and reversed in part on the main bill, and affirmed on the cross-bill.

In May, 1919, the commissioners of roads and revenues of Mitchell county, by proper resolution, called an election for the voting of bonds for the grading and paving of the public roads of the county. At the election held the bonds carried, and, on August 2, 1919, were regularly validated by judgment of the superior court. In the resolution calling the election, in the notice of election, in the petition for the validation of the bonds, in the answer to the petition, and in the judgment of validation, it was provided that the bonds when issued should bear date as of August 1, 1919 (one day before the judgment of validation was rendered), and that \$100,000 of principal should fall due August 1, 1939, \$100,000 August 1, 1944, and the remaining \$200,000 should mature August 1, 1949; all within 30 years from date of issue. On account of disturbed financial conditions and the inactivity of the bond market, the commissioners could not obtain a satisfactory offer for these bonds, although they made repeated efforts to sell them and were still offering them for sale, but none of them had been sold; in fact, none had been issued. In pursuance of the provisions made for the payment of interest due on these bonds when issued, and the creation of a sinking fund for the retirement of principal upon maturity, the commissioners levied a tax for this purpose in 1919, which was paid, and again in 1920, a portion of which was paid before this suit to restrain collection was brought. Mrs. J. H. Phillips and others brought their petition in equity in the superior court against Mitchell county, G. B. Baggs and others, as the commissioners of roads and revenues of the county, L. L. Boyd, the tax collector, C. D. Crow, the sheriff, and Jonah Palmer, the treasurer of the county, seeking to enjoin the defendants from collecting the taxes which had been levied against the property of the plaintiffs on account of the issue of \$400,000 of bonds. The defendants were seeking to collect taxes on account of said bond issue, in the following amounts: Two and two-tenths mills on the dollar as a sinking fund for the retiring of the bonds at maturity, and 2.6 mills as an interest and redemption fund to pay the interest as called for in the bond issue. As no part of the bond issue had ever been sold, the plaintiffs contended that the mere authorizing of an issuance of bonds could not be considered as a debt against the county for which taxes could be levied and collected, and that the attempt on the part of the defendants to do so was without authority of law.

The defendants filed their answer, in which they alleged that on account of the fact of the great stress in the money market of the world, and especially in this country, they

had been unable to sell the bonds, but that they had tried often to do so and were still trying to sell them and expected to do so as soon as they could find a buyer who would offer a fair market price for them; that the bonds as validated should bear date of August 2, 1919, and bear interest at 5 per cent. from that date, said interest being payable semiannually in August and February of each year; and that by reason of the dating of said bonds from August 2, 1919, they became a charge or debt against the county from date, on account of which fact taxes should be levied and collected to take care of the interest and retirement of the bonds and to provide a sinking fund for the bonds.

The question as to whether or not a quantity of cotton in bales, stored in a designated warehouse, was taxable as the property of the plaintiffs, was also involved. It was conceded that if the plaintiffs were the owners of the cotton on the 1st day of January, 1920, the same was subject to taxation for that year; the plaintiffs denying that they were the owners of this property on that date. An agreed statement of facts was submitted for the consideration of the court, upon which the court was to determine the question just specified. That statement is as follows (omitting those parts of it which have already been sufficiently stated in substance):

(1) "That the cotton that was, by the board of tax equalizers of Mitchell county, assessed for taxes as the property of plaintiffs, was stored in the warehouse of the Georgia Manufacturing Company and had been there for some time, said cotton being deliverable to receipt only; that on the 31st day of December, 1919, a selling order was by the plaintiffs given to the Georgia Manufacturing Company, and that on the same date all receipts for said cotton were by the Bank of Camilla, with whom they had been deposited by plaintiffs as security for debt, turned over to the Georgia Manufacturing Company, which said company did on said date offer the same, with other cotton, for sale to the Georgia Cotton Company of Albany, which said offer was accepted, and the said Georgia Cotton Company did on said date issue to the said Georgia Manufacturing Company its written confirmation of sale, which was as follows, to wit (dated Albany, Ga., 12/31/19): 'Messrs. Georgia Mfg. Co., Camilla, Ga. We confirm having bought from you this date per our usual terms of business, as follows: 700 b/c at 39 basis good middling. Yours very truly, Georgia Cotton Company, by I. S. Billingshea, Vice Pres.'"

(2) "That in the said transaction the Georgia Manufacturing Company was acting for and in behalf of the plaintiffs herein and the Bank of Camilla, and in making of said transactions, and all other transactions with reference thereto, the said Georgia Manufacturing Company was the authorized agent and representative of the said plaintiffs herein and the Bank of Camilla."

(3) "That the said cotton was not actually shipped out of the warehouse of the Georgia Manufacturing Company to the Georgia Cotton

Company until the 10th day of January, 1920, and settlement was not made for said cotton until January 10, 1920."

(4) "It is further agreed that the plaintiffs had secured loans upon said cotton from the Bank of Camilla, representing almost the actual value of the same, and which said cotton, while in said warehouse of the said Georgia Manufacturing Company, was held subject to the liens thereon; that the proceeds from said sale were credited to the accounts of plaintiffs on the 10th day of January, 1920; that no money whatever was paid to two of the plaintiffs; and that, if any money at all was paid to the other plaintiff, it was of an inconsequential amount."

(5) "It is further agreed that if the plaintiffs were the owners of said cotton on the 1st day of January, 1920, the same was subject to taxation for the year 1920; but this agreement does not mean that the plaintiffs admit the ownership on that day, or that the said cotton was taxed in accordance with law."

(6) "That the plaintiffs were by the board of equalizers of said county summoned to appear before them to answer such questions as might be asked by said board of tax equalizers, and in conformity with the notice the plaintiffs did appear before said board, when the said board did examine them as to the ownership of said cotton, and at said time the plaintiffs denied ownership, but they were by said board adjudged to be the owners of said cotton on January 1, 1920, and subject to taxation therefor; that this notice was the only notice that the plaintiffs had with reference to the purpose or intention of said board of tax equalizers to assess said cotton for taxation. The plaintiffs did not demand arbitration."

(7) "It is further admitted that the raising of the values as to all the property of said county by the said board of tax equalizers was in accordance with the requirements of the tax commissioner of the state; and that the said board of tax equalizers gave no notice whatsoever to any person or persons as to their intention to raise said valuations, and gave no notice as to said valuations actually having been raised."

(12) "That a tax of 5 mills for the payment of principal and interest on said bonds was levied and collected for the year 1919; that a tax of 4.8 mills was levied for the payment of principal and interest for the year 1920, a large portion of which said tax has actually been collected."

(13) "That the entire tax levied for state and county purposes for the years 1919 and 1920 was \$25 per thousand for each year."

Upon the hearing the court passed the following order:

"It is ordered that all of the prayers for injunction be and the same are denied, except as to the collection of the tax of \$2.60 per thousand dollars levied for the purpose of paying the interest on bonds and \$2.20 per thousand dollars levied for the purpose of providing a sinking fund for paying principal of bonds; these two items being shown in paragraph eight of plaintiffs' original petition. As to these items, it is ordered that the injunction be granted as prayed."

To this order the defendants excepted, and assigned error on that part of the order granting an injunction against them as prayed for. The plaintiffs filed a cross-bill of exceptions, assigning error upon the refusal of the court to restrain the defendants from collecting the other items of tax set forth in the petition.

J. J. Hill, of Pelham, and A. S. Johnson and E. E. Cox, both of Camilla, for plaintiffs in error.

M. A. Warren, of Camilla, for defendants in error.

ATKINSON, J. (after stating the facts as above). [1] 1. We are of the opinion that, under the evidence submitted to the court, the court properly enjoined the collection of the tax levied for the year 1920 to meet the payment of the interest coupons for that year. The bonds issued in pursuance of the authority given by the election and the validation of the bonds had not been issued and sold, and consequently no interest was accruing upon these bonds and did not accrue in the years 1919 and 1920. The failure of the county authorities to issue the bonds and sell them in the years 1919 and 1920 did not have the effect to abrogate the authority, vested in them by the election and the validation of the bonds, to sell the bonds; and they might at some subsequent date put the bonds upon the market and sell them. But during the years 1919 and 1920 no sale was made, and no interest was accruing during those years; and the commissioners, if they should sell any in after years, would remove and destroy the coupons attached to the bonds representing the years which had elapsed before the sale was made, and they would not raise the interest to pay these coupons thus removed from the bonds. But the bonds were dated August 1, 1919; this had been fixed in the validation proceedings; and they would fall due August 1, 1949, and it was necessary that provision should be made for the payment of the principal of the bonds, and the collection of a tax for the purpose of creating a sinking fund to meet the payment of the principal as it would fall due was in accordance with the law and was necessary in order to discharge the principal debt when it should fall due; and the court should not have enjoined the collection of that percentage of tax required for the creation of the sinking fund for the purpose indicated. Consequently, the judgment of the court below granting the injunction is affirmed in part and reversed in part. It is affirmed in so far as it enjoins the collection of the tax for the years 1919 and 1920, intended for the payment of interest on the bonds during those years; and is reversed in so far as it enjoins the collection of the necessary amount to create the sinking fund.

[2-5] 2-5. The rulings made in headnotes 2, 3, 4, and 5, read in connection with the accompanying statement of facts, dispose of all the other questions in the record not disposed of by the preceding part of the opinion.

Judgment on the main bill of exceptions affirmed in part and reversed in part; judgment on the cross-bill affirmed.

All the Justices concur.

(152 Ga. 796)

JONES et al. v. COLEMAN et al.
(No. 2700.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Schools and school districts \Leftrightarrow 97(4½)—Judgment validating bonds conclusive as to matters required to be determined before issuance.

The judgment of the superior court validating bonds is conclusive as to the school district, the citizens thereof, and all other persons, that the school district has the legal right to incur the debt of the amount and for the purpose indicated in the notice of the bond election, and that the assent of the qualified voters of the district has been obtained for the issuance of the bonds in question, in the manner required by law; and upon all other questions which the Constitution and laws require to be determined before authority is conferred upon the district to incur a debt. *Baker v. Cartersville*, 127 Ga. 221, 56 S. E. 249, and authorities cited; *Edwards v. Guyton*, 140 Ga. 558, 79 S. E. 195; *Dumas v. Rigdon*, 151 Ga. 267, 106 S. E. 261.

2. Schools and school districts \Leftrightarrow 108(4)—Tax properly levied for sinking fund but not interest when bonds not sold.

The collection of a tax levied for the purpose of creating a sinking fund for the purpose of retiring the bonds at maturity will not be enjoined on the ground that the bonds, duly voted and validated, have not been sold. The Constitution of Georgia, article 7, § 7, par. 2 (Civil Code 1910, § 6504), provides that there shall, at or before the time of incurring such debt, be an assessment and collection of a tax sufficient to pay such principal and interest within 30 years from the date of the incurring of such indebtedness. "But where such a delay is for a period of one * * * or more years, inasmuch as interest will not be paid during the years elapsing before the bonds are sold, no tax should be assessed and levied for such period of time." *Mitchell County v. Phillips*, 152 Ga. —, 111 S. E. 374.

3. Schools and school districts \Leftrightarrow 97(4½)—Taxpayers not becoming parties to proceedings to validate bonds, bound thereby.

If the plaintiffs failed to become parties to the proceedings to validate the bonds and to set up their objections to the entry of the judgment, as they could have done, they would not now be heard to go behind it and complain. *Thomas v. Blakely*, 141 Ga. 488, 81 S. E. 218.

4. Schools and school districts \Leftrightarrow 111—Bonds taxes not enjoined because of misunderstanding or misrepresentations, etc., inducing authorization of bonds.

The levy and collection of a tax for the purpose of paying interest and creating a sinking fund to retire bonds which have been confirmed and validated as required by law will not be enjoined because citizens and property owners were induced to vote in favor of said bonds under a misunderstanding, nor because of misrepresentations made as to the location of the school building to be erected from the proceeds of such bonds, nor because the school trustees are believed to be faithless to their promises in regard to the location of the school building. Whether or not the school trustees could be enjoined from locating the school building at a point other than that chosen at the election on the question is not made in the case, and therefore is not decided.

5. Disposition of case.

In so far as the court refused to enjoin collection of the tax to create a sinking fund, the judgment is affirmed; but, in so far as the court refused to enjoin the collection of a tax to pay the interest for the year 1920, the judgment is reversed.

Error from Superior Court, Candler County; R. N. Hardeman, Judge.

Suit by W. M. Jones and others against J. L. Coleman and others. Judgment for defendants, and plaintiffs bring error. Affirmed in part, and reversed in part.

W. M. Jones et al. filed a petition against the trustees of the Rose-Mary school district, the superintendent of public schools, the board of education and the tax collector and the sheriff, all of Candler county, alleging, in substance, that an election was duly called and held in said school district on January 18, 1920, for the purpose of determining whether said school district should issue bonds in the sum of \$6,500, to build and equip a schoolhouse in said district; that said election resulted in favor of bonds; that on March 12, 1920, the bonds were confirmed and validated by the superior court; that the bonds had never been issued or sold; that the schoolhouse had not been erected and equipped, nor any indebtedness created by reason of the same; that the trustees of said school district, the county school superintendent, and the board of education, recommended to the board of roads and revenues that the sum of five mills be levied on the taxable property of the district for the year 1920, to provide a fund with which to pay the annual interest on the bonds for the year 1920, and to provide a sinking fund to retire said bonds at maturity; that said tax was so levied and placed in the hands of the tax collector, who issued executions against the property of petitioners; that said executions are in the hands of the sheriff of the county, who will seize some of their property in

satisfaction of the same, unless the court grants affirmative relief immediately; that petitioners have no adequate remedy at law; that petitioners have tendered to the sheriff the amounts of taxes legally due by them, to wit, all state and county taxes, except the five mills levied as aforesaid, and have demanded their tax receipts of said officer, who has failed and refused to surrender them unless the said five mills are also paid; that the levy of five mills on the taxable property of the district will not yield an amount sufficient to pay the annual interest and retire said bonds at their maturity; that at the time the election was held and the bonds voted upon, and at the time of the validation of said bonds and at the time of the levy of the tax, the school district was not legally constituted, because it had not been properly laid out and surveyed and a map of the same had not been filed in the office of the ordinary of the county as required by law; and that the tax is illegal and void. The prayers of the petition are: (1) That the tax collector and sheriff be temporarily and permanently enjoined from collecting said school bond tax; that they be required to surrender to the petitioners their tax receipts upon the payment of all their legal taxes; (2) that the trustees of the school district and their successors in office, and the board of education and their successors in office, and the county school superintendent be temporarily and permanently enjoined from issuing said bonds, for the reason that they might fall into the hands of innocent purchasers who might suffer thereby; (3) for general relief; and (4) for process.

The petition was subsequently amended by alleging, in substance, that, at the same time and in the election submitting to the voters the question of the issuance of bonds, there was also submitted the question of locating a site for the schoolhouse in said district; that the result of the election on this question showed that the voters overwhelmingly favored a designated site; that the voters were induced to vote for the bonds by reason of being allowed to select a site for the school building; and that petitioners are informed and believe that the school authorities have determined to change the location of the schoolhouse and to build on a different site from that decided upon in the election. Petitioners pray that the trustees be enjoined from issuing or selling said bonds, and from collecting the said taxes, and from levying or collecting taxes in the future to pay said interest and to provide a sinking fund to retire said bonds, for the reason that petitioners were deceived by the trustees and induced to vote for the same.

The defendants, by way of plea and answer, show that the bonds have previously been, by order of the court, validated and confirmed; that said judgment of validation

adjudicates all of the issues now made or attempted to be made by petitioners, and petitioners could have made themselves parties to that proceeding at the time of the judgment, or by exception thereto, as is required by law. The court refused to grant an injunction, and the petitioners excepted.

C. W. Turner and Chas. Emory Smith, both of Metter, for plaintiffs in error.

W. H. Lanier and J. L. Brown, both of Metter, for defendants in error.

GILBERT, J. Judgment affirmed in part, and reversed in part.

All the Justices concur.

(152 Ga. 793)

GLENN v. GLENN. (No. 2627.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Trial \Leftrightarrow 165—Plaintiff may move to set aside nonsuit and reinstate case.

A motion to set aside a judgment granting a nonsuit and to reinstate the case is one of the remedies available to the plaintiff. *City of Atlanta v. Jenkins*, 137 Ga. 454, 73 S. E. 402, and cases cited.

2. Appeal and error \Leftrightarrow 973—Trial \Leftrightarrow 165—Discretion in reinstating case after nonsuit not controlled unless manifestly abused.

Whether such motion will be granted is a matter within the legal discretion of the trial judge; and where he reinstates the case his discretion will not be controlled, unless manifestly abused. *Southern Railway Co. v. James*, 114 Ga. 198, 39 S. E. 849.

3. Trial \Leftrightarrow 165—Abuse of discretion to set aside nonsuit unless movant has evidence which will make prima facie case.

It is an abuse of discretion to set aside the judgment and reinstate the case where there is no evidence to authorize a verdict in the plaintiff's favor, unless the movant informs the court of other evidence in his possession which would, in connection with the evidence previously introduced, make a prima facie case in favor of the plaintiff, and offers to submit such evidence.

4. Trial \Leftrightarrow 165—Abuse of discretion to set aside nonsuit when plaintiff's testimony showed alleged cruelty condoned.

This is a suit brought by the husband for divorce on the ground of cruel treatment; and even if the alleged acts relied on as constituting cruel treatment, and the testimony of the husband himself in reference to them, was sufficient to authorize a verdict in his favor, under the ruling in *Ring v. Ring*, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878, and cases following that decision, his testimony clearly showed that he had by subsequent cohabitation with his wife condoned the alleged cruelty. Under these circumstances, the judge abused his discretion in setting aside the judgment.

Error from Superior Court, Muscogee County; Geo. P. Munro, Judge.

Action by G. E. Glenn, Jr., against A. C. Glenn. Judgment for plaintiff, and defendant brings error. Reversed.

Battle & Arnold, Geo. C. Palmer, and T. T. Miller, all of Columbus, for plaintiff in error.

Love & Fort, of Columbus, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(153 Ga. 19)

GAY et al. v. DEMOTT. (No. 2614.)

(Supreme Court of Georgia. Feb. 21, 1922.)

(Syllabus by the Court.)

1. Evidence \S 178(4), 182—Secondary evidence admissible when proper foundation laid; existence and due execution of lost deed must be proved before secondary evidence admissible.

Where the proper foundation is laid, secondary evidence of the contents of a lost deed is admissible; but before such evidence can be admitted, the existence and due execution of the deed must be shown. *Dasher v. Ellis*, 102 Ga. 830, 833, 30 S. E. 544, and cases cited.

2. Evidence \S 182—Execution of lost deed held not sufficiently proved to admit copy.

In the present case the only witness offered to prove the existence and execution of the lost deed was the alleged grantor. The copy deed, offered in evidence, purported to have been signed by this witness, and to convey a lot of land to two persons as tenants in common. On direct examination, the witness testified that she had owned the land and had sold it to one of the alleged grantees about 20 years before the trial, and made him a deed; and that the copy of the deed offered in evidence "appears to be a copy of the deed I made; the best I can remember; it has been quite a while since it was done." On cross-examination the witness testified: "My father brought the deed to the bed, and I signed it. I do not know what land was described in the deed. I did not read it. My father showed me where to sign it. I said I was sick at that time. I do not know what was in the paper. I could not say that this paper is a copy of the paper I signed. I did not read the paper over." Held, that the copy deed offered in evidence was properly rejected; counsel stating at the time that he did not offer it as a certified copy from the record of deeds, but solely upon the ground that the execution had been proved by the testimony of the maker.

3. Ejectment \S 96—Prior unabandoned possession must be shown to be of whole tract or of part of tract so defined as to be described in the verdict.

"In order for a plaintiff in ejectment to recover upon proof of an unabandoned prior possession (no written color of title in the pos-

essor being shown), against one who subsequently acquires possession by mere entry and without any lawful right, the evidence must show that the possessor had actual possession of the whole tract, or, if he was in actual possession of only a part of the tract, the evidence must so define the boundaries of the part that it may be described in the verdict." *Keen v. Georgia Trading Co.*, 149 Ga. 264, 99 S. E. 888.

4. Nonsuit properly granted.

Applying the principles stated to the evidence for the plaintiffs, the court properly granted a nonsuit.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by M. L. Gay and others against G. T. Demott. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. C. Mather and Dowling & Askew, all of Moultrie, for plaintiffs in error.

Shipp & Kline and Hill & Gibson, all of Moultrie, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(152 Ga. 836)

BENTLEY v. STATE BOARD OF MEDICAL EXAMINERS OF GEORGIA
et al. (No. 2611.)

(Supreme Court of Georgia. Feb. 23, 1922.)

(Syllabus by the Court.)

1. Physicians and surgeons \S 1 — Board of Medical Examiners has only such powers as are conferred expressly or by necessary implication.

An administrative body created by an act of the Legislature has only such powers as are expressly or by necessary implication conferred upon it.

2. Physicians and surgeons \S 1(3)—Board of Medical Examiners cannot sue to enjoin illegal practice, cancel diploma, and expunge license from the record.

The State Board of Medical Examiners is without power to file an equitable petition to enjoin one from illegally engaging in the practice of medicine in this state, to cancel the diploma under which he claims to practice medicine, on the ground that it was fraudulently obtained or is a forgery, and to have the license under which he claims the right to practice medicine declared null and void and expunged from the records of the court in which the same is recorded.

(Additional Syllabus by Editorial Staff.)

3. Statutes \S 210, 211—Preamble or caption cannot control body.

The preamble or title of an act is no part thereof, and, while it may be considered as one of the aids to construction when the body is ambiguous, it cannot control the plain meaning of the body of the act.

4. Statutes §—63—Unconstitutionality of provision does not affect its bearing on construction of act.

That Act Aug. 20, 1918 (Acts 1918, p. 193) § 14, authorizing the Board of Medical Examiners to cause a licentiate's name to be removed from the records of any clerk of court for fraud or deception, etc., has been declared unconstitutional, does not affect its force as manifesting the legislative intention to give a specific remedy, and thus exclude any other remedy.

Error from Superior Court, Murray County; M. C. Tarver, Judge.

Suit by the State Board of Medical Examiners of Georgia and others against F. C. Bentley. Judgment for plaintiffs, and defendant brings error. Reversed.

The State Board of Medical Examiners of Georgia, composed of named members, brought complaint against Franklin C. Bentley, and made this case: The State Board of Medical Examiners was created under acts of the General Assembly of Georgia, approved August 18, 1913, and August 20, 1918. One of the duties of this Board is to "protect the people from illegal and unqualified practitioners of medicine and surgery." Bentley is engaged in the practice of medicine and surgery in Murray county, contrary to law, and without having complied with the provisions of law authorizing such practice. He has never been authorized to practice medicine in said county by a diploma from an incorporated medical college, school, or university. He has never been licensed by any medical board to practice. He is not a graduate of any school. He has never taken three full courses of study of six months each at any of such schools of medicine. He has never stood any medical examination before any medical board of this state, nor obtained a license therefrom to practice medicine. In September, 1912, he entered the North Carolina Medical College as a freshman, and attended that college during the collegiate year. He failed to pass at the end of his freshman year, and was refused admission to the sophomore class. Plaintiffs allege on information and belief that he has never attended any other medical college for any full term of six months. In 1912, in Baltimore, Md., the Eclectic School of Medicine of Milton University was organized. Later it took the title of Eastern University School of Medicine, and, in 1914, that of Maryland College of Eclectic Medicine and Surgery. In 1915 this corporation was dissolved. In 1917 the dean of this institution was convicted and sentenced for having sold a number of diplomas from the Maryland College of Medicine and Surgery, the Eastern University School of Medicine, the Eastern University Dental School, and the Southern College of Medicine and Surgery of Atlanta. The

defendant claims to have a diploma from one of the above colleges. If he has, "it is a fraud and a forgery." If he has such diploma, he obtained it without having attended the college for three full terms of six months each, or for a full term of six months. If he has a diploma from any incorporated medical college, he got it without having attended the same for three full terms of six months each. He claims to have secured a license from the Board of Medical Examiners of this state on May 3, 1913. If he has such license, "it is a fraud and a forgery." If he has such license, he got it without having stood an examination before said board. Said license was recorded in the clerk's office of the superior court of Catoosa county, and on February 22, 1915, was recorded in the clerk's office of the superior court of Murray county. On account of the facts hereinbefore stated, the defendant is an illegal and unqualified practitioner of medicine and surgery in Murray county, this state. The plaintiffs pray for an injunction restraining him from practicing medicine and surgery in said county, that his alleged certificate or license be declared null and void and expunged from said records, and that any diplomas he may have be canceled.

The defendant demurred to this complaint on the grounds that there was no equity therein; that the State Board of Medical Examiners of Georgia, as such, has no right to prosecute this complaint; that the complaint charges him with criminal offenses, of which a court of equity will not take cognizance, neither aiding nor restraining criminal courts in the exercise of their jurisdiction; and that complainants have an adequate and complete remedy at law. The court sustained so much of the demurrer to the complaint as prayed for injunctive relief, and overruled the same as to the remainder of the petition. The defendant assigns error on this judgment. He answered, denying the substantial allegations of the petition, and pleaded in bar his acquittal under an indictment in Murray superior court charging him with practicing medicine and surgery without a license. The court struck this portion of the answer; and the defendant complains of this ruling.

H. H. Anderson and O. N. King, both of Chatsworth, and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error.

Morris & Hawkins, of Marietta, for defendants in error.

HINES, J. (after stating the facts as above). [1] 1. The petition in this case was filed to enjoin the defendant from illegally practicing medicine in this state, for cancellation of his medical diploma, on the ground that the same was fraudulently obtained or is a forgery, and to have expunged from the records of Murray superior court, where the

same was recorded, the license under which he claims the right to practice medicine. Has this Board, as such, the power to file this suit for these purposes? This Board is an administrative body, and has only such powers as the Legislature has expressly or by necessary implication conferred upon it. This is the rule which is well established as to other administrative bodies, such as the Railroad Commission of Georgia (*Zuber v. Southern Ry. Co.*, 9 Ga. App. 539, 71 S. E. 937); and this rule applies on principle and reason to the board of medical examiners. Such a body has such implied powers only as are reasonably necessary to execute the express powers conferred. *Railroad Commission v. Macon Railway, etc., Co.*, 151 Ga. 256, 258, 106 S. E. 282.

[2] The act of the Legislature creating this Board (Ga. Laws 1913, p. 101), as amended by the act of August 20, 1918 (Ga. Laws 1918, p. 173), does not expressly confer this power upon this Board. Such power is not reasonably necessary to execute the express powers conferred upon this Board by these acts, and for this reason cannot be implied.

[3] It is insisted by learned counsel for the plaintiff that this language, "to protect the people from illegal and unqualified practitioners of medicine and surgery," found in the caption of these acts, is an express grant of authority to file this suit. The above language appears only in the caption of the above-recited acts. The preamble or title of an act is no part thereof. It is true that the preamble or caption of an act may always be considered as one of the aids to its construction, when the body is ambiguous, but it cannot control the plain meaning of the body of the act. *Eastman v. McAlpin*, 1 Ga. 157; *Johnson v. Reese*, 31 Ga. 601, 605; *Etowah Milling Co v. Crenshaw*, 116 Ga. 406, 42 S. E. 709; *United States v. Palmer*, 3 Wheat. 631, 4 L. Ed. 471. This implication of authority is negated by the terms of this act. It is declared in section 2 of both of these acts that "said Board shall perform such duties as it possess and exercise such powers, relative to the protection of the public health and the control and regulation of the practice of medicine in the state as shall be in this act prescribed and conferred upon it." Here it is declared in the act creating this Board that it shall possess and exercise only the powers prescribed and conferred upon it therein.

If the above language found in the caption of this act were contained in its body, the proper construction thereof would not confer the power claimed by the plaintiff in this case. The methods of protecting the people in this state from illegal and unqualified practitioners of medicine and surgery are fully outlined and defined in these acts. They provide for examination of all applicants for license to practice medicine in this state. Applications for such licenses must be

accompanied with proof that the applicant is a graduate of a legally incorporated medical college or institution in good standing with the board; and it is made unlawful for any person without license to practice in this state. Before any person who has obtained a certificate from said Board can lawfully practice in this state, he shall cause the certificate to be recorded in the office of the clerk of the superior court of the county in which he resides. The Board is empowered to pass upon the good standing of any medical college. Only such medical colleges can be considered in good standing as possess a full and complete faculty for the teaching of medicine, surgery, and obstetrics in all their branches; as afford their students adequate clinical and hospital facilities; as require attendance upon at least 80 per cent. of each course of instruction; as give four graded courses of instruction of 120 weeks; as require at least 42 months to have elapsed between the beginning of the student's first course of medical lectures and the date of his graduation; as require an average grade in each course of instruction of at least 75 per cent.; as fulfill all their public promises, requirements, and other claims respecting advantages afforded their students; as enact a preliminary educational requirement equal to that prescribed by the above act; as require students to furnish testimonials of good moral character; and as give advance standing only on cards from accredited medical colleges. The Board shall issue licenses to practice medicine to all persons who shall furnish satisfactory evidence of attainments and qualifications under the provisions of the above acts, and under its promulgated rules and regulations.

Section 14 of the act of August 20, 1918, above referred to, authorized this Board to cause a licentiate's name to be removed from the records in the office of any clerk of court in this state, when fraud or deception was used in applying for license, or in passing the examination provided for in said act, and for other reasons mentioned in this section. Thus this action gives the Board express authority to have a licentiate's name removed from the records in the office of any clerk of court in this state. As this statute confers a specific remedy for expunging the name of a physician from the records in the office of any clerk of court in this state, the power to proceed in equity for the same purpose will not be implied.

[4] The fact that this section has been declared by this court unconstitutional (*State Board of Medical Examiners v. Lewis*, 149 Ga. 716, 102 S. E. 24) does not affect the conclusion arrived at. This section manifests the legislative intention to give to the Board a specific remedy in such case, and thus to exclude any other remedy. The method of procedure provided by this section is exclusive.

It is made a crime for any person to prac-

tice medicine in this state without possessing in full force and virtue a valid license to practice under the laws of this state; and such person so practicing is declared to be guilty of a misdemeanor, and upon conviction of such offense he shall be punished for a misdemeanor, in accordance with section 1065 of the Penal Code of this state.

Thus the statutes creating this Board fully prescribed the means and methods of protecting the people of this state against illegal and unqualified practitioners of medicine and surgery; and, when such means and methods are prescribed for such protection, they must be followed by this Board. The Board cannot resort to any other methods of protecting the people of this state. Certainly no other power of protection will be inferred from the acts creating this Board.

This court has held that a court of equity, at the instance of the state, cannot enjoin a person from illegally practicing medicine in this state. *Dean v. State*, 151 Ga. 371, 106 S. E. 792. If the state itself cannot in equity protect the people of the state by enjoining one from illegally practicing medicine, then, of course, this Board cannot maintain a petition for such injunction; and this was recognized by the court below in striking so much of the prayers of the petition as sought injunctive relief. On principle and reason, the principle ruled in *Dean v. State* controls the case at bar. Injunction would afford swift, full, and complete protection to the people of the state against illegal and unlawful practitioners of medicine. If equity cannot grant such relief, it cannot grant the other relief of cancellation of the defendant's diploma and the expurgation of the record of his license, which would have the effect, indirectly, of the grant of an injunction.

So we think that this Board is without power, express or implied, to file the petition in this case.

Furthermore, this Board does not make a case of cancellation. Cancellation is an ancient head of equity jurisdiction, founded on the administration of a protective or preventive justice; and its exercise is for the purpose of preventing or restraining the exercise of an injurious power which one man, under the common law, may hold over another. It operates to establish or protect individual rights, and is exercised in order to remove the obstacle which stands in the way of the enjoyment of one's right, interest, or estate. 9 C. J. 1159.

It is unnecessary in this case to determine what is the proper method of expunging from the records of a court the record of an instrument which is forged. The power of courts over their own records, and their power of correcting or canceling the same on their own motions, or at the suggestion of others, are not involved in this case. This

suit is at the instance of this Board, as such, and is not a proceeding by the court in reference to the correction or cancellation of the record of the license of the defendant to practice medicine.

So we are of the opinion that the court erred in not sustaining the general demurrer to the petition in this case. This makes it unnecessary to deal with any other error of which the defendant complains.

Judgment reversed.

All the Justices concur, except ATKINSON, J., disqualified.

(152 Ga. 799)

POPE v. READ. (No. 2705.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Landlord and tenant §92(1)—Provision for sale in rental contract held option, rental being consideration.

Two persons entered into a written contract whereby one, the owner of realty, rented the same to the other party at a stipulated amount to be paid monthly, and also agreed to sell the property to the other for a stated sum, and further agreed to release the tenant from the obligation to purchase, if the latter should find himself unable to do so. No time limit to the rental feature of the contract was fixed, nor was any time limit fixed for the exercise of the purchase feature of the contract, other than that the entire purchase price might be paid "at any time." Under the pleadings and the undisputed evidence, the contract as to the payment of monthly rent was fully performed by the tenant until a tender of the purchase price to the owner was duly made and a demand for conveyance of the property under the terms of the contract. Upon the refusal of the owner to complete the sale the tenant filed an action for specific performance of the contract, alleging the above-stated facts, and a continuing tender of the purchase price. The defendant admitted in his answer all of the facts as alleged in the petition, and in addition pleaded the bar of the statute of limitations. *Held*:

The purchase feature of the contract constituted an option, the consideration of which was the payment of the rent stipulated in the contract.

2. Limitation of actions §50(1)—Do not run against enforcement of option in rental contract so long as rent paid and accepted.

The action was not barred by the statute of limitations, because in such a contract the right of the optionee, under the contract, did not expire so long as he continued to pay the stipulated rental and the same was accepted by the optioner. Each payment and the acceptance thereof constituted a renewal of the contract.

Error from Superior Court, Wilkes County; E. T. Shurley, Judge.

Suit by H. H. Read against M. C. Pope. Judgment for plaintiff, and defendant brings error. Affirmed.

H. H. Read filed an equitable petition, alleging that he and M. C. Pope, the defendant, entered into a written contract dated October 6, 1902, and signed by both parties. The contract is attached to the petition as an exhibit, and is as follows:

"Mark Cooper Pope, party of the first part, and H. H. Read, party of the second part, enter into the following agreement: The said Pope agrees to build a house at a cost not to exceed 1,300 dollars, on the lot adjoining the lot on which said Read now resides. The house is to [be] built as cheaply as is consistent with good work and good material. The said lot fronts 100 feet on Lexington avenue, and extends back between parallel lines about 320 ft. to Effie Pope park. The said Pope agrees to sell the said house and lot to the said Read. The lot to be valued at 700 dollars, and the house at the actual cost of construction by a competent contractor; said cost to include interest on all money paid out until said Read takes possession. From date of occupancy, and until said house and lot are paid for, the said Read agrees to pay \$15.00 (fifteen dollars) per month for the use therefor; and whatever amount he pays in addition to the fifteen dollars per month is to go to the purchase of said house and lot, and the rent is to be reduced in exact proportion to such additional payments. If the said Read should find that he is unable to perfect the purchase of said house and lot, the said Pope agrees to release him, and to return, with interest at 8% per annum, any money he may have paid on the purchase of the property; provided that the property is in thorough repair at the time of said release. Until one-fourth of purchase price is paid, said Pope is to pay taxes and insurance on said house and lot; said Read to keep it in good repair and make all repairs necessary after it has been turned over to him in first-class condition. Said Read is to have the right to pay the entire purchase price of said house and lot at any time." Dated and signed.

The petitioner alleges that he has fully complied with the terms of his agreements in the contract; that he has elected to purchase the property therein described, and has tendered to the defendant, in conformity with the contract, the amount due thereon, \$2,000, and the defendant has refused to accept the tender; that the defendant stated he considered the contract void and at an end, and would not comply with its terms. The prayer of the petition is for specific performance of the contract, and that the defendant be required to convey the property to the plaintiff in fee simple. The plea and answer of the defendant admitted each and every of the above allegations; and the defendant further pleaded that the contract sued on was executed in October, 1902; that for a period of 18 years "plaintiff occupied said premises as a tenant of this defendant, and never at any time until the filing of

this petition undertook to occupy any other relation toward this defendant; and any right plaintiff may have had under said contract is barred by the statute of limitations." The plaintiff amended his petition by alleging that in carrying out and complying with his contract he had kept the premises in complete repair, and in doing so he had, within 4 or 5 years after taking possession, expended more than \$1,000 in repairs and in installing plumbing, sewerage, electric lights and accessories, digging a well, building a barn, a garage, fencing the yard and garden, planting fruit trees, repairing plastering and a fallen chimney, and paying a paving assessment levied by the city of Washington on said lot; that the defendant must have known of these things; "that defendant well knew of the assessment of the city as to the paving tax, and must have known it was paid by petitioner." The evidence in the case, substantially without conflict, supported the material allegations of the petition, and showed that the plaintiff went into possession of the property in 1902, about the time of the execution of the contract. The evidence does not show any fact or circumstance upon which the jury could have found that the defendant had given notice that he desired to terminate the option contract of purchase, nor to indicate a decision on the part of the plaintiff to surrender his rights under said contract. The jury returned a verdict for the plaintiff. The defendant made a motion for a new trial, which was overruled, and he excepted.

W. A. Slaton, of Washington, Ga., for plaintiff in error.

Colley & Colley, of Washington, Ga., for defendant in error.

GILBERT, J. [1,2] As shown by the preceding statement, the defendant, by his plea and answer, admitted each and every paragraph of the plaintiff's petition. The only issue raised by his answer is his contention that the remedy of the plaintiff was barred by the statute of limitations. This issue is made a ground of the amended motion for a new trial, where movant complains that the court failed to charge the jury the law in regard to the statute of limitations. Obviously it is unnecessary to deal with any of the other grounds of the motion, because, under the pleadings, as stated above, everything was admitted except the one stated. The court did not err in omitting to charge the jury on the subject of the statute of limitations, since the undisputed evidence and the admission in the defendant's answer showed that the plaintiff had performed his contract in every detail until the filing of the suit. We are not overlooking the fact that it has been repeatedly ruled by this court and by other courts, and stated by text-writers, that where a contract fixes no time

for performance the contract is to be construed as allowing a reasonable time for that purpose. *Bearden v. Madison Oil Co.*, 128 Ga. 695 (3), 58 S. E. 200; *Pearson v. Horne*, 139 Ga. 453, 77 S. E. 387; *James on Option Contracts*, §§ 389, 356. This rule applies to an option contract different in character from the one in the present case. It does not apply to contracts which by their terms provide for continuing payments which furnish consideration for renewals of the obligations under the contract. In this case the optionee, under the terms of the contract, was to pay a sum not less than \$15 per month; and this payment is sufficient consideration to support the option, which is a part of the same contract. *Walker v. Edmundson*, 111 Ga. 454, 457, 86 S. E. 800; *Turman v. Smarr*, 145 Ga. 312 (3), 89 S. E. 214. It is reasonable to account for the latter ruling on the theory that the amount to be paid and called rent is sufficiently large to more than cover what would be reasonable and just if paid as rent only, and that the additional sum paid over and above what would be thus sufficient for rent is added as a consideration for the option feature of the contract; both the rental and the option features being parts of one and the same contract. Compare *Spooner v. Shelfer*, 152 Ga. —, 108 S. E. 773. Therefore, when the optionee in the present case continued to pay \$15 per month, which, under the pleadings and the evidence, he continued to do until the suit was filed, he was continuing to pay a consideration for the option feature of the contract, the defendant thereby continuing to accept renewed payments, both as a consideration for the option feature and the rental feature of the contract. In this view, which we think is the correct one, there was no basis of fact for the contention that the suit was barred by the statute of limitations. Moreover, the optionee, the plaintiff, by the expenditure of relatively large sums of money, in the building of outhouses, fences, digging a well, and adding plumbing and electric lights to the dwelling, gave some evidence that he had exercised, or intended to exercise, his right to purchase the property. Under the pleadings and the evidence the verdict for the plaintiff was demanded.

Judgment affirmed.

All the Justices concur.

(152 Ga. 761)

CLOUD v. HIGHTOWER. (No. 2542.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(*Syllabus by the Court.*)

Habeas corpus \S 113(12)—Discretion in sustaining certiorari and granting first new trial not disturbed, when judgment not demanded.

The evidence submitted before the judge of a city court, on the trial of a habeas cor-

pus case, not demanding the judgment rendered by him, the discretion of the judge of the superior court in sustaining a certiorari and granting a first new trial will not be interfered with by the Supreme Court. *Bell v. Askins*, 150 Ga. 635, 104 S. E. 421, and cases cited; Civ. Code 1910, § 6204.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Habeas corpus between J. D. Cloud and Mrs. W. J. Hightower. Judgment for Cloud, and certiorari sustained by the judge of the superior court, and Cloud brings error. Affirmed.

Burch & Daley, of Dublin, for plaintiff in error.

Jas. B. Hicks, T. E. Hightower, J. S. Adams, and R. Earl Camp, all of Dublin, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(152 Ga. 711)

TILLINGHAST v. CLAY. (No. 2485.)

(Supreme Court of Georgia. Feb. 21, 1922.)

(*Syllabus by the Court.*)

1. Plaintiff not entitled to relief.

Under the allegations in the equitable petition filed by the plaintiff in this case, he was not entitled to the relief sought, and the general demurrer to the petition should have been sustained.

(*Additional Syllabus by Editorial Staff.*)

2. Divorce \S 165(1)—Verdict and decree cannot be impaired without setting aside.

So long as the verdict and decree in a divorce case and the judgment and decree founded thereon stand, equity cannot grant relief which impairs the effectiveness of the verdict and decree, as by declaring void an agreement on which the verdict and decree were based, enjoining the collection of alimony, and fixing the custody of a minor child, without setting them aside.

3. Divorce \S 165(1)—Decree following verdict not set aside unless verdict set aside.

Where the decree in a divorce suit followed the verdict, it cannot be set aside wholly or in part, unless the verdict itself is set aside.

4. Divorce \S 165(3)—Verdict and decree set aside for fraud within three years.

Where a verdict and decree in a divorce suit are obtained by fraud, equity, on a petition brought within three years, as required by section 4358, Civ. Code 1910, will annul the decree.

5. Divorce \S 302—Verdict and decree construed as awarding custody of child to wife.

A verdict and decree in a divorce suit, granting the wife a total divorce and \$25 a month as permanent alimony until remarriage,

and \$25 a month for a child during its minority, to be paid to the wife, and to be increased to \$50 a month upon the wife's remarriage, though not expressly giving the wife the custody of the child, held to have that effect, especially when construed in connection with the husband's prayer that he be given the custody and control of the child upon the wife's remarriage, which was apparently denied.

6. Divorce ¶149, 189—Verdict and decree construed in light of pleadings.

The verdict and decree in a divorce suit are to have a reasonable intendment and when construction is necessary will be construed in the light of the pleadings.

7. Divorce ¶299 — Husband entitled to see child whose custody is awarded to wife.

A verdict and decree in a divorce suit, awarding the custody of a child to the wife, does not mean that the husband shall not be permitted to have reasonable opportunities of seeing the child and enjoying his company.

8. Divorce ¶247—Decree not violated by wife by removing from state.

As a divorce decree, awarding alimony to the wife until remarriage and an allowance to a minor child, to be increased by the amount of the wife's alimony on her remarriage, contemplated a remarriage, its provisions were not violated by the wife's removal to another state, so as to prevent her from enforcing the rights given her thereby.

9. Divorce ¶311—Violation of decree by wife may be urged by husband in defense to rule for contempt without equitable proceeding.

If a wife to whom money for the support of a minor child is to be paid under a divorce decree does anything in violation of the decree justifying the husband's refusal to make further payments, such fact can be urged in opposition to the wife's application for a rule against the husband for nonpayment, and no equitable proceeding is necessary for such purpose.

Error from Superior Court, Cobb County;
D. W. Blair, Judge.

Suit by E. H. Clay against M. L. Tillinghast. Judgment for plaintiff, and defendant brings error. Reversed.

At the March term, 1918, of the superior court of Cobb county, the plaintiff in error obtained a divorce from the defendant in error. The decree taken in the case provided that the defendant in error should pay the plaintiff in error the sum of \$25 per month as permanent alimony for herself so long as she remained a widow, and also should pay to her the sum of \$25 per month as permanent alimony for the support of the minor son of the said parties. The decree further provided that, in the event of the remarriage of the plaintiff in error, the \$25 per month alimony which was to be paid to the plaintiff in error for herself should be paid to her as permanent alimony for the minor

child, in addition to the \$25 to be paid under the decree as above set out, making \$50 per month to be paid the plaintiff in error for permanent alimony for the minor child. After the rendition of the decree the plaintiff in error removed with the minor child to the state of Rhode Island, and there remarried. After her remarriage, and after she had removed from the state of Georgia, the plaintiff in error brought a rule against the defendant in error in the superior court of Cobb county, Ga., praying that he be adjudged in contempt of court for his failure to pay to her the money she alleged to be due as permanent alimony for the support of the minor child. In the petition for the rule it is alleged, after setting forth the verdict in the divorce suit, and that a decree was rendered in accordance with the terms of that verdict, that subsequently to the granting of said verdict and decree plaintiff in error had married on September 17, 1919, and is now a resident of the state of Rhode Island, and has the minor child in question with her there. The substance of a certain agreement entered into on May 10, 1917, and which is further referred to in the opinion is also set forth. Failure to make the payments as ordered in the decree after a specified date is also alleged, and there is a prayer for a rule nisi, and for such further orders as might be necessary to compel the defendant to comply with the decree. The defendant in error then filed a petition in said court, service thereof being made upon the attorney at law of record for the plaintiff in error, alleging that the plaintiff in error was not entitled to the custody of said child, on account of the facts alleged in said petition; that the contract under which she claimed the custody of said child had expired, and, if it had not expired by its own terms, it was null and void on account of the fraud perpetrated upon defendant in error in its procurement; and that the plaintiff in error was not a fit and proper person to have the custody of the child, for the reasons set out in the petition. It was prayed that said contract, if it had not expired by its own terms, be declared null and void; that the collection of alimony be enjoined so long as the plaintiff in error kept the child without the jurisdiction of the superior court of Cobb county; and that the court by decree fix the custody of the minor child.

Plaintiff in error filed her demurrers to this petition; and the court, holding that the defendant in error had the right to have the contempt proceedings enjoined until such time as the plaintiff in error should submit herself and the child to the jurisdiction of the superior court of Cobb county, overruled the demurrers. The plaintiff in error thereupon by writ of error brought the case to the Supreme Court for review.

N. A. Morris, of Marietta, for plaintiff in error.

Anderson & Roberts, Abbott & Wallace, and L. M. Blair, all of Marietta, for defendant in error.

BECK, P. J. (after stating the facts as above). [1-8] We are of the opinion that, even if the proceeding brought by the plaintiff in error in the superior court of Cobb county, in which she sought to obtain a rule against the defendant in error for a failure to pay the money alleged to be due as alimony and support of the minor child, was such a pending proceeding that it would authorize the superior court of Cobb county to take jurisdiction for the purpose of affording relief upon the prayers of an equitable petition showing proper grounds for relief, nevertheless the demurrer to the present equitable petition should have been sustained, for the reason that, so long as the verdict and decree in the divorce case between the parties to this proceeding and the judgment and decree founded thereon stands, a court of equity cannot grant relief which impairs the effectiveness of that verdict and decree without setting them aside. To get rid of the decree or any part of it, the verdict itself must be set aside; for it is not complained that the decree does not follow the verdict. Whether that decree and verdict are or are not in part founded upon the agreement entered into on May 10, 1917, the fraud alleged by which that agreement and contract was obtained cannot avail the plaintiff in this equitable action to set aside or nullify a part of the verdict and decree in the divorce case, without an attack upon the verdict and decree made in a proper equitable petition for the purpose of setting them aside. The court cannot afford to the plaintiff in this equitable petition relief which is in effect an annulment in part of the verdict and decree in the divorce case. If the verdict and decree were obtained by fraud, they should be attacked upon that ground in a petition brought for the purpose of setting them aside. Where a verdict and decree are obtained by fraud, as has many times been decided by this and other courts, equity will, upon a petition brought within the time allowed by our statute (Civ. Code 1910, § 4358), that is, within three years, annul the decree. But if the verdict and decree stand, all the rights secured to the parties under such verdict and decree must also stand. The verdict in the divorce case is:

"We, the jury, find that sufficient proofs have been submitted to our consideration to authorize the granting of a total divorce. * * * We further find for the plaintiff \$25.00 per month for permanent alimony, payable on the 15th day of each month hereafter, provided

that in the event of the remarriage of the plaintiff she shall receive no further payment but such payment shall be continued to her as long as she remains unmarried. We further find for said minor child of plaintiff and defendant, the issue of said marriage, for permanent alimony, \$25.00 per month during the minority of said child, to be paid to its mother, the plaintiff, on the 15th day of each month hereafter; provided that in the event of the remarriage of the plaintiff, at which time the payment of alimony to her shall cease, an additional sum of \$25.00, payable on the 15th day of each month, shall be paid to the plaintiff as permanent alimony for said child, making the amount of alimony payable to her for said child, on the 15th day of each month, after the remarriage of the plaintiff (in the event of such remarriage) during the minority of said child, \$50.00 per month from the time of such remarriage, during said minority. We further find that the disabilities of the defendant be removed."

The decree in all respects follows this verdict. It will be observed that the verdict and decree do not expressly give the wife the custody of the minor child. But they are to have a reasonable intendment; and they will, where construction is necessary, be construed in the light of the pleadings. The verdict and decree provide that the plaintiff recover of the defendant \$25 per month as permanent alimony for the support and maintenance of the minor child, the issue of the marriage of the parties, during the minority of the said child, "to be paid to the plaintiff on the 15th day of each month hereafter," etc. The fact that the amount allowed for the support of the child was to be paid to the mother monthly, and that it was to be paid "during the minority of said child," affords strong grounds for concluding it was intended that the mother should have the custody of the child. Besides, the verdict and decree provide that in the event of the remarriage of the mother the \$25 allowed her as alimony for herself should no longer be paid, but that an additional sum of \$25 should be paid monthly to her for the child during his minority. And this shows that it was contemplated that the mother should retain the custody of the child even after her remarriage until the child attained his majority. Moreover, in the answer of the defendant in the divorce suit, we find that he prays that he—

"be allowed the privilege of having the custody and control of his son during part of his life. Defendant does not wish to take him away from his mother; at the same time he is defendant's son, and defendant is willing to support him, and is now supporting him under agreement with the plaintiff, and defendant asks that on final decree the court give him the custody of his son for such time and at such times as the court may see fit and proper."

And further, it is prayed in the answer to the divorce suit as follows:

"(a) That he be awarded the custody of his son, part of the time, at and for such time as the court may direct. (b) That he be required to pay some alimony for the support of his wife and child, but only such as his means will allow; defendant having no intention not to pay permanent alimony, but he does pray that in the event the plaintiff remarries, permanent alimony cease so far as plaintiff is concerned. (c) That in the event plaintiff remarries, defendant be given the custody and control of his son."

[7, 8] These prayers here quoted, especially (b) and (c), throw further light upon the verdict and decree. The prayer that in case of the remarriage of the plaintiff the defendant be not further required to pay alimony to the plaintiff was favorably answered by the jury. The other prayer was apparently denied. And so, considering the language of the decree itself and the prayers in the answer to the libel for divorce, we are forced to the conclusion that the meaning of the verdict and decree in the divorce case was that the mother should have the custody of the child. Of course, that did not mean that the father should not be permitted to have reasonable opportunities of seeing him and enjoying his company. The removal of the mother to another state was not a violation of the provisions of the decree. It was contemplated that she might marry again; and of course if she married she would go to the home of her husband, wherever that might be. Then, with the decree still standing under which a certain amount of money is payable monthly to the wife while she remained single as alimony for herself, and a stated amount payable monthly for the support of the minor child, provision being made in the decree that the amount payable to the wife as alimony should cease upon her remarriage, and that this amount should thereafter be added to the amount payable each month for the support of the minor child, the wife may claim the enforcement of the rights thus established by the verdict and decree until they are set aside. And this petition does not seek to have them set aside. To merely have the contract entered into between the parties on May 10, 1917, declared void for fraud, would not impair this effect.

[9] If the wife to whom the money for the support of the minor child is to be paid shall do anything in violation of the decree in the divorce suit which would justify a refusal upon the part of the defendant in that case, the petitioner in this equitable proceeding, to refuse payment of the amount payable to her for the support of the minor son, that fact can be urged in opposition to the application of the wife for a rule against this petitioner, as a matter defensive to the proceedings to obtain a rule; and no equi-

table proceeding is necessary for that purpose. Consequently, we hold that the demurrer to the petition should have been sustained.

Judgment reversed.

All the Justices concur.

(153 Ga. 44)

NEAL et al. v. NEAL et al. (No. 2424.)

(Supreme Court of Georgia. Feb. 28, 1922.)

(Syllabus by the Court.)

1. Descent and distribution \S 66—Widow's election to take child's part may be shown by circumstances; allegations in suit by widow held to authorize finding of election to take child's part.

J. C. Neal died intestate on June 23, 1917. Etta M. Neal, widow of the intestate, was appointed administratrix on October 9, 1917. On July 10, 1918, the administratrix instituted an action against herself as an individual, and Charles P. Neal and William G. Neal, sons of the intestate by a former marriage, alleging that such widow and two sons were all the heirs at law of the intestate. The petition alleged all that is stated above, and substantially the following: Petitioner has sold the estate, consisting of realty and personalty, and paid all debts of the intestate, and has on hand approximately \$2,000 in money for distribution after payment of the expenses of the administration. In 1916 the intestate gave to each of his two sons above-named property or money approximating in value \$700; such property being so given upon the understanding that it was to be in full of all their respective interests as heirs at law in his estate after his death, and that it was so received by them. In view of such advancements the widow demands all of the money as sole heir at law of the deceased. The sons each deny that the property was given to them in full settlement of their interests in the estate, or that it was given to them as advancements, and refused to consent to the payment of all of the money in the hands of the administratrix to the widow. It was prayed, among other things, that the court give directions as to distribution of the funds in the hands of the administratrix; whether the property theretofore turned over to the sons should be accounted for as advancements and in what amount; whether either of the sons is entitled to any further share in the estate; and whether the widow is entitled to the whole of the fund. The answer of the defendants admitted the allegation, contained in the second paragraph of the petition, "that the heirs of the said J. C. Neal, deceased, are Mrs. Etta M. Neal, his wife, and two sons by a former marriage, to wit, William G. Neal and Charles P. Neal," but denied the several allegations as to having received property or money from their father in full payment of any interest they might have as heirs at law after his death, or that they received any property or money given by their father as advancements to be deducted from their

interest in the settlement of his estate. The jury returned a verdict as follows: "We, the jury, find an advancement to W. G. Neal of \$700.00; also to C. P. Neal of \$700.00." The bill of exceptions assigns error on the judgment of the court overruling a motion for new trial made by the defendants named in the verdict. **Held:** Election of a widow to take a child's part in the estate of the husband may be affirmatively shown by circumstances as well as by direct evidence. Allegations in a petition to marshal assets, and for accounting, filed by the widow as administratrix upon the estate of her deceased husband within the first year of the administration, to the effect that petitioner and two others are the heirs of the deceased, will authorize a finding that the widow had elected to take a child's part. *Harris v. McDonald*, 152 Ga. 18, 24, 108 S. E. 448; *Smith v. Smith*, 141 Ga. 629 (2), 81 S. E. 895.

2. Witnesses ¶159(5)—Widow suing as administratrix held competent to show declarations of decedent as to intent to make advancements.

In a suit by a widow as administratrix against the heirs of the intestate to marshal assets and for an accounting, the widow is a competent witness for the plaintiff, under the provisions of Civ. Code 1910, § 5858, to testify as to declarations of the deceased tending to show that certain property delivered to some of the heirs was intended as advancements. *Bland v. Beasley*, 138 Ga. 712, 76 S. E. 50, and cit.

3. Descent and distribution ¶115—Gift to adult child not living with parent presumed an advancement.

A gift of property by a father to his adult son, who is married and does not live under the parental roof, is presumed to be an advancement. Civ. Code 1910, §§ 4052-4058, 3020; *Holliday v. Wingfield*, 59 Ga. 206(2); *Howard v. Howard*, 101 Ga. 224, 28 S. E. 648.

4. Descent and distribution ¶93, 115—Mortgaging land and conveying subject to mortgage held gift as to value above mortgage and sale of the other interest; gift by mortgaging land and conveying subject to mortgage presumed an advancement.

If a father has two adult sons to whom he desires to give a tract of land in equal shares, but before making the gift he mortgages the whole tract for half its value, and gives the money to one of them, and afterwards conveys the whole tract to the other son, intending that he shall pay for a half interest by discharging the mortgage, and receive the other half interest as a gift, the transaction will be a sale as to the first half interest and a gift as to the latter.

(a) If there were no other circumstances to negative an intention by the donor that the donee should account for the value of the gift in the subsequent distribution of the donor's estate, the gift would be presumed to be an

advancement. *Holliday v. Wingfield*, and *Howard v. Howard*, supra.

5. Evidence ¶269(2), 419(2)—Recited consideration of deed claimed to be gift may be inquired into; declarations of father tending to show gift to son held admissible, though not in son's presence.

If a father, intending to give effect to a transaction of such dual character as mentioned in the preceding note, executes an absolute deed conveying the whole tract to the son, which states a specified sum of money as the consideration which is double the amount actually paid, the statement as to consideration may be inquired into (Civ. Code 1910, § 4179) in an action by the administrator of the estate of the grantor against the heirs of the grantor, to marshal the assets and for an accounting, and in such action declarations of the intestate, made at and prior to execution of the deed, although out of the presence of the sons, tending to show a gift of such undivided interest in the land, are admissible in evidence. *Tuggle v. Tuggle*, 57 Ga. 520; *Bland v. Beasley*, 138 Ga. 712, 76 S. E. 50.

(a) The record of file in this court in the case last cited shows that one of the deeds relied on to show an advancement stated a sole money consideration, which does not appear in the report of the case. In the case first cited the deed recited "love and affection" and \$500 as the consideration.

(b) Nothing ruled in this case conflicts with the decision of this court in *Miller v. Miller*, 105 Ga. 305, 31 S. E. 186. The grantees in the deed relied on in that case to show an advancement were minors living with their father, the grantor, and there was no offer to show by extraneous evidence that a gift to the grantees was intended.

6. No error committed.

Applying the principles above announced, none of the grounds of the motion for new trial complaining of the admission of evidence and of certain excerpts from the charge of the court show error requiring a new trial.

Error from Superior Court, Chattooga County; *Moses Wright*, Judge.

Suit by E. M. Neal, administratrix, and others against W. G. Neal and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Henry & Jackson, of La Fayette, Wesley Shropshire, of Summerville, and Maddox & Doyal, of Rome, for plaintiffs in error.

Denny & Wright, of Rome, and Jno. D. & E. S. Taylor, of Summerville, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(152 Ga. 842)

ROWLAND v. MORRIS et al. (No. 2649.)

(Supreme Court of Georgia. Feb. 28, 1922.)

(Syllabus by the Court.)

1. Constitutional law \S 82, 251, 293, 322—Eminent domain \S 70 — Tick eradication statute does not deny due process; Fifth Amendment limits powers of Congress, and not of the states; tick eradication statute does not violate constitutional provision as to protection of person and property, or provision as to right to prosecute and defend causes.

The act of the Legislature approved Aug. 17, 1918 (Ga. Laws 1918, p. 256), which provides for state-wide tick eradication, is not unconstitutional because it violates the due process clause of the federal Constitution and a similar provision in the state Constitution, in that it does not give to the owners of cattle notice and an opportunity to be heard in opposition to their quarantine and dipping for such purpose; and said act is not unconstitutional (a) because it violates the Fifth Amendment to the federal Constitution, (b) because it violates article 1, \S 1, par. 2, of the Constitution of this state, and (c) because it violates the fourth paragraph of said article and section.

2. Animals \S 30—Quarantine and dipping held not illegal.

The inspector and sheriff were authorized to quarantine and dip the cattle of the plaintiff without any warrant; and the fact that they were proceeding to do so under color of an affidavit made by the inspector and a warrant issued thereon by the judge of the superior court, when there was no authority for such procedure, does not render their action illegal and void.

3. Refusal of injunction not error.

The court did not err in refusing to grant an injunction, under the pleadings and facts in this case.

(Additional Syllabus by Editorial Staff.)

4. Constitutional law \S 253 — Due process provisions do not interfere with the police power.

The due process clause of Const. U. S. amend. 14, and the similar provision of the state Constitution, are not designed to interfere with the police power of the state to prescribe regulations to protect the health, peace, morals, education, general welfare, and good order of the people.

5. Constitutional law \S 81—Legislature has wide discretion in exercising police power.

A very large discretion is vested in the Legislature to determine what the public interests require, and what measures under the police power are necessary to their protection.

6. Nuisance \S 83—Notice or judicial determination not necessary before abatement.

When the particular thing or act sought to be abated is made a nuisance by statute, or characterized as such by the common law, or

is such per se, and an officer is commanded by law to abate it, no notice or judicial determination is necessary as a prerequisite, and the officer or agent effecting the abatement is not liable.

7. Nuisance \S 83—Officers act at their peril in destroying property or quarantining.

Where statutes or valid municipal ordinances define the terms and conditions on which property may be destroyed as a nuisance or persons or property quarantined when infected by disease or exposed to contagious disease, the officers or agents of the state or municipality act at their peril.

8. Animals \S 29 — Tick eradication statute valid.

Act Aug. 17, 1918 (Acts 1918, p. 256), providing for tick eradication, though not in express language declaring cattle not dipped to be public nuisances, in effect makes them such, and is valid.

9. Evidence \S 13—Judicial notice taken of facts respecting Texas fever and tick infestation.

It is a matter of common knowledge of which the court takes judicial notice that the cattle of the state were formerly infested with cattle fever ticks, or exposed to tick infestation, that cattle in certain counties, including Johnson county, are still so infected or exposed, and that Texas fever, a communicable and dangerous cattle disease, is prevalent in all counties where tick eradication has not been completed, including the county of Johnson.

10. Eminent domain \S 2(2) — Quarantining and dipping cattle not such a taking as requires compensation.

Quarantining infected cattle, and treating them for the eradication of disease, as is authorized by Act Aug. 17, 1918 (Acts 1918, p. 256), is not such a taking of property for public use as requires compensation to be made to the owner.

11. Eminent domain \S 2(1)—Nuisance may be abated without compensation, and at owner's expense.

When property becomes a nuisance, the nuisance can be abated without compensation to the owner, and at his own expense.

Error from Superior Court, Johnson County; J. L. Kent, Judge.

Suit by J. R. Rowland against C. E. Morris and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. R. Rowland filed his petition against L. Davis, sheriff of Johnson county, and C. E. Morris, state cattle inspector in said county, to enjoin them from quarantining his cattle and having them dipped for tick eradication under the statute of this state passed for such purposes. He attacked this statute on the ground that it is unconstitutional, in that it does not provide for notice and an opportunity to be heard before his cattle could be seized, quarantined, and dipped, in violation

of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and of the similar provision in the state Constitution. He further asserts that this act is in violation of article 1, § 1, par. 2, of the Constitution of this state, which declares that—

"Protection to person and property is the paramount duty of government, and shall be impartial and complete."

He further asserts that this act is unconstitutional because it violates article 1, § 1, par. 4, of the Constitution of this state, which declares that—

"No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this state, in person, or by attorney, or both."

He further asserts that this act is unconstitutional because it violates the Fifth Amendment to the Constitution of the United States, and because it violates the provision of the state Constitution that private property shall not be taken for public use without just compensation. He further asserts that these officers are proceeding illegally to quarantine and dip his cattle, under an affidavit sworn to by said inspector before the judge of the superior court of said county, and under a warrant issued by the latter, and that there is no authority of law for the making of said affidavit and the issuing of said warrants. He further alleges that his cattle are not infected with ticks, and have not been exposed to tick infestation. He further alleges that his cattle are kept on his own premises, and not allowed to run at large. With one exception they are milk cows, kept for the use of himself and family, and by reason of the distance they would have to be taken to be dipped, and the manner prescribed for their dipping, there is great danger of damage to them, for which the defendants are not responsible. R. R. Martin and J. C. Williams deposed for the plaintiff that they had examined his cattle carefully and thoroughly, that they found them free from ticks, and, so far as they knew or could learn from others, the same have not been exposed to tick infestation.

Defendants in their answer denied the allegation in the petition that the plaintiff was never served with notice as required by the Tick Eradication Act. They denied all the attacks made upon the constitutionality of the act. C. E. Morris, in behalf of the defendants, deposed that he is a duly appointed and qualified cattle inspector of this state; that Johnson county is, by virtue of an order passed by the state veterinarian, put under quarantine; that he has found that a good portion of the cattle of said county are affected with cattle ticks; that splenic fever from cattle ticks exists in said county at this time: that the cattle of the plaintiff, if not infected with cattle ticks, are exposed to in-

festation; that the plaintiff failed and refused to dip his cattle at such time and place as had been designated by the local cattle inspector; that his cattle would become infected with Texas fever, and all cattle in said county are exposed to this fever, and unless checked the same would become general among the cattle of the county, rendering the flesh and milk of cattle diseased and unfit for food, and thereby seriously affect the health of the community. The failure of the plaintiff to comply with the law would delay the completion of the tick eradication, thereby necessitating dipping for another year, which would put a great expense upon the county and taxpayers, and upon individuals who have complied with the dipping law. Notice has been given to the public by posting at the courthouse, along the county line, and upon public highways that said county was under quarantine. Turner Scarboro deposed for defendants that he had in his possession a cow of the plaintiff; that it had never been dipped, as required by the Tick Eradication Law; that he was instructed by plaintiff not to carry said cow to be dipped until instructed by him; that he has had possession of said cow since March 18, 1921, at which time said cow had ticks on her.

Plaintiff alleged in his petition that he had not been served with written notice requiring him to dip cattle 30 days before the defendants undertook to quarantine his cattle. This the defendants denied in their answer, and proved that such notice had been served.

The case was heard on the petition, answer, and affidavits. After hearing the evidence the court below denied an injunction, and the plaintiff assigns this ruling as error on all the grounds set out in his petition.

A. L. Hatcher, of Wrightsville, and J. S. Adams and R. Earl Camp, both of Dublin, for plaintiff in error.

C. S. Claxton, of Wrightsville, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for defendants in error.

HINES, J. (after stating the facts as above). [1] 1. On August 17, 1918, the Legislature passed the statute known as the State-Wide Tick Eradication Act. The plaintiff filed his petition to enjoin the county cattle inspector and sheriff of the county from putting his cattle in quarantine, and from dipping the same, under the provisions of this act, on the ground that the same was unconstitutional, because it did not provide for notice to the owners of such cattle, and did not give them an opportunity to be heard on the question whether their cattle were infested with ticks or had been exposed to tick infestation. The plaintiff insists that he was thus deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States, and under the similar provision in our state Constitution.

[4, 5] The Fourteenth Amendment to the

federal Constitution is not designed to interfere with the police power of the state to prescribe regulations to protect the health, peace, morals, education, general welfare, and good order of the people. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *State v. McCarty*, 5 Ala. App. 212, 59 South. 543; *Cassidy v. Wiley*, 141 Ga. 331, 338, 80 S. E. 1046, 51 L. R. A. (N. S.) 128. In the last case this court has held that the similar provision in our state Constitution does not interfere with the exercise by the state of this power. If this statute falls within the circle of the police power, it lies out of the orbit of the due process clauses of the federal and state Constitutions. So the question arises, Does this statute come within the police power of the state? What is the police power?

"It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 335; *Mack v. Westbrook*, 143 Ga. 690, 692, 98 S. E. 339.

A very large discretion is vested in the Legislature to determine what the public interests require, and what measures are necessary to their protection. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; *Mack v. Westbrook*, 143 Ga. 690, 692, 98 S. E. 339.

The validity of statutes or ordinances authorizing the destruction of animals having infectious or contagious diseases has been sustained in a number of cases, as an exercise of the police power. *Durand v. Dyson*, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84; *New Orleans v. Charouleau*, 121 La. 890, 46 South. 911, 18 L. R. A. (N. S.) 368, 126 Am. St. Rep. 332, 15 Ann. Cas. 46; *Newark, etc., R. Co. v. Hunt*, 50 N. J. Law, 308, 12 Atl. 697; *Chambers v. Gilbert*, 17 Tex. Civ. App. 106, 42 S. W. 630, writ of error denied by Supreme Court, 98 Tex. 726, 42 S. W. 630; *Livingston v. Ellis County*, 30 Tex. Civ. App. 19, 68 S. W. 723; *Maynard v. Freeman* (Tex. Civ. App.) 60 S. W. 334; *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 963, 1 Ann. Cas. 341; *Houston v. State*, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39. So goods laden with infectious disease may be seized under health laws, and, if they cannot be purged of their poison, may be committed to the flames. *Gilman v. Philadelphia*, 70 U. S. (3 Wall.) 713, 730, 18 L. Ed. 96. So a city having power to abate nuisances endangering the public health and safety may destroy damaged grain. *Dunbar v. Augusta*, 90 Ga. 390, 17 S. E. 907. So bed-clothing infected with disease may be destroyed. *Mayor, etc., of Savannah v. Mulligan*, 95 Ga. 323, 22 S. E. 621, 29 L. R. A. 303, 51 Am. St. Rep. 86. The confiscation and

destruction of milk intended to be sold in a city, which has been drawn from cows not subjected to tuberculin tests, as required by a municipal ordinance, does not unconstitutionally deprive the owner of his property without due process of law. *Adams v. Milwaukee*, 144 Wis. 371, 129 N. W. 518, 43 L. R. A. (N. S.) 1066; *Id.*, 228 U. S. 572, 33 Sup. Ct. 610, 57 L. Ed. 971. So the quarantine of domestic animals, infected with disease, or which have been exposed to such infestation, falls within the police power, and is not inhibited by the Constitution of the United States. *Richter v. State*, 16 Wyo. 437, 95 Pac. 51; *State v. Mo. Pac. Ry. Co.*, 71 Kan. 613, 81 Pac. 212; *Garff v. Smith*, 81 Utah, 102, 86 Pac. 772, 120 Am. St. Rep. 924; *State v. McCarty*, 5 Ala. App. 212, 59 South. 543; *Smith v. St. Louis Ry. Co.*, 181 U. S. 248, 21 Sup. Ct. 603, 45 L. Ed. 347.

[8] Where the particular thing, or the act sought to be abated, is made a nuisance by statute, or is characterized as such by the common law, or is such per se, and an officer is commanded by law to abate it, no notice or judicial determination is necessary as a prerequisite to its abatement. In such case an officer or agent effecting the abatement would not be liable. *Mayor, etc., of Americus v. Mitchell*, 79 Ga. 807, 5 S. E. 201; *Dunbar v. Augusta*, 90 Ga. 391, 17 S. E. 907; *Mayor, etc., of Savannah v. Mulligan*, 95 Ga. 323, 22 S. E. 621, 29 L. R. A. 303, 51 Am. St. Rep. 86; *Western, etc., R. Co. v. Atlanta*, 113 Ga. 537, 38 S. E. 996, 54 L. R. A. 294; *Peginis v. Atlanta*, 132 Ga. 302, 63 S. E. 857, 35 L. R. A. (N. S.) 716; *McWilliams v. Rome*, 142 Ga. 848, 83 S. E. 945.

[7, 8] In cases where statutes or valid municipal ordinances define the terms and conditions upon which property may be destroyed as a nuisance, or persons or property quarantined when infected by disease, or exposed to contagious disease, the officers or agents of a state or municipality act at their peril. *Mayor, etc., of Savannah v. Mulligan*, 95 Ga. 323, 22 S. E. 621, 29 L. R. A. 303, 51 Am. St. Rep. 86; *McWilliams v. Rome*, 142 Ga. 848, 83 S. E. 945. Does this act declare cattle which have not been treated for tick eradication a nuisance? It prohibits the movement of cattle infested with the cattle fever tick into, within, or through this state at any time or for any purpose, except as therein provided. It requires the county authorities in each and every county where tick eradication has not been completed to construct such number of dipping vats as may be fixed by the state veterinarian, and to provide the proper chemicals and other materials necessary to be used in the systematic work of tick eradication in such counties. Cattle, horses, or mules infected with cattle ticks or exposed to tick infestation, where their owners, after 30 days' written notice from a local or state inspector, shall fail or refuse to dip such animals every 14 days in a vat

properly charged with arsenical solution as recommended by the United States Bureau of Animal Industry, under the supervision of the local inspector in charge of tick eradication, shall be placed in quarantine and dipped and cared for at the expense of the owner by the local inspector. It is made unlawful for any inspector to knowingly permit any cattle, horses, or mules to be kept in the territory for which he is appointed without being so treated. While this statute does not in so many words declare cattle which have not been treated for tick eradication, as provided in this act, to be public nuisances, it does in effect make them such. *York v. Hargadine*, 142 Minn. 219, 171 N. W. 773, 3 A. L. R. 1627 (3).

[9] It is a matter of common knowledge that the cattle of this state were formerly infested with cattle fever ticks, or were exposed to tick infestation; and it is now a matter of common knowledge that the cattle in certain counties of this state, including the county of Johnson, are still infested with these ticks, or exposed to such tick infestation. This court will take judicial cognizance of the fact that Texas fever, a communicable and dangerous cattle disease, is prevalent in all counties of the state where tick eradication has not been completed, and that this state of affairs existed in the county of Johnson. *State v. McCarty*, 5 Ala. App. 212, 227, 59 South. 543; *Grimes v. Eddy*, 128 Mo. 168, 28 S. W. 756, 26 L. R. A. 638, 47 Am. St. Rep. 653.

As this statute in spirit and effect declares cattle which have not been treated for tick eradication to be public nuisances, and dangerous to the cattle industry of the state, the same can be summarily quarantined and treated for the purpose of tick eradication. The prevention of disease is the essence of a quarantine law. Such a law is directed not only to the actual disease, but to all that have become exposed to it. *Smith v. St. Louis, etc., Ry. Co.*, 181 U. S. 248, 21 Sup. Ct. 603, 45 L. Ed. 847.

The summary abatement of this nuisance by quarantine and dipping of these cattle is the only available and efficient method of accomplishing the ends sought. If the right to abate had to be judicially determined after notice to a cattle owner and an opportunity to be heard, the remedy would prove practically worthless. *Lieberman v. Van De Carr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305; *Adams v. Milwaukee*, 228 U. S. 572, 584, 33 Sup. Ct. 610, 57 L. Ed. 971.

[10, 11] This statute is not unconstitutional for any of the reasons alleged by the plaintiff. We have undertaken to show above that it does not violate the Fourteenth Amendment to the Constitution of the United States or the same provision of the Constitution of this state. It does not violate the Fifth Amendment to the Constitution of the United States, because that amendment is a limitation upon the power of Congress, and not upon the powers of the state. Quarantining infected cattle, and treating them for the eradication of disease, is not such a taking of property for public use as requires compensation to be made to the owner. Whenever property becomes a nuisance, the nuisance can be abated without compensation to the owner and at his own expense. *Dunbar v. Augusta*, 90 Ga. 390, 17 S. E. 907.

[2] 2. It is alleged by the plaintiff that the county inspector and sheriff are proceeding to seize, quarantine, and treat his cattle for tick eradication, under an affidavit made by the inspector reciting that the plaintiff has failed, after due notice to dip his cattle as required by this act, and, under a warrant based on said affidavit, issued by the judge of the superior court, directing the sheriff to quarantine and dip said cattle, when there is no authority for the making of said affidavit or the issuing of said warrant. This act directs the local inspector to do these things, and makes it the duty of the sheriff of any county in which the work of tick eradication is in progress to render said inspector any assistance necessary to the enforcement of this act. The statute is the warrant for the inspector and sheriff to seize, quarantine, and treat these cattle. No warrant from any court is necessary for this purpose. Conceding that the affidavit made by the local inspector and the warrant issued by the judge of the superior court to be null and void for want of authority, still these officers were authorized to do these things without any other warrant or authority than that conferred by these acts. The fact that such warrant was null and void does not prevent them from acting under the authority of the statute.

[3] So we think the judge properly denied the injunction in this case.

Judgment affirmed.

All the Justices concur.

ATKINSON and GILBERT, JJ., concur in the judgment.

(152 Ga. 306)

MUNFORD v. PEEPLES. (No. 2592.)

(Supreme Court of Georgia. Feb. 20, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 448—Pending appeal from interlocutory injunction restraining voting of stock, court held to have jurisdiction to appoint receiver to vote the stock.

The court below did not err in entertaining jurisdiction of an application for the interlocutory order sought, and in granting an interlocutory order, which in its essence was preservative of the estate involved, and tended to safeguard the rights of the applicant, which had otherwise been placed in jeopardy pending the appeal to the Supreme Court in a former case between the same parties and involving the same property.

(Additional Syllabus by Editorial Staff.)

2. Appeal and error \S 445—That application for interlocutory order preserving rights pending review included matters not within court's jurisdiction did not prevent grant of interlocutory relief.

In a suit involving the right to vote stock, the fact that an application made pending review of an interlocutory injunction on writ of error, for interlocutory relief to preserve the estate and safeguard plaintiff's rights, also introduced questions then pending in the Supreme Court, of which the superior court had no jurisdiction, was not ground for refusing to consider the application, so far as it sought interlocutory and administrative relief.

3. Appeal and error \S 843(2)—Whether order of lower court pending appeal went beyond jurisdiction held unnecessary to determine.

Whether an interlocutory order of the superior court, made pending the review by the Supreme Court of an interlocutory injunction restraining defendant from voting stock, went further than equity was authorized to go in giving specific directions to a receiver as to how he should vote the stock, and should be changed or modified, need not be determined, where such directions related to powers which terminated at the next annual meeting of the stockholders held after the decision by the Supreme Court, and the stock had doubtless passed into the control of the party held entitled thereto before such meeting.

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Suit by Mrs. L. M. Peeples against R. S. Munford. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

See, also, 152 Ga. 31, 108 S. E. 454.

On the 13th day of February, 1920, Mrs. Louis M. Peeples filed her equitable petition against R. S. Munford, and this petition and the demurrers and answers thereto raised issues involving the ownership and control of and the right to vote certain shares of stock

in the Etowah Development Company in the meetings of the directors of that corporation. In that petition Mrs. Peeples claimed that she was the owner in fee simple of the stock, and that the trust under which the defendant, R. S. Munford, had been controlling and voting the stock as a trustee, claiming the right to so vote it under the terms of the will of S. L. Munford, the father of the above-named plaintiff and defendant, was an executed trust, and that she had the right to the possession, control, and disposition of the stock; it being hers in her own right. The petition also contained prayers for construction of such parts of the will of S. L. Munford as would determine the ownership of the stock. The plaintiff further prayed for injunction restraining the defendant from selling or attempting to sell the same stock, for his removal from the trusteeship, and that, until it be determined whether the trust was an executed one or a continuing trust, a receiver be appointed by the court to control the shares of stock under the order and direction of the court, and that the management and control of the shares of stock be placed in the hands of such receiver under the order and direction of the court, and until the further order of the court, and that the defendant be enjoined from voting or attempting to vote the stock at any stockholders' meeting. Upon the presentation of this petition an order was passed, temporarily restraining the defendant as prayed, and P. C. Flemister was appointed as temporary receiver, and the defendant was required to turn over the stock to him; it being provided in the order that the stock should be held by the receiver pending the further order of the court.

At the interlocutory hearing of this petition and the answers and demurrers before the court, the court granted an interlocutory injunction, on July 12, 1920, and ordered that the temporary restraining order theretofore granted and above referred to "be continued in full force and effect pending the further order of the court." It was also ordered that, upon conditions specified in the order, Mrs. Peeples, the plaintiff, might give bond, to be approved by the clerk of the superior court, in the sum of \$100,000, and that in lieu of other security the clerk was directed to accept on the bond the signatures of the plaintiff and her husband, together with the pledge of the said stock upon the delivery of the same to the clerk of the superior court, and for the purpose of permitting the execution of the bond the temporary receiver was authorized, on the written demand of the plaintiff, to deliver the shares of stock, or the certificates representing the same, to the clerk of the superior court for the purpose stated. It was further recited in this interlocutory order:

"Should at any time it be made to appear to the court that the bond herein required will be insufficient protection to the said Etowah Development Company, the right is reserved to require such other and additional security as in the judgment of the court may be necessary. The granting of the temporary restraining order herein referred to is made conditional upon the execution and filing of such bond within ten days from the date hereof."

The order further contained a provision for the defendant giving bond upon certain conditions, in the event of the failure of the plaintiff to give bond; but the plaintiff gave the bond, and the certificates of the shares of stock were pledged as security. The interlocutory order contained also the following recital:

"Should neither party exercise the privileges granted in the two preceding paragraphs, the court reserves the right, upon application of either party after said 20 days have expired, to revise this order and judgment so as to protect the interests of all parties, and upon the application of either of them. Pending the exercise of the rights granted in the two paragraphs referred to, and the further order of the court, the restraining order heretofore granted upon the application of the plaintiff is continued in full force and effect. * * * The receiver heretofore appointed shall continue to hold possession of the certificates representing said shares of stock, unless he shall deliver them to the clerk of the superior court of Bartow county on the written order of the plaintiff, as provided for in paragraph 1 hereof."

To the granting of the interlocutory restraining order, which contained, among other things, the provisions quoted immediately above, the defendant excepted and sued out a writ of error, bringing the case to the Supreme Court for review. No supersedeas bond was filed, and no supersedeas was granted.

On December 31, 1920, Mrs. Peeples filed an application for an interlocutory order, in which she referred to the injunction granted on July 12, 1920, on the petition filed in the previous February, a copy of that injunctive order being attached to her application. She recited also the fact of having given bond in compliance with the terms of the order, and that the defendant, R. S. Munford, had sued out a writ of error to the Supreme Court to have the judge's order granting an interlocutory injunction reviewed in the Supreme Court. The application also contained certain recitals that were contained in the equitable petition above referred to, and raised certain issues that were raised by that petition and by the demurrer and answer. It further appears from the application that the next annual meeting of the stockholders of the Etowah Development Company was to be held on January 3, 1921, and the applicant averred and charged that it was the purpose of R. S. Munford to at-

tend the stockholders' meeting and control the same by voting his individual stock, and she insisted that, as the trust stock claimed by her could not be voted or represented at that meeting, under the terms of the court's order, which enjoined R. S. Munford from voting said trust stock, the action of the stockholders would be controlled by the majority of the remaining shares of the stock, thus giving defendant R. S. Munford, absolute control of the meeting; that it would be unjust to allow him to get control of the affairs of the corporation, as the applicant, under the terms of the order granted on the equitable petition and bond given by her, would be rendered liable for losses and mismanagement; and she insisted that the present status be preserved by the court until the former case was decided by the Supreme Court. She prayed for such interlocutory order as would protect her against the threatened change in the management and control of the corporation by R. S. Munford, in the manner aforesaid, at the approaching annual meeting of the stockholders, and to that end prayed that the receiver theretofore appointed be authorized and directed by the court to attend the stockholders' meeting and vote the shares of stock bequeathed in trust to her, which were in part the subject-matter of the equitable petition above referred to, and also prayed that Munford be restrained and enjoined from voting his individual stock, unless the trust stock should be voted. She further prayed that if, for any reason, the court should deem it improper to direct the receiver to vote said trust stock at the stockholders' meeting on January 3, 1921, or on some subsequent date to which said meeting might be adjourned or postponed, the court grant an order to enjoin the holding of the stockholders' meeting, or require that it be postponed to some subsequent date. She prayed, further, that, if neither of the foregoing modes of interlocutory protection of movant could be adopted by the court, the court grant such other interlocutory order for her protection, and preservation of the status quo, as might seem just and equitable, and as would not deprive her and her husband of the control of the corporation, and yet leave her responsible on her bond for any impairment or loss of the value of the assets of the corporation; alleging in this connection that, if R. S. Munford should be allowed to vote his individual stock while the trust stock was not allowed to be voted by her or her representative, Munford could and would resume control and management of the corporation.

Demurrers to this application, and a plea to the jurisdiction of the court to entertain the same, were filed on the ground that the court had been divested of the jurisdiction of the matter involved by the appeal to the Su-

preme Court, and that the latter court now had entire jurisdiction of the matter, and upon the ground that the stock had been hypothecated with the clerk of the superior court as security for the bond, and could not be taken from his custody.

Upon hearing the application, the court ordered that P. C. Flemister be appointed receiver for the trust stock theretofore deposited in the office of the clerk of the superior court as security for the bond executed by the plaintiff, under the provisions of the previous order of the court, but that the liability of said stock as security on the bond should not be impaired by reason of the order: that the receiver of the stock in question should attend all the stockholders' meetings of the corporation, and should vote the stock in all matters coming before the meeting as in his discretion he might deem to be the best interest of the company and the trust estate, subject to the limitation that he should vote the stock for himself, R. S. Munford, Mrs. L. M. Peeples, and certain other named parties for directors of the company; that, in voting the stock and in the exercise of his authority as director, neither the receiver nor the officials of the company should create any liens upon the property of the company, nor make any sales of the property, except by unanimous vote of the board of directors, in excess of \$2,500, nor make any lease of the property for a longer period than 12 months, except by unanimous vote or with the approval of the court; the business of mining and selling ores belonging to the corporation being excluded from this limitation. This order was excepted to upon the grounds indicated in the demurrer and the plea to the jurisdiction, and the questions raised by the exceptions are before the Supreme Court for review.

G. H. Aubrey and John T. Norris, both of Cartersville, for plaintiff in error.

Neel & Neel, of Cartersville, for defendant in error.

BECK, P. J. (after stating the facts as above). [1-3] On September 13, 1921, this court rendered a decision in the case of Munford v. Peeples, 152 Ga. 31, 108 S. E. 454, upon review of the questions made by the demurrers and answers to the petition filed on February 13, 1920, and that decision disposes of the questions involving the substantial merits of this controversy. The stock therein referred to as trust stock was held to be the property of Mrs. Peeples in fee simple. The other questions raised in that record were also adjudicated adversely to the plaintiff in error in the instant case, by the affirmance of the judgment of the court be-

low, and the only remaining question for decision here is the question of the court's jurisdiction to entertain the present application for the interlocutory order sought. It may be true that in this application questions were introduced which were involved in the case already pending in the Supreme Court, and that this fact would divest the court below of jurisdiction of such questions; but the fact that certain questions in the present record were not within the jurisdiction of the court did not afford ground for a refusal to consider the application, so far as it sought the interlocutory and administrative order, and the court did not go beyond its equitable powers in entertaining and disposing of the application for that purpose, especially in view of the peculiar rights involved and the peculiar condition of the affairs of the Etowah Development Company, and the attitude of the plaintiff to these affairs, and the obligation resting upon her, in view of the court's former order, and the conditions in the bond which she had been required to give, and the jurisdiction of the court to entertain the application for interlocutory orders of the nature of that involved here has been settled by decisions of this court involving analogous questions. *Ryan v. Kingsbery*, 88 Ga. 361, 14 S. E. 596; *May v. Printup*, 59 Ga. 129 (1); *Farmers' Co-operative Mfg. Co. v. Drake*, 96 Ga. 768, 22 S. E. 1004; *Armstrong v. American National Bank*, 144 Ga. 245, 86 S. E. 1087; 3 C. J. 1268, § 1385 et seq.

If the court below, in granting the interlocutory order referred to, went further in giving specific directions to the receiver as to how he should vote than a court of equity is authorized to go, nevertheless the specific directions related to powers which terminated at the next annual meeting of the stockholders of the corporation, which was held after the decision in the case of *Munford v. Peeples*, referred to above; and it is therefore not necessary to consider whether the order of the court in this respect should be changed or modified, as the trust stock before the annual meeting of the stockholders had no doubt, passed into the control of Mrs. Peeples, the absolute owner thereof, and the powers with which the receiver was vested had ceased to be material. It follows, from this, that the judgment of the court below should be affirmed.

Judgment affirmed.

All the Justices concur.

ATKINSON and HINES, JJ., concur in the decision of the majority, but are of the opinion that the bill of exceptions should have been dismissed, because prematurely brought.

(152 Ga. 865)

DUNBAR v. HINES, Director General.
(No. 2294.)

(Supreme Court of Georgia. March 4, 1922.)

(Syllabus by the Court.)

1. Master and servant ¶258(9,14), 259(4), 261(4)—Count for injuries from article falling from top of car held sufficient; count for injuries held plain, full, and distinct as against general demurrer; proximate cause alleged; count not alleging inability to avoid consequences of defendant's negligence held insufficient.

The first count in the petition set forth a cause of action, and was not subject to general demurrer; but the second count did not set forth a cause of action, and the demurrer thereto was properly sustained.

(Additional Syllabus by Editorial Staff.)

2. Master and servant ¶261(4)—Servant must allege lack of equal means of knowing of danger.

In suits for injuries from a master's negligence in failing to provide a safe place to work or to warn the servant of an unknown danger, the servant must make it appear that he had not equal means of knowing of the defective condition of the instrumentality employed or of the danger, and, by the exercise of ordinary care, could not have known thereof, and these facts must be alleged.

Beck, P. J., and Atkinson, J., dissenting in part.

Certiorari from Court of Appeals.

Action by M. S. Dunbar against W. D. Hines, Director General. Judgment for defendant on demurrer was affirmed by the Court of Appeals, and plaintiff brings certiorari. Reversed in part, and affirmed in part.

This was an action by an employee of a railroad company, to recover damages for personal injuries. The petition contained two counts. In the first count the injury was alleged to have occurred under the following circumstances: About 3:30 o'clock in the afternoon of January 11, 1918, the plaintiff, as one of a switching crew composed of himself, a conductor in charge of the crew, an engineer, and a fireman, was engaged in switching a freight car in the yards of the defendant, for the purpose of placing it opposite a small building near the track. The train consisted of the engine, tender, and one car. Plaintiff stood with his right foot on the lower round of a ladder attached to the rear end of the east side of the car, holding to an upper round of the ladder with his right hand, and giving signals with his left hand to the engineer as the car was being backed towards the place where it was to be deposited. Just as the car stopped at the place, and while plaintiff was in the position above described, he was struck on his head

by some heavy wooden substance or instrument, not a part of the car, that should not have been upon the top of the car, and that fell, or was blown down by the wind, from the top of the car and caused the injury. He did not know that the instrument had been placed or left on the car, and had no reason to anticipate its presence, or that he would be injured by its falling. The defendant was alleged to have been negligent in that: (a) The defendant's agents and employees placed said foreign substance or instrument upon the top of said car. (b) Said agents and employees, knowing said substance or instrument to be upon the top of said car, allowed it to remain there and operated said car with it on the top. (c) Said agents and employees, knowing that said substance or instrument was upon the top of said car and that, by the movement of the train or the force of the wind, it might be thrown or blown from the car and fall upon some employee using the ladder or standing upon the side of the track, carelessly and negligently allowed it to remain on top of the car while operating it, and, as the result of so leaving it, petitioner was injured.

The second count was in the same language as the first, except as to the cause of the injury and the negligence of the defendant. Upon this subject it was alleged: That the substance or instrument with which plaintiff was struck—

"was a part of a building belonging to the defendant, and which was blown by the wind and carried over the top of the freight car and fell upon him. * * * The building * * * was erected more than 30 years ago. * * * It was used for the purpose of housing engines when not in service; * * * was a poor structure when it was first built; * * * was not housed from the roof to the ground; * * * was only weatherboarded on the side near the top, and really consisted of some upright pieces with a roof out of some material made of cotton or paper, with a small portion of the weatherboarding on two sides to hold the building together; * * * was weakly constructed and had become weaker; * * * was so weakly put together that wind blowing from 31 to 35 miles was sufficient to take off a portion of the paper roof and scantlings and carry them over the car and hurl them against petitioner. * * * Said building had become weak and frail by age; * * * the timber of which it was constructed had decayed; this was especially true of the roof; and for this reason said building was unable to stand a wind blowing 30 or 35 miles an hour. * * * The roofing on said building at the place where it was blown off was of an inferior quality, and it had become decayed, * * * and * * * as a result was not strong enough to resist an ordinary wind of 30 or 35 miles velocity; * * * the defendant knew, or in the exercise of ordinary care should have known, of the rotten and frail condition of said building."

The substance which struck plaintiff was blown off the roof by a wind having a velocity of 30 to 35 miles an hour. There was no allegation that he did not know the condition of the building. In this count the defendant was alleged to have been negligent in that:

"(a) It constructed said building in the frail and weak manner in which it was originally built. (b) It did not construct a strong and safe building for the purpose of housing its engines. (c) It maintained said building thus weakly and dangerously constructed upon its grounds, when it knew, or in the exercise of ordinary care should have known, that the same could be unroofed by an ordinary wind. (d) It continued to use said building after it had become weak and frail after the lapse of 30 or more years. (e) It allowed said building to remain upon its yards, adjacent and near to its tracks, after it had become so frail and weak that it could be shaken to pieces by a wind blowing with a velocity of 31 to 35 miles per hour."

The trial court sustained the general demurrers to each count in the petition, and dismissed the same. On appeal to the Court of Appeals this judgment was affirmed; and the case is now in this court on certiorari.

Robt. L. Berner, of Macon, for plaintiff in error.

Harris, Harris & Witman, of Macon, for defendant in error.

HINES, J. (after stating the facts as above). [1] 1. The first count of the petition in this case alleged: (1) Employment of the plaintiff by the defendant carrier; (2) injury while in such employment; (3) injury to the plaintiff while in the discharge of his duty as a switchman, resulting from his being struck by some heavy wooden substance, not a part of the car, on the ladder of which he was riding, and giving signals to the engineer as the car was being backed toward the place where it was to be deposited, said heavy wooden substance being blown by the wind from the top of the car and injuring him; (4) plaintiff did not know that said instrument had been placed or left on the car, and had no reason to anticipate its presence there, or that he would be injured by its falling, and the employees of plaintiff knew of the presence of said instrument upon said car, allowed it to remain there, and operated said car with said instrument on the top thereof; (5) the negligence of the defendant's employees in placing said instrument on the top of said car, operating the same with it thereon, and carelessly and negligently allowing it to remain on the top of said car when in operation, from which his injury resulted; and (6) the amount of damages claimed. The first count containing the above allegations set forth a cause of action, which would entitle the plaintiff to recover on proof there-

of. Civil Code, § 2782; Corley v. Coleman, 113 Ga. 994, 39 S. E. 558.

2. Does the second count of the petition set forth a cause of action? This count alleges injury to the plaintiff while in the service of the defendant as a switchman, and while engaged in the line of his duty as such. While engaged in switching a box car on which he was riding, and giving signals to the engineer, as such box car was being taken to the place where it was to be left, he was struck by a part of a building belonging to the defendant, which part was blown by the wind and carried over the top of the freight car and fell upon him, from which he was injured. This building was for the purpose of housing engines when not in service. It was a poor structure when first built. It was only weatherboarded on the sides near the top. It really consisted of some upright pieces, weatherboarded as stated, with a roof of some material made of cotton or paper, was weakly constructed, and had become weaker from age and decay. It was so weakly constructed that the wind, blowing from 30 to 35 miles per hour, was sufficient to take off a portion of the paper roof and scantlings, carry them over the car, and hurl them against him, whereby he was injured. The defendant knew, or, in the exercise of ordinary care, should have known, of the rotten and frail condition of said building. The defendant was negligent in having constructed said building in its original frail and weak condition; it did not construct a safe building for the purpose of housing its engines; it maintained said building thus weakly and dangerously constructed upon its grounds, when it knew, or, in the exercise of ordinary care should have known, that the same could be unroofed by an ordinary wind; it continued to use said building after it became weak and frail after the lapse of 30 or more years, and it allowed said building to remain upon its yards, adjacent to its track, after it had become so frail and weak that it could be shaken to pieces by the wind, blowing at the rate of 30 to 35 miles per hour.

It is urged, by counsel for the defendant, that the petition in this case was properly dismissed, (a) because it does not plainly, fully, and distinctly set forth a cause of action; and (b) because the petition does not show that the negligence of the defendant, if any, was the proximate cause of the plaintiff's injury. It is further urged that the second count is defective because it does not allege that the plaintiff did not know, or, by the exercise of ordinary care, could have known, of the dangerous condition of the engine house, a portion of which was blown by the wind upon the car on which he was riding at the time of his injury, and by which he was struck and injured. The petition in this case is not subject to the first objection so urged, and is good against a general demurrer, the court not having passed upon

the grounds of special demurrer. *Hudgins v. Coca-Cola Bottling Co.*, 122 Ga. 695, 50 S. E. 974.

According to the allegations of the petition, negligence of the defendant was the proximate cause of the injury to the plaintiff; and this court cannot hold, as a matter of law, that this negligence was not such proximate cause. If a master is liable to his servant for an injury arising from a dead tree, standing near the roadbed of its tramroad, being blown upon a car operated on such tramroad, on which car such employee was riding, and by the falling of which tree the car was derailed and he was injured, the master knowing of the presence of such dead tree (*Corley v. Coleman*, 113 Ga. 994, 39 S. E. 558), a railway company doing the business of a common carrier will be liable to its servant who is hurt by the maintenance of a dangerous structure adjacent to its right of way, by which such servant was injured.

The main question, as to the sufficiency of the second count of this petition, is whether the same should have contained the allegation that the servant did not know, and by the exercise of ordinary care could not have known, of the existence of this old, frail, and decayed engine house of the defendant, and that parts thereof were liable to be blown by the wind upon employees working upon the track adjacent thereto. By the Employers' Liability Act of this state it is provided that—

"Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment: Provided, nevertheless, no recovery shall be had hereunder if the person killed or injured brought about his death or injury by his own carelessness amounting to a failure to exercise ordinary care; or if he, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence." Civil Code, § 2782.

This section, which is codified from the act of 1902, was intended to work, and did work, a great change in regard to the right of employees of common carriers by railroad to recover for injury arising from the negligence of the carrier or of coemployees. *Atkinson v. Alexander*, 142 Ga. 124, 82 S. E. 561.

Does good pleading under this statute require the plaintiff to negative, in his petition, the existence of negligence amounting to a failure to exercise ordinary care on his part? Must he likewise allege that he could not, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence? It is not necessary to answer

these questions to dispose of this case. Does good pleading, under the facts of this case, require the plaintiff to allege in his complaint that he did not know of the defect in this engine house and the consequent danger therefrom, and that he could not, by the exercise of ordinary care, have avoided the negligence of the defendant? The Supreme Court of the United States has held that the federal Employers' Liability Act has not taken away the defense of the assumption of risks by the employee. *Seaboard Air-Line Ry. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, 1 L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. This court has held that our state Employers' Liability Act does not exclude the doctrine of the assumption of risks as a defense. *Emanuel v. G. & F. Ry. Co.*, 142 Ga. 543, 546, 83 S. E. 230; *Macon, etc., Ry. Co. v. Musgrove*, 145 Ga. 647, 89 S. E. 767. This doctrine being still in force in this state, must an employee, suing a railroad carrier for damages, allege that he was not guilty of negligence amounting to lack of ordinary care, or that he could not, by the use of ordinary care, have avoided the consequences of the defendant's negligence? Under the law in force before the present Employers' Liability Act, an employee could not recover unless he was without fault. Under that law it was necessary for the plaintiff to allege that he was free from fault, and that the defendant was negligent. *Pierce v. Seaboard Air-Line Railway*, 122 Ga. 664, 50 S. E. 468; *Central of Georgia Ry. Co. v. Ruff*, 127 Ga. 200, 56 S. E. 290.

[2] In suits for injuries arising from the negligence of the master, when the dereliction of duty consists in the failure to provide a safe place to work, or a failure to warn the servant of an unknown danger, the servant must not only make it appear that the master failed to perform his duty to furnish him a safe place to work, or to warn him of an unknown danger, but also that the servant injured did not know and had not equal means of knowing of the defective condition of the instrumentality employed or of the danger, and by the exercise of ordinary care could not have known thereof; and it is necessary to allege these facts in the complaint. *Roland v. Tift*, 131 Ga. 683, 63 S. E. 133, 20 L. R. A. (N. S.) 354; *Quinn v. Allen*, 1 Ga. App. 807, 57 S. E. 957; *Cedartown Cotton, etc., Co. v. Miles*, 2 Ga. App. 79, 58 S. E. 289; *Southern States Portland Cement Co. v. Helms*, 2 Ga. App. 308, 58 S. E. 524.

The failure of the second count in the petition to allege that the plaintiff did not know of the defect and danger in the engine house from which the timber was blown, and by which he was hurt, rendered this count subject to general demurrer; and the court did not err in sustaining the general demurrer thereto.

Judgment reversed in part, and affirmed in part.

All the Justices concur, except GILBERT, J., absent, and—

BECK, P. J., and ATKINSON, J., who concur in the ruling as to the first count in the petition, and dissent as to the ruling upon the demurrer to the second count.

(153 Ga. 21)

BEERMAN et al. v. ECONOMY LAUNDRY CO. (No. 2636.)

(Supreme Court of Georgia. Feb. 21, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 70(5)—Pleading \S 225(1)—Motion to dismiss improperly denied, when plaintiff did not amend after special demurrer sustained; direct bill of exceptions lies to denial of motion to dismiss for failure to amend after sustaining of demurrer.

Defendants at the appearance term demurred to the petition. One ground of demurrer was sustained, with leave to plaintiff to amend within 10 days. No amendment having been made to meet the ground of demurrer and the ruling of the court thereon, defendants at a subsequent term moved to dismiss the petition, because of the failure to amend in pursuance of the court's order. *Held*, that such motion should have been sustained; and, if this had been done, it would have been a final disposition of the case in the trial court, and therefore a direct bill of exceptions would lie to the refusal of the court to grant the motion; and this is true although after the motion to dismiss the petition was overruled, the case went to trial on its merits, and a verdict and judgment were rendered in favor of the plaintiff. In such a case it was not necessary to assign error on the final judgment based on the verdict.

2. Appeal and error \S 327(7)—On bill of exceptions by individual defendants, failure to make corporate defendant a party held not ground for dismissal.

The motion to dismiss the bill of exceptions is without merit.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by the Economy Laundry Company against H. C. Beerman and others. Judgment for plaintiff, and defendants bring error. Reversed.

The Economy Laundry Company, in behalf of itself and such other creditors of the American Ice Cream Manufacturing Company as might become parties plaintiff, sued the latter named company, and certain named individuals for breach of contract by the defendant company, and for the statutory liability fixed by Civil Code 1910, \S 2220, on persons who organize a company and transact business in its name, before the minimum capital stock has been subscribed for. The defendant company filed a demurrer to the pe-

tition, on general and special grounds. The general demurrers were overruled, as well as most of the special demurrers. In the order of the judge dealing with the demurrer of the defendant company it was, among other things, ruled:

"The special demurrer as to measure of damages is overruled, except that the plaintiff is required to amend within 10 days, setting up the monthly difference between the agreed price and the actual (value) of said lease contract."

The date of this judgment was December 4, 1917. On December 13 thereafter, the following amendment to the petition was offered:

"And now comes the plaintiff, Economy Laundry Company, and with leave of the court first had and obtained, and within the time allowed by the order of the court in ruling on the special demurrer to paragraph 10 of the petition, and in accordance with said ruling amends said paragraph of the petition as follows: 'The difference between the agreed price and the actual value of said lease contract at the time it was repudiated, renounced, and breached, as aforesaid, is the sum of one hundred and fifty (\$150) dollars per month.'"

This amendment was allowed. After this amendment the judge on the date it was offered granted the following order:

"It appearing to the court that since the filing of the above case two of the defendants, to wit, August Denk and Geo. P. Leoles, having died, now on motion of attorneys for the plaintiff said case is dismissed as to said two defendants."

Paragraph 10 of the demurrer to the petition of the individual defendants was as follows:

"These defendants demur specially to said petition, for that it is not alleged how or in what way they organized said corporation, or how, when, or in what way they transacted business in its name, with plaintiff or other creditors of said defendant corporation."

On December 4, 1917, in the order dealing with such demurrer the following, among other things, was ruled:

"As to paragraph 10 of the special demurrer it is ordered that the same is overruled as to the transaction of business, with 10 days' leave to amend."

On a review of the case by this court (American Ice Cream Mfg. Co. v. Economy Laundry Co., 148 Ga. 624, 97 S. E. 678) it was, among other things, held:

"The petition was not subject to general demurrer, nor to special demurrer on the ground of misjoinder of parties defendant, or of causes of action, nor to any of the other grounds of special demurrer which were overruled. *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174 (73 S. E. 13)."

Subsequently two of the individual defendants died pending the action, and on motion of the plaintiff an order was granted, striking their names from the case. The case came on for trial on April 6, 1921, and the individual defendants made a written motion to dismiss the case, one of the grounds of the motion being that the court, on December 4, 1917, had sustained the demurrer of such defendants to the petition, on the ground that the petition did not allege "how, when, or in what way, they [defendants] transacted business in its [corporation's] name, with plaintiff or other creditors of said corporation"; the order allowing the plaintiff 10 days in which to amend. The motion alleged that plaintiff did not amend to meet such judgment within the 10 days or at any time since, nor did the plaintiff except in any way to such judgment. This motion was overruled; and the case proceeded to trial on its merits, and a verdict and judgment were rendered for the plaintiff. The defendants excepted to this ruling, by a direct bill of exceptions, in which the only error assigned was on the judgment overruling the motion.

McCallum & Sims, of Atlanta, for plaintiffs in error.

Dorsey, Shelton & Dorsey and Carlton W. Bims, all of Atlanta, for defendant in error.

FISH, C. J. (after stating the facts as above). [1] The court erred in overruling the motion to dismiss the petition on the ground that the court in its order of December 4, 1917, had ruled that the petition was subject to the demurrer of the individual defendants, on the ground that it did not set out how, when, or in what way they, after organizing the defendant corporation, had transacted business in the corporation's name; and that, although the plaintiff had been allowed 10 days in which to amend its petition in this respect, no amendment meeting the demurrer and the judgment of the court thereon had ever been made. It is true that the petition was amended within 10 days, but such amendment related solely to a ground of demurrer that the petition failed to set "up the monthly difference between the agreed price and the actual [value] of said lease contract." This clearly appears from the wording of the amendment allowed to the petition, dated December 13, 1917, which amendment is set forth in the statement of facts. The motion, the overruling of which was excepted to, was in the nature of a general demurrer, or at least it was such a motion, as, if it had been granted, would have finally disposed of the case; and therefore a direct bill of exceptions would lie, assigning error upon the overruling of it. It was not a motion the sustaining of which would have left the case pending in the trial court.

See *Johnson v. Vassar*, 143 Ga. 702, 85 S. E. 833.

[2] In view of the ruling made, the motion to dismiss the bill of exceptions, on the ground that error was not assigned on the final judgment based on the verdict, is not meritorious. Nor should the bill of exceptions be dismissed on the ground that the defendant corporation is not a party plaintiff in error, or a party defendant in error.

Judgment reversed.

All the Justices concur.

(152 Ga. 511)

MULLIS et al. v. PHILLIPS. (No. 2695.)

(Supreme Court of Georgia. Feb. 20, 1922.)

(Syllabus by the Court.)

1. Sufficiency of evidence.

There was sufficient evidence to authorize the jury to find that the will to the probate of which a caveat was filed was duly executed, and that the witnesses signed the same in the presence of the testator, and that he signed in their presence.

2. Wills §123(5)—Testator need not have seen signing by witnesses if he could have seen them.

The charge of the court to the jury, that "the testator need not have actually seen the witnesses sign, if in his position he might have so seen," was not erroneous. *Robinson v. King*, 6 Ga. 539; *Gordon v. Gilmore*, 141 Ga. 347 (8), 80 S. E. 1007.

3. Wills §121—Attestation clause held sufficient; instruction that will was legal and regular in form, etc., not erroneous.

The will offered for probate in several items recited that the testator did "will and bequeath" certain specified property; it was signed by the testator, and following his signature was the attestation clause, "Signed in presence of and of each other, this the 26 day of October, 1920," which attestation clause was followed by the signatures of four witnesses. *Held* that, while the attestation clause was not in the most usual form, it was sufficient; and the court did not err in stating to the jury, in the course of his instructions, that "a document is offered which in form is legal and regular, which measures up to the requirements of the law on its face. *Deupree v. Deupree*, 45 Ga. 415 (2); 40 Cyc. 1125.

4. Trial §260(3)—Failure to charge as to burden of proving factum of will not erroneous in view of instructions given.

The court having instructed the jury that the burden was on the propounder to establish the will by a preponderance of evidence, it is not ground for the grant of a new trial that the court failed to charge the jury that the burden which the law placed upon the propounder was, in the first instance, "to prove the factum of the will, that at the time of the execution of the will the testator apparently had sufficient men-

tal capacity to make it, and in making it acted freely and voluntarily."

5. Wills §329(5), 384—Charge withdrawing reasonableness of disposition from jury's consideration on issue of capacity should not be given; charge excluding reasonableness of disposition from consideration not harmful under the evidence.

Where one of the issues upon a probate of a will raised by the caveat thereto is whether the testator had testamentary capacity, the court should not give to the jury instructions which contain language that would exclude from their consideration the reasonable or unreasonable disposition made in the will of the testator's estate, in passing upon the issue as to whether the testator had testamentary capacity. But in the instant case there was no evidence from which the jury could have found that there were such inequalities in the provisions of the will as would authorize the jury to find that the testator had made an unreasonable disposition of his estate; consequently the charge referred to could not have been hurtful.

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Proceeding by Mrs. Julia S. Phillips for the probate of the will of James I. Phillips, in which Mrs. Lula Phillips Mullis and others filed a caveat. Judgment in favor of the will, and the caveators bring error. Affirmed.

L. D. McGregor, of Warrenton, for plaintiffs in error.

J. T. Olive, of Harlem, and John T. West & son, of Thomson, for defendant in error.

BECK, P. J. Mrs. Julia S. Phillips offered for probate in solemn form an instrument in writing purporting to be the last will and testament of James I. Phillips. Mrs. Lula Phillips Mullis and others, alleging themselves to be heirs at law of the testator, filed their caveat to the probate, on the grounds that the testator, at the time of the execution of said will, was not of sound and disposing mind and memory, and was mentally incapable of making a disposition of his property by will; that he did not execute the will freely and voluntarily, but was moved thereby by undue influence exercised upon him by his son, T. Elwood Phillips; that at the time of the execution of the will the testator did not see the witnesses as they signed their names as such; neither was he in a position to see the attesting witnesses sign the will, and could not have seen them sign without changing his position; that he did not know the contents of the will, the property he was disposing of, nor the parties to whom he was devising it.

Upon hearing the case the ordinary adjudged that the will be probated in solemn form; and the caveators filed their appeal to the superior court, where the case came on for trial, and the jury returned a verdict in

favor of the propounder. The caveators made a motion for new trial, which was overruled, and they excepted.

[1-3] 1-3. The rulings made in headnotes 1, 2, and 3 require no elaboration.

[4] 4. Error is assigned upon the failure of the court to charge the jury that the burden which the law placed upon the propounder of the last will and testament was, in the first instance, "to prove the factum of the will, that at the time of the execution of the will the testator apparently had sufficient mental capacity to make it, and in making it acted freely and voluntarily." This charge is one which is proper to give in all cases where there is an issue as to the proper execution of the will and the testamentary capacity of the testator is involved. But the failure to give this charge is not ground for the grant of a new trial in this case, no written request for the same having been given, and it appearing from an inspection of the charge that the court did charge generally that "the burden is on the plaintiffs to establish—the propounders to establish—the will by the greater weight of credible testimony." And it also appears that the judge had charged the jury as to what constituted testamentary capacity, and as to the proper execution of a will and the necessary formalities to be observed. Moreover, it has been held that failure to charge upon the burden of proof, in the absence of a written request therefor, is not reversible error. *Hickman v. Bell*, 10 Ga. App. 319, 73 S. E. 596; *Whittle v. Central of Ga. Ry. Co.*, 11 Ga. App. 257, 74 S. E. 1100.

[5] 5. The court charged the jury as follows:

"I want to say this to you: Juries and courts don't make wills for people. We don't sit up here and say, 'Why, this will is not exactly just and right, and we think so and so ought to be done between the parties.' If this was true, then there wouldn't be any will making in this country."

This charge is excepted to on the ground that it is argumentative, and that it contravenes the provisions of the statute that the jury should consider the reasonableness or unreasonableness of the disposition of the estate of the testator, in determining whether he was mentally capacitated to make the will. The judge further charged the jury that:

"The court has no concern with the exact details of whether the will is, in the opinion of the court and jury who try the case, exactly just or right."

Section 3841 of the Civil Code provides:

"Eccentricity of habit or thought does not deprive a person of power of making a testament; old age, and the weakness of intellect resulting

therefrom, does not, of itself, constitute incapacity. If that weakness amounts to imbecility, the testamentary capacity is gone. In cases of doubt as to the extent of this weakness, the reasonable or unreasonable disposition of his estate should have much weight in the decision of the question."

The extracts from the charge which we have set forth above are criticized upon the ground that they contravene that part of the statute quoted declaring that in cases of doubt as to the extent of the weakness of intellect the reasonable or unreasonable disposition of his estate by the testator should have weight in the decision of the question. And if there were evidence in the case tending to show the value of the distributive shares given to each of the legatees so that the jury from the evidence in the case would have been authorized to find that there were inequalities in the value of the legacies bequeathed there would have been merit in the criticism of the charge. But, in view of the fact that there was no evidence from which the jury could find that there existed inequalities, the charge could not have been hurtful, and it was therefore not error requiring the grant of a new trial.

Judgment affirmed.

All the Justices concur.

(153 Ga. 69)

PUCKETT v. HEATON. (No. 2624.)

(Supreme Court of Georgia. Feb. 28, 1922.)

(Syllabus by the Court.)

1. Trial \S 191(3)—Instruction held erroneous as assuming truth of plaintiff's contention as to terms upon which land was to be conveyed.

The charge of the court complained of virtually assumed as true a contention of the plaintiff as to which there was an issue of fact made by the defendant's contention respecting the same question. The issue made by these conflicting contentions, being one of fact, should have been submitted to the jury, and the court erred in assuming one to be true rather than the other.

2. Ejectment \S 142(4)—One holding under contract to purchase not bona fide holder under adverse claim as to offsetting improvements.

One in possession of land under a bond for title, or under a verbal agreement with the owner by the terms of which the latter is to convey to him the land upon the payment of the purchase price, is not such a bona fide holder of the land under adverse claim of title as to avail himself of the beneficial provisions of section 5587 of the Civil Code, declaring when one may set off the value of permanent improvements.

3. New trial \S 41(3)—Error in charge as to matter respecting which defendant not entitled to recover not sufficient ground.

The jury found against the contentions of the defendant that he had paid the purchase price of the land and was entitled to a conveyance; and it necessarily follows that he was not a bona fide holder of the land under an adverse claim of right. Consequently, even if the court instructed the jury that in estimating the value of the improvements placed upon the land they should take into consideration the value of the improvements at the time they were made, and not at the time of the trial, this charge would not entitle the defendant in this case to a new trial, as the jury actually allowed the defendant to recover a certain sum as the excess of the value of the improvements over the mesne profits. For a similar reason the rejection of evidence which tended to show the value of the improvements at the time of the trial was not such error as entitled the defendant to a new trial.

4. Appeal and error \S 302(3)—When ground of motion does not show relevancy of excluded evidence, court will not determine admissibility.

The relevancy of certain notes to the issue made by the contentions of the parties, which were rejected when offered in evidence by the defendant, is not made to appear in the ground of the motion for new trial complaining of the rejection of this evidence; and consequently this court will not attempt to determine the admissibility of such evidence, as it would be necessary to examine other parts of the record to ascertain this, and such an examination will not be undertaken by the court to aid an incomplete ground of a motion for new trial.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Action by W. W. Heaton against J. D. Puckett. Judgment for plaintiff, and defendant brings error. Reversed.

See, also, 151 Ga. 211, 106 S. E. 116.

Taylor Smith, of Bremen, and M. J. Head, of Tallapoosa, for plaintiff in error.

Griffith & Matthews, of Buchanan, for defendant in error.

ATKINSON, J. W. W. Heaton brought complaint for land against J. D. Puckett. Upon the trial of the case the jury found in favor of the plaintiff, but allowed the defendant to recover \$100 for valuable improvements made on the land. The defendant made a motion of new trial, which was overruled, and he excepted.

The defendant in this case did not deny that the legal title to the land was in the plaintiff, but he undertook to show that the plaintiff could not recover, because the defendant had an equitable title; and this claim of equitable title was founded on the fact that he had purchased the land from one Driver, giving his notes for the purchase money and receiving a bond for title from

Driver; that, being unable to pay the notes as they fell due, he entered into a contract with the plaintiff, by the terms of which the latter was to purchase the land from Driver, take defendant's obligation for the payment of the purchase money, give him a bond for title, and, when the purchase price was paid, make him a deed to the land. Plaintiff in part admitted the agreement set up by the defendant, but claimed that he was to make deed to the defendant, not when he had finished paying the purchase price of the land, but when he had paid the purchase price of the land and his indebtedness to the Waco Mercantile Company, of which the plaintiff was president. Thus, according to the plaintiff's statement of the agreement between himself and the defendant, upon the execution of which the land was to be conveyed by plaintiff to the defendant, there were two separate and distinct obligations imposed upon the defendant, and a compliance with both was a prerequisite to the execution of the conveyance. The defendant insisted that he had complied with the agreement as it was actually entered into. There were certain notes executed, which purported to be for rent, but defendant claims that he did not know the contents of these notes; that he was an unlettered man, not able to read or write, and accepted the statement of the plaintiff as to the contents of the notes, alleging that the plaintiff said that they were purchase price notes. There are other issues, collateral in their nature, raised in the case; but the foregoing statement of facts shows the substantial issue and the divergence of the claims of the plaintiff and defendant as to the essential features of the contract respecting the purchase of the land.

[1] 1. In charging the jury the court, after a partial statement of the contentions of the parties, gave them the following instructions:

"I charge you that, when the defendant pleads payment he sets up that he has paid the purchase money and the indebtedness due to Heaton and the Waco Mercantile Company at the time this alleged contract was made, the burden is upon him to satisfy you by a preponderance of the evidence that he has made this payment as he contends; that he has paid the old debts due the mercantile company and W. W. Heaton, at the time this trade was entered into. He must show you by a preponderance of the testimony that he has done that, just as though he was bringing a suit and occupied the position of plaintiff in the case."

This charge was error, because it submitted to the jury the plaintiff's contention of the case as true, and as though there were no issue between the plaintiff and the defendant as to what were the actual terms of the agreement touching the conveyance of the land to the defendant. If the plaintiff's contention as to the actual terms of the

agreement had been undisputed, the charge would not have been open to the criticism made upon it; but the defendant directly contradicted the plaintiff upon this controlling issue, and submitted evidence to sustain his contention, and the court should not have assumed as true the contention of one party, and rejected that of the other party, but should have submitted their conflicting contentions to the jury.

[2] 2. It sufficiently appears from the statement of facts set forth above that the defendant, according to his own contentions, was in possession of the land under an agreement by the terms of which he was to have executed to him a conveyance of the land by the plaintiff when the claims of the latter for the purchase money were paid. That being true, he was not in possession of the land under an adverse claim of title; and if he made valuable improvements upon the land, but failed to pay the purchase money for the property, he would not have the right, under the provisions of section 5587 of the Code of 1910, providing that a bona fide holder may set off the value of improvements and recover a verdict for the value of the amount of the excess of the value of the improvements over the mesne profits, to recover such excess.

[3, 4] 3, 4. The rulings made in headnotes 3 and 4 require no elaboration.

Judgment reversed.

All the Justices concur.

(152 Ga. 798)

DURRENCE et al. v. COWART. (No. 2631.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 800—Exceptions, bill of \S 20—Prayer of bill of exceptions held sufficient; amendment of bill of exceptions, by adding prayer for relief, defeats motion to dismiss.

On the call of the case in this court counsel for the defendant in error moved to dismiss the writ of error, on the ground that "there is no prayer in the bill of exceptions or elsewhere praying that the errors complained of may be reviewed and corrected, and because there is no prayer in the said bill of exceptions for any relief because of the alleged errors or otherwise." Thereupon the plaintiffs in error amended their bill of exceptions as follows: "Plaintiffs in error pray that the errors alleged to have been committed may be considered and corrected." Held, that the bill of exceptions as amended was sufficient, and the motion to dismiss the writ of error is denied.

2. Pleading \S 248(16)—Amendment in partition, adding other land, subject to demurrer, as setting up new cause of action, etc.

During the trial the plaintiff offered an amendment which sought to add another and

different 100 acres of land to the 51 acres already described in the petition, so that the proceeding would be for the partition of 151 acres. The defendant demurred, and moved to strike said amendment, on the ground, first, that it set up a new and distinct cause of action; second, because it seeks to have partitioned a separate and distinct tract of land from that sought to be partitioned in the original petition in said case. The court overruled the demurrer, and the defendant excepted. *Held*, that the court erred in refusing to sustain the demurrer to the amendment, based on the above-stated grounds. *Venable v. Burton*, 118 Ga. 153, 159, 45 S. E. 29; *Stringer v. Mitchell*, 141 Ga. 403, 81 S. E. 194.

3. Appeal and error ¶843(1)—Where demurrer erroneously overruled, subsequent proceedings not considered.

The remaining assignments of error will not be dealt with, for the reason that, after the court erroneously overruled the demurrer mentioned in the next preceding headnote, all subsequent proceedings were nugatory.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by J. L. Cowart, administrator, against Eugenia Durrence and others. Judgment for plaintiff, and defendants bring error. Reversed.

W. H. Waters filed a petition for the partition of "51 acres of land," bounded as follows:

"On the north by lands of the estate of John Waters, deceased, late of said county; on the east by lands of Willie Norman and J. P. R. Sikes; on the south and west by lands of J. P. R. Sikes, situated, lying, and being in the state and county aforesaid, and in the 1432d district of said county, G. M."

He alleged that John Waters died seized and possessed of the land; that the same was set apart as dower to Nancy Waters, the widow of John Waters, and she held the same until the time of her death; that he was one of seven children of John Waters, had never parted with his interest in the dower, and was entitled to a one-seventh part. Pending the action, the petitioner died, and his administrator was made a party. By amendment the petitioner set up that the land set apart as dower to Nancy Waters consisted of 151 acres, instead of 51 acres, and that the 151 acres were bounded as follows:

"On the north by lands of S. M. Groover; on the east by lands of Jasper Blocker and lands formerly owned by Willie Norman and J. P. R. Sikes; on the south by lands formerly owned by J. P. R. Sikes; on the west by lands formerly owned by J. P. R. Sikes, and lands of Noah Waters, D. H. Groover, and perhaps others, and better known as the dower lands of Nancy Waters, and including the south half of the Jacob Brazell survey of land, situate, lying, and being in the state and

county aforesaid and formerly in the 1432d district, G. M., of said county."

When the cause came on for trial the defendant demurred to and moved to strike the amendment, because (1) it set up a new and distinct cause of action; and (2) because it sought to have partitioned a tract of land separate and distinct from that set out in the original petition. Error is assigned on exceptions *pendente lite* taken upon the overruling of this demurrer. The trial of the case resulted in a verdict finding for the plaintiff a one-seventh interest of the 151 acres of land, and \$180 mesne profits. A motion for new trial filed by the defendant was overruled, and error is also assigned upon that judgment.

H. H. Elders, of Reidsville, and Hines & Jordan, of Atlanta, for plaintiffs in error.

W. T. Burkhalter, of Reidsville, for defendant in error.

GILBERT, J. Judgment reversed. All the Justices concur.

(152 Ga. 829)

GRESHAM v. LEE. (No. 2804.)

(Supreme Court of Georgia. Feb. 23, 1922.)

(*Syllabus by the Court.*)

1. Brokers ¶55(1)—Broker first presenting customer as ready to buy not as a matter of law procuring cause so as to defeat another's right to commissions.

Where property has been listed for sale with two or more real estate brokers, and one of them, with the knowledge of the owner, has interested a customer in the purchase, and, while negotiations with the broker are still pending, the owner proceeds to close the sale with the same customer through another broker, the latter being the first to present the customer as ready, able, and willing to buy, and actually offering to buy, at the price and on the terms stipulated by the owner; and where the owner, pending such negotiations, has committed no act of bad faith, the efforts of the broker thus actually closing the trade cannot be regarded, as a matter of law, as the procuring cause of the sale, so as to exclude the claim of the other broker against the owner for commissions.

2. Brokers ¶55(1)—Owner acts at his peril in selling through one broker to customer which he knows was interested by another.

In such a case the owner must proceed at his peril, in effecting the sale and paying the commissions to the broker thus closing the sale.

3. Brokers ¶88(3)—Question of fact as to which of two brokers was procuring cause.

Under the facts stated in the questions propounded by the Court of Appeals, it cannot be said, as a matter of law, that a finding was demanded in favor of either of the brokers; it

being, under said facts, a question of fact as to which broker was procuring cause of the sale, and therefore entitled to commissions.

4. Courts \Leftarrow 190(3½)—Party not making oral motion in municipal court or appealing to appellate division not entitled to attack judgment as contrary to evidence.

Under subdivisions (a) and (b) of section 42 of the act establishing the municipal court of Atlanta (Acts 1913, pp. 167, 168), a party who has made no oral motion for a new trial, nor appealed to the appellate division thereof from an order denying an oral motion for new trial, cannot urge that a judgment by that court, on a trial without a jury, is contrary to the evidence; and subdivision (b) denies such a right to a petitioner in certiorari.

5. Appeal and error \Leftarrow 861—On certified questions, decision based on facts therein set out.

Quere, whether other facts in the record may or may not demand a finding in favor of the plaintiff, is not decided, because this court deals with questions propounded by the Court of Appeals only on such facts as are set out therein.

(Additional Syllabus by Editorial Staff.)

6. Brokers \Leftarrow 55(1)—Broker whose efforts are primary, proximate, and procuring cause is entitled to commissions.

Where the services of two brokers conjointly contribute to a sale, the broker whose services and efforts were the primary, proximate, and procuring cause of the sale is entitled to the commissions.

7. Brokers \Leftarrow 55(1)—Owner cannot, while negotiations are pending, complete sale through another broker and defeat commissions.

Where a broker notifies the owner that he has a customer and introduces the customer to the owner, and the negotiations are still pending, the owner cannot, with knowledge of such facts, complete the sale through another agent and avoid his liability for the commission due the first broker.

8. Brokers \Leftarrow 6—Good faith required.

Between a principal and a broker the utmost good faith must be exercised.

9. Brokers \Leftarrow 56(3)—Owner cannot defeat right to commissions by completing sale himself.

Under Civ. Code 1910, § 3587, a broker must procure a purchaser able, ready, and willing to buy, and actually offering to buy, on the owner's terms, but when he procures such a purchaser, the principal cannot defeat his right to commission by completing the sale himself.

10. Courts \Leftarrow 190(3½)—Party not moving for new trial in municipal court or appealing from denial may bring certiorari.

Under Acts 1913, pp. 145, 167, § 42, subd. (a) the failure to move orally for a new trial in the Atlanta municipal court, or, if the motion is overruled, to appeal therefrom under paragraph (b), does not deprive a party of his right to apply for a writ of certiorari.

Certified Questions from Court of Appeals.

Action between W. B. Gresham and M. M. Lee. Judgment for the latter, and the former brought error to the Court of Appeals, which certified questions to the Supreme Court. Questions answered.

Neufville & Neufville, of Atlanta, for plaintiff in error.

Ernest Buchanan, of Atlanta, for defendant in error.

HINES, J. [1] 1. The Court of Appeals desires instructions of this court upon the following question:

"Where property has been listed for sale with two or more real estate brokers, and one of them, with the knowledge of the owner, has interested a customer in the purchase, and, while the negotiations with the broker are still pending, the owner proceeds to close the sale with the same customer through another broker, the second broker being the first to present the customer as ready, able, and willing to buy, and actually offering to buy, at the price and on the terms stipulated by the owner, and where the owner, pending such negotiations, has committed no act of bad faith, amounting to a failure to remain neutral between the brokers, or to an interference in favor of the broker actually closing the sale, must the efforts of the broker thus actually closing the trade be regarded, as a matter of law, as the procuring cause of the sale, so as to exclude the claim against the owner for commissions by the other broker, whose prior negotiations were then still pending?"

[2] Where the services of a broker, as well as those of another broker, have conjointly contributed to the successful termination of negotiations resulting in the sale of real estate for an owner, the question which of the brokers is entitled to commissions from the owner for effecting such sale depends upon whose efforts were the primary, proximate, and procuring cause of the sale negotiated. The broker whose services and efforts were the primary, proximate, and procuring cause of the sale would be entitled to the commissions. *Beougher v. Clark*, 81 Kan. 250, 106 Pac. 39, 27 L. R. A. (N. S.) 198; *Votaw v. McKeever*, 76 Kan. 870, 92 Pac. 1120.

Where one broker, with the knowledge of the owner, has interested a customer in the purchase, and, while negotiations with the broker are still pending, the owner proceeds to close the sale with the same customer through another broker, who first presents the customer as ready, able, and willing to buy, and actually offering to buy, at the price and on the terms stipulated by the owner; and where the owner, pending such negotiations, has committed no act of bad faith amounting to a failure to remain neutral between the brokers, or to an interference in favor of the broker actually closing the sale,

the broker thus actually closing the trade cannot be said, as a matter of law, to be the one whose efforts were the primary, proximate, and procuring cause of the sale. Under such circumstances it becomes a question of fact as to which broker was the proximate, predominating cause of the sale. *Murray v. Currie*, 7 Car. & P. 584, 2 Eng. R. C. 527.

[7] Where a broker for the sale of property notifies the owner that he has a customer, and introduces such customer to the owner, and where the negotiations between such broker and such customer are pending and have not fallen through, the owner cannot, with the knowledge of the facts, complete the purchase through another agent and avoid his liability for the commission due the first broker. *Beougher v. Clark*, 81 Kan. 250, 106 Pac. 39, 27 L. R. A. (N. S.) 198; *Jennings v. Trummer*, 52 Or. 149, 96 Pac. 874, 23 L. R. A. (N. S.) 164, 132 Am. St. Rep. 680; *Day v. Porter*, 161 Ill. 235, 43 N. E. 1073; *Rigdon v. More*, 226 Ill. 382, 80 N. E. 901.

The law will not permit one broker who has been intrusted with the sale of land, and is working with a customer whom he has found, to be deprived of his commission by another agent stepping in and selling the land to the customer so found by the first broker. *Williams v. Bishop*, 11 Colo. App. 378, 53 Pac. 239; *Clifford v. Meyer*, 6 Ind. App. 633, 34 N. E. 23; *Hogan v. Slade*, 98 Mo. App. 44, 71 S. W. 1104; *McCormack v. Henderson*, 100 Mo. App. 647, 75 S. W. 171; *Holland v. Vinson*, 124 Mo. App. 417, 101 S. W. 1131; *Gilmour v. Freshaur*, 126 Mo. App. 299, 102 S. W. 1107; *Wood v. Wells*, 108 Mich. 320, 61 N. W. 508; *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264.

[8] Between the principal and the broker the utmost good faith must be exercised. *Jennings v. Trummer*, 52 Or. 149, 96 Pac. 874, 23 L. R. A. (N. S.) 164, 132 Am. St. Rep. 680.

Under the facts recited in the above question it cannot be said, as a matter of law, that the second broker was the procuring cause of the sale; and we answer this question in the negative.

[2] 2. The Court of Appeals propounds this question:

"Is it the rule, in such a case, that the owner could only proceed at his peril to effect the sale and pay the commission to the broker thus closing the sale, for the reason that, under such circumstances, it is not a question of law, but one of fact, to be determined under the particular circumstances of the case, as to whose efforts were the primary, proximate, and procuring cause of the sale?"

Under the above authorities and the principles therein ruled we answer the above question in the affirmative.

[3] 3. The Court of Appeals propounds this question:

"In such a case, does the mere fact that a broker was the first to interest the purchaser in the property, to the extent that he began negotiations for a purchase, which continued until a sale was effected to the same customer through another broker, render the owner liable, as a matter of law, for commissions to the first broker, as the one whose efforts must be taken to be the procuring cause of the sale, although the owner commits no act of bad faith toward the first broker, but merely knows that he found the prospect and was the first to begin negotiations?"

Under the facts stated in the first question and in this question, would the owner, as a matter of law, be liable to the agent for his commissions? According to the case as stated, one broker, with the knowledge of the owner, interested a customer in the purchase. While the negotiations between the purchaser and this broker were still pending, the owner proceeded to close the sale with the purchaser through another broker. The relation between the owner and the first broker had not been terminated, but continued until a sale was effected to the customer through the second broker. The second broker first presented the customer as ready, able, and willing to buy, and actually offering to buy, at the price and on the terms stipulated by the owner, and the owner had committed no act of bad faith in the transaction. Under these circumstances, would the owner be liable as a matter of law to pay the first broker his commissions?

[9] The general rule is that, where the owner of property employs a broker to sell the same, in order to earn his commissions the broker must procure a purchaser who is able, ready, and willing to buy, and who actually offers to buy, on the terms stipulated by the owner. *Phinlzy v. Bush*, 129 Ga. 479, 59 S. E. 259; Civil Code, § 3587. Where a broker employed to negotiate a sale of a parcel of land procures a purchaser ready, able, and willing to purchase upon terms satisfactory to the principal, the principal cannot defeat the broker's right to commission by taking the proceeding out of the hands of the broker and completing the sale himself. *Gresham v. Connally*, 114 Ga. 906, 41 S. E. 42. The same result would follow if the owner dealt with the customer through another broker. *Jennings v. Trummer*, 52 Or. 149, 96 Pac. 874, 23 L. R. A. (N. S.) 164, 132 Am. St. Rep. 680. Which of two brokers, both of whom are employed to sell a piece of real estate, and who expended effort in attempting to sell the same, is the procuring cause of the sale, is usually a question of fact for the jury. *Rosenfield v. Wall*, 94 Conn. 418, 109 Atl. 400, 9 A. L. R. 1189; *Jennings v. Trummer*, 52 Or. 149, 96 Pac. 874, 23 L. R. A. (N. S.) 164, 132 Am. St. Rep. 680; *Murray v. Currie*, 7 Car. & P. 584, 2 Eng. R. C. 527; *Doonan v. Ives*, 73 Ga. 295.

We understand, from the questions pro-

pounded by the Court of Appeals, that that court inquires, and wishes instructions, whether, under the facts stated in such questions, either of these two brokers, as a matter of law, is entitled to commissions for the sale of this property; and not whether a finding in favor of either broker would be contrary to the evidence or to the law. So understanding the purport of these questions, we answer the third question in the negative.

[5] There appear in the record other facts which may or may not make a case for the plaintiff, and which may or may not demand, as a matter of law, a finding in his favor. It appears that the plaintiff took the prospective customer to the premises on Saturday, before any sale was effected; and on that day the defendant took the first broker and this customer over the premises. This inspection of the premises and this interview between the purchaser and the owner, in the presence of the first broker, resulted in an understanding, according to the contention of the plaintiff, by which the wife of the purchaser was to see this property on the following Sunday afternoon. The customer was to see the plaintiff about the purchase of this property on the next Monday. On Saturday night the first broker called up the owner, and informed her that the purchaser made an offer for this property, less than her price, which she declined. The purchaser said he would give the owner's price, if his wife was pleased with the property; but it does not appear that this fact was communicated to the owner. On the following Sunday afternoon, after the above inspection of this property, by the purchaser, the latter went out to see the same. At that time the second broker was at the premises, showing the same to other customers. It appears that the second broker told the owner that she need not be uneasy about selling this property, and that if she did not sell it he would buy it. On this occasion the customer asked the owner if she had sold the house, and she replied that she had not, but to the first one who came to her with a check the next day she would sell the same. On the next day the second broker went to the house of the owner, and informed her he had sold the premises. The owner states that she did not know who the purchaser was, or why he switched from the first broker to the second broker, and on this subject the record is silent; but the owner did transfer to the customer of the first broker her bond for title under which she held the premises.

It has been held that where the owner of real estate closes a deal with a customer of a real estate agent, through other agents, and at a lower price than was named to the first agent, while the latter's authority is unrevoked, and he is still working with the customer at the price named to him, he must pay

the agent his commission. *Hogan v. Slade*, 98 Mo. App. 44, 71 S. W. 1104; *Holland v. Vinson*, 124 Mo. App. 417, 101 S. W. 1131; *Clifford v. Meyer*, 6 Ind. App. 633, 34 N. E. 23; *Grove Realty Co. v. Adair*, 26 Ga. App. 220, 105 S. E. 735.

But as these additional facts are not embraced in the questions propounded, this court does not undertake to say what weight should be given them, or whether they, with the facts stated in the questions propounded, demand a verdict for the plaintiff.

[4] The Court of Appeals propounds this question:

"(a) If an affirmative answer is given to the second question, has a petitioner for certiorari in a case in the municipal court of Atlanta, who has made no motion for new trial in the municipal court nor appealed to the appellate division thereof, the right to urge that a finding and judgment rendered by that court, on a trial without a jury, is contrary to the weight of the evidence? (b) Does the act establishing the municipal court of Atlanta (Ga. L. 1913, p. 145), and especially subdivisions (a) and (b) of section 42 thereof, deny such a right to a petitioner in certiorari in such a case?"

A petitioner for certiorari in a case in the municipal court of Atlanta, who has made no motion for a new trial therein, nor appealed to the appellate division thereof, has no right to urge that a finding and judgment in that court, on a trial without a jury, is contrary to the weight of evidence. Section 42, paragraph (a) of the act creating the municipal court of Atlanta (Ga. L. 1913, pp. 145, 167) provides:

"Upon the rendition of a verdict of a jury in said court or upon the announcement of judgment by the court in a case tried without a jury, any party to said cause, or his counsel, may make an oral motion for a new trial in the said court and unless an oral motion for a new trial shall be made upon the rendition of judgment or the finding of a verdict, the parties shall be held to have waived their right to move for a new trial, except upon the grounds upon which extraordinary motions for new trial may be made. * * * Should the court grant said motion upon any ground, there shall be no appeal from such judgment granting a new trial and the case shall stand for new trial, *de novo*."

[10] This paragraph means that when a party fails to make the oral motion for new trial therein provided for, he shall be held to have waived his right to move for a new trial in said court. But a failure to make said motion, or, if overruled, to appeal therefrom, as is provided in paragraph (b) of said section, does not strip such party of his right to apply for the writ of certiorari. *Johnston v. Brenau College-Conservatory*, 146 Ga. 182, 91 S. E. 85.

In a case in the municipal court of Atlanta, where no jury is demanded and the trial judge passes upon the issues of law and fact

involved and renders judgment, that judgment or the judgment of the trial judge overruling an oral motion for a new trial may be reviewed by certiorari, without first taking an appeal to the appellate division of that court from the judgment on the oral motion for a new trial. *Taylor v. Mutual Benefit Ass'n*, 146 Ga. 660, 92 S. E. 47.

Subdivision (b) of said section provides that, should the trial judge deny such oral motion for a new trial, an appeal will lie to the appellate division of said court, except upon two grounds: (1) That the verdict found or judgment rendered is contrary to the evidence and the principles of equity; and (2) that said verdict or judgment is decidedly and strongly against the weight of the evidence; which excepted grounds for new trial shall not be otherwise urged than in such oral motion, "and as to which excepted grounds the order denying" the oral "motion for new trial shall be conclusive, and such ground shall not be urged upon appeal from such order, nor by writ of error." This court has held that—

"Subdivision (b) of section 42 [of this act] denies to a petitioner in certiorari, or a plaintiff in error seeking a review in the Court of Appeals, the right to urge the question of sufficiency of the evidence as a ground for reversal." *Johnston v. Brenau College-Conservatory*, supra.

That was a decision by a full bench of this court, and is controlling. On the strength of that decision we answer paragraph (a) of question 4 in the negative, and paragraph (b) of said question in the affirmative.

All the Justices concur.

(153 Ga. 75)

HAND v. MATTHEWS. (No. 2532.)

(Supreme Court of Georgia. March 1, 1922.)

(Syllabus by the Court.)

1. Mortgages \S 37(2) — Conveyance can be shown to be security by parol, when vendor in possession; that contract relinquishing right in property and taking option to repurchase was security could be shown by parol.

Instruments conveying land, however clear and unambiguous, can always be shown by parol evidence to have been made to secure debt, where the vendor remains in possession.

2. Sufficiency of evidence.

There was evidence authorizing the court to submit to the jury the issue whether the title of the plaintiff to the land in dispute was absolute or was made only to secure debt, and to instruct the jury, in case they found it to be to secure debt, that upon the payment of the debt so secured and interest the defendant would be entitled to redeem the land.

3. New trial \S 39—Trial \S 250—Giving of inapplicable instructions, submitting issue not made by pleadings or evidence, requires new trial; instructions submitting question whether option had been exercised erroneous, without pleading or proof.

Instructions inapplicable to the pleadings and the evidence should not be given to the jury; and, where such instructions submit to the jury an issue and a theory not supported by the pleadings and evidence, a new trial will be granted.

4. Mortgages \S 605 — Cross-action for accounting not defeated by want of tender, when there is offer to pay whatever is found due.

In an equitable cross-action by the defendant for accounting for rents received by the vendee in a security deed, who is seeking to recover the premises thereby conveyed, and for which he is accountable, such cross-action will not be defeated for want of tender of the principal and interest of such debt, where the defendant offers to pay whatever amount is found due after the plaintiff accounts for rents of the premises with which he is chargeable. *Jones v. Laramore*, 149 Ga. 825, 102 S. E. 528; *Mayer v. Waterman*, 150 Ga. 613, 104 S. E. 497.

(Additional Syllabus by Editorial Staff.)

5. Appeal and error \S 1033(5) — Instruction as to invalidity of contract held more favorable to plaintiff than to defendant.

Where plaintiff, to whom W. transferred a title bond as security, canceled the debt, took a release of W.'s interest, and gave him an option to repurchase, an instruction that, if this transaction was void for inadequacy of consideration, etc., it would place title in plaintiff as security, if erroneous, was more favorable to plaintiff than to defendant, and he could not complain thereof.

6. Mortgages \S 608½—Instruction held not to give impression that contract might be valid as security, though invalid as conveyance.

Where one holding a title bond as security canceled the debt, took a release of the debtor's interest, and gave him an option to repurchase, an instruction that, if this contract was invalid for inadequacy of consideration, etc., it would place the title in plaintiff as security, held not erroneous, as conveying the idea that the contract might be valid as security for a debt, but invalid as a conveyance.

7. Mortgages \S 199(3)—Vendee, giving option to repurchase, entitled to rents, in absence of contrary agreement.

If one holding a bond for title as security, and taking a release of the debtor's interest, bought the land absolutely, and only gave the other a right to rebuy it, he was entitled to the rents, under Civ. Code 1910, § 3692, in the absence of any arrangement that the other was to have the land free from rent during the life of the option.

8. Mortgages \S 602—Mortgagor's administrator entitled to redeem on payment of debt, with interest, less rents.

If a transaction whereby one holding a bond for title as security canceled the debt, took a

release of the debtor's interest, and gave him an option to repurchase, was merely to secure the debt, the debtor's administrator was entitled to redeem on paying the debt due, with interest, less any rents received by the creditor.

Error from Superior Court, Fayette County; W. E. H. Searcy, Jr., Judge.

Suit by Lee Hand against A. L. Matthews, administrator. Judgment granting plaintiff insufficient relief, and he brings error. Reversed.

Lee Hand brought suit against A. L. Matthews, as administrator of Samuel Westmoreland, and made this case: He is the owner of a described tract of land. This land formerly belonged to Westmoreland, who, on October 20, 1909, deeded the same to K. B. Banks to secure a debt due by the former to the latter. Banks delivered to Westmoreland his bond for title, conditioned to reconvey to the latter on the payment of said debt. On January 21, 1913, Westmoreland transferred said bond to Hand to secure a debt due by the former to Hand, amounting to \$1,025.61. On December 21, 1914, Westmoreland, being unable to pay his debt to Banks and his debt to Hand, entered into a written contract with Hand, by which Hand was to pay his debt to Banks, amounting to \$644.15, and Hand delivered to Westmoreland his notes, representing said indebtedness, and satisfied his own debt due by Westmoreland, and delivered to the latter the notes representing said debt, then amounting to \$1,119.05, and Westmoreland, in consideration of the satisfaction of said debts, relinquished all his right, title, and interest in said land, except as hereinafter set out. Westmoreland delivered possession of said land to Hand. At the date of this contract Hand gave to Westmoreland an option to purchase back said land for \$1,763.20, being the price which Hand had paid Westmoreland for the same. This option was to expire January 1, 1916. Under the above bond for title, so transferred to Hand, and by virtue of said contract, Banks delivered to Hand a deed to said land. Matthews, as administrator of Westmoreland, under some pretended claim, in violation of the rights of the plaintiff, rented said premises for the year 1916 to two tenants for 2,500 pounds of lint cotton, of the value of \$225. Hand has demanded the rent from these tenants, and they refused to pay it. The estate of Westmoreland is insolvent, and, if the administrator is permitted to collect said rents, Hand would be remediless to enforce his rights to them. He prays that his title and possession of said lands be confirmed, that the administrator be enjoined from interfering with his possession and collecting said rents, and that a receiver be appointed.

The defendant answered, in brief, as follows: He denied the title of the plaintiff to said lands. Said lands belonged to said Westmoreland at the time of his death on July 25, 1915. The deed from Westmoreland to Banks was void, because tainted with usury. The bond for title from Banks to Westmoreland, and its transfer by Banks to the plaintiff, were parts of the usurious transaction, and were likewise void. The deed from Banks to the plaintiff is likewise void for usury. When the contract between Westmoreland and the plaintiff was made, it was the intention of both that the plaintiff was to take up the Banks deed and notes, and hold the deed from Banks as security for Banks' debt and his own. Westmoreland never did surrender possession of the land to plaintiff, never attorned to him as tenant, and remained in possession until his death. At the time of his death Westmoreland was about 80 years of age. At the time he signed said alleged contract he was very old and feeble, was scarcely able to walk, was almost blind, was an ignorant old negro, and for more than a year before his death was utterly incapable of understanding the nature and consequences of his acts in making any contract. After the death of Westmoreland, the plaintiff applied to this court, and was appointed receiver for the crops growing on said lands in 1915. He took possession of said crops, amounting to \$1,000, and the same should be credited on his debt for \$17,763.20, which he claims against Westmoreland. By amendment it is alleged that he offered to pay the plaintiff the principal of the original debt due to Banks, with 8 per cent. interest thereon from December 21, 1914. Hand is an unusually intelligent business man. Said land is worth \$4,000. For this gross inadequacy of consideration, coupled with great mental disparity, such contract should be declared void.

On the trial the jury rendered a verdict, finding for the defendant this land, and for the plaintiff \$1,763.20 principal and \$810.97 interest. There was evidence from which the jury could find that the deed and contract under which the plaintiff held was made to secure debt, that the intestate of the defendant was mentally incapable of making the contract upon which the plaintiff relies for title, and that the defendant as administrator had offered to pay the plaintiff the principal of his intestate's debt, with interest thereon from December 21, 1914. The plaintiff moved for a new trial. The motion was overruled, and error was assigned upon this judgment.

Hall & Jones, of Newnan, for plaintiff in error.

J. W. Culpepper, of Fayetteville, H. A. Allen, of Atlanta, and Reagan & Reagan, of McDonough, for defendant in error.

HINES, J. (after stating the facts as above). [1] 1. In the first ground of the amendment to the plaintiff's motion for a new trial it is alleged that the court erred in the following charge to the jury:

"If you believe from the evidence that the contract for the sale of the land was made by Samuel Westmoreland to Mr. Lee Hand, December 21, 1914, was made for the purpose of securing a debt, and was not intended to convey absolute title to Lee Hand, then, upon the payment of the debt and interest on it, the defendant would be entitled to recover the land."

It is insisted that this charge was not adjusted to the facts, and submitted a theory unsupported by any substantial evidence in the case, for which reason it was misleading to the jury and prejudicial to the movant. It is urged that the option and contract executed by the parties on December 21, 1914, are plain and unambiguous, and that the undisputed evidence shows that when said papers were executed Hand delivered to Westmoreland all notes and evidences of debt held by him against Westmoreland, showing a cancellation of said debts and a purchase of the property, with an option to Westmoreland to buy the same back by a given time by the payment of a given sum. Movant insists that these facts show that the transaction was completely changed from that of a loan, secured by a deed to land, to that of one putting title in Hand, with an option to Westmoreland to rebuy. Standing alone, this contention would be good; but Westmoreland remained in possession, and there is evidence in the record that Hand stated, after Westmoreland's death, that the papers which he held to the land were to secure the indebtedness of Westmoreland to Banks, which he had taken up, and Westmoreland's debt to himself. So long as a party remains in possession of land, he can show that conveyances made by him of his land were mere security for debt, and upon the payment thereof he will be entitled to redeem.

[2] Where a grantor executes a deed absolute in form and remains in possession of the land, parol evidence is admissible to show that the deed was intended as security only, and such evidence does not offend the rule which makes inadmissible parol evidence to vary the written terms of an absolute deed. *Askew v. Thompson*, 129 Ga. 325, 58 S. E. 854; *Mercer v. Morgan*, 136 Ga. 632, 71 S. E. 1075; *Lowe v. Findley*, 141 Ga. 330, 81 S. E. 230; *McNair v. Brown*, 147 Ga. 161, 93 S. E. 289. If in the face of an absolute deed the maker can by parol evidence show that it was made only to secure a debt, we see no reason why in this case it cannot be shown by parol evidence that the contract between Hand and Westmoreland, by which the former claims title to the land in dispute, was given only to secure a debt. It was the prov-

ince of the jury to determine, under the facts, which contention was true; and, they having found against the plaintiff, we cannot say that their finding was without evidence to support it. The charge complained of was adjusted to the evidence, and could not mislead the jury.

[5] 3. In the second special ground it is urged that the court fell into error in this charge:

"If you find there was gross inadequacy of consideration, coupled with great mental disparity of intellect, or that at the time Westmoreland was of unsound mind—of an unsound mind within the meaning of the law—and was incapable of making a contract, and find the contract was not binding upon him, the execution of the contract would place into Hand the title to the property in dispute as security for his debt, and defendant would be entitled to recover the premises in dispute on the payment of the debt of \$1,763.20, together with interest on from December 21, 1914, to this date."

The plaintiff insists that this was inapt and misleading under the evidence in the case. He urges that if the contract of December 21, 1914, between Hand and Westmoreland was void for either of the reasons set out in this charge, then this contract would not place in Hand the title to the property in dispute as security for his debt. We are not called upon to determine whether this charge was an accurate statement of the law in reference to the rights of Westmoreland; but it was more favorable to the plaintiff than to the defendant. The plaintiff in error cannot complain of instructions prejudicial to the defendant in error. He will be never heard to complain of an instruction which is more favorable to him than it ought to have been. *Ausley v. Cummings*, 145 Ga. 750, 89 S. E. 1071.

[6] But it is insisted by counsel for the plaintiff that the above charge conveyed to the jury the idea that this contract might be valid as placing the title in Hand as security for his debt, but invalid as conveying an absolute title with an option to Westmoreland to buy back. We do not see how the jury could have gotten this idea from this charge, in view of the entire charge of the court. The court distinctly instructed the jury that the plaintiff contended that he was the owner of this tract of land, and that the contracts and deeds offered in evidence by him would entitle him to recover in this case, unless the defendant by a preponderance of the evidence showed that he was not entitled to recover. Under this charge, the jury could not have gotten the idea that this contract was valid as a security for debt, but invalid as a conveyance of title to Hand.

[3] 4. In the third ground the plaintiff complains of this charge:

"If you find in favor of the plaintiff, that this was a valid contract, that Westmoreland was mentally able to make a contract, that he was

a sane person as defined to you, and did make this deed, and that there was no gross inadequacy of consideration, coupled with disparity of intellect, that it was a legal and binding obligation, then that would pass absolute title to Mr. Lee Hand, and you would find in his favor, and the form of your verdict would be, 'We, the jury, find for the plaintiff the premises in dispute,' unless you find that during the life of the option, between the 21st of December, 1914, and the 1st of January, 1916, that the right granted in the option to Westmoreland was exercised by the administrator * * * of Westmoreland."

The plaintiff insists that the latter portion of this charge, beginning with the word "unless," submitted and suggested an issue to the jury without support by the evidence and without pleadings to authorize it, for which reason it confused and misled the jury, to the prejudice of the plaintiff. There were no pleadings on the part of the defendant that he, as the administrator of Westmoreland, had undertaken to exercise the option given to Westmoreland to buy back this land by January 1, 1916. There was no evidence that the administrator had undertaken to exercise this option before it expired. There is evidence that, prior to January 1, 1916, the administrator offered to pay to the plaintiff \$1,763.20, the price at which Westmoreland agreed to buy this land under this option, with interest thereon from the date of said option, less the rents received by the plaintiff from this land for the year 1915.

[7] If the plaintiff had in fact bought this land from Westmoreland absolutely, and had only given Westmoreland the right to rebuy it, then the plaintiff would have been entitled to the rents of this place at the time of his purchase, unless under some arrangement he was to have the land free of rent during the life of the option. When title is shown in the plaintiff, and occupation by the defendant, an obligation to pay rent is generally implied. Civil Code, § 3692. But there is nothing in the evidence to show that Westmoreland was not to pay rent. There is evidence to the effect that Westmoreland worked this land during the year of 1915 under the direction of the plaintiff, which would hardly be the case if he was not to pay rent therefor. Instructions inapplicable to the pleadings and evidence should not be given; and where a charge gives a party the benefit of a material defense not set up in the pleadings, and without evidence to support it, a new trial must result. *Southern Marble Co. v. Pinyon*, 144 Ga. 259 (2), 86 S. E. 1086.

5. The plaintiff complains, in the fourth ground, of another charge, in which the court submitted to the jury the question whether the defendant had tendered to the plaintiff the amount due upon the option according to its terms. This charge, as the

one set out in the third ground, gave the defendant the benefit of a defense not set up in his answer, and not supported by the evidence. For the reasons stated in dealing with the last ground, this was an error, which requires the grant of a new trial.

[8] If the papers under which the plaintiff claims title to this land were given merely to secure a debt due by Westmoreland, then Matthews, as administrator of Westmoreland, would be entitled to redeem the land by paying the debt due by Westmoreland to the plaintiff, with interest, less any rents which the latter received for the land for the year 1915, or since that time. On the other hand, if the plaintiff owned this land absolutely, and had only given Westmoreland the right to rebuy it by January 1, 1916, then the plaintiff would be entitled to recover in this case, unless the administrator offered to exercise the right given to his intestate under this option to buy back his land, by paying to the plaintiff the price agreed on for the repurchase of this land by Westmoreland by January 1, 1916.

[4] 6. The fourth headnote needs no elaboration.

Judgment reversed.

All the Justices concur.

(153 Ga. 29)

WARD v. SPEER et al. (No. 2477.)

(Supreme Court of Georgia. Feb. 22, 1922.)

(*Syllabus by the Court.*)

1. Usury \Rightarrow 119—Question held for the jury.

The plaintiff, claiming under a junior security deed from W. F. Hogg to him, filed his equitable petition attacking a prior security deed from W. F. Hogg to the Eady-Baker Grocery Company, on the ground that the latter deed was tainted with usury and void, and prayed that this prior security deed might be canceled, in order that he might have funds arising from the sale of the lands embraced in both deeds applied to his debt secured by his junior deed. The plaintiff introduced evidence showing that on the book accounts between Hogg and the Eady-Baker Grocery Company, between 1902 and June 13, 1914, inclusive, there were various items charged to Hogg under the language, "Interest 10 per cent." The Eady-Baker Grocery Company claimed that, under an agreement between it and Hogg, the latter was to pay the cash prices of merchandise plus 10 per cent., at the time prices of goods bought by him from this company. In some instances this 10 per cent. was charged on balances brought forward from year to year. On June 16, 1914, these book accounts were balanced by a cash payment of \$2,590.70, and closed. The defendants introduced a note from Hogg to this company, for \$6,130.88, dated November 25, 1907, and secured by a mortgage of even date, and a note from Hogg to this company, for \$6,130.88, dated June 15,

1914, secured by a deed of even date. Neither of these notes was charged in the accounts of Hogg appearing on the books of this company. There was no direct proof that this note of Hogg to this company embraced any part of these accounts, or that there was usury in it; but, at the most, proof of circumstances, not strong enough to authorize this court to draw that conclusion, but from which the jury might or might not draw that conclusion. There was no proof of the consideration of this note, except such circumstances. *Held*, that this court cannot, as a matter of law, hold that a verdict should have been returned finding that the security deed of this company was tainted with usury and void.

2. Continuance \Leftrightarrow 17, 22—Forcing plaintiff to trial before production of all documents called for not abuse of discretion; proceeding with trial before time for examination of books held not error.

The court did not abuse its discretion in "forcing" the plaintiff to go to trial before the production of all the books and other documentary evidence mentioned in his notice to the defendants to produce, it not appearing that these books and documents were not produced during the trial, and the character and relevancy of their contents not being shown; nor did the court err in requiring counsel to proceed with the trial before he had time to examine these books, a previous order of the court having been passed allowing plaintiff to examine these books, and an examination thereof having been made by an accountant for the plaintiff before the trial, and no excuse being shown why his counsel had not examined the same prior to the time the case was called for trial.

3. Evidence \Leftrightarrow 158(28)—Testimony as to meaning of ledger entry held properly admitted.

The court did not err in admitting, over the objection of counsel for the plaintiff, the evidence set out in the seventh ground of the amendment to the motion for new trial.

4. Appeal and error \Leftrightarrow 1075—Abandoned grounds not considered.

Counsel for the plaintiff having expressly abandoned the fifth, sixth, and eighth grounds of the amendment to the motion for new trial, the same are not considered.

Error from Superior Court, Troup County; J. B. Terrell, Judge.

Suit by W. A. Ward against G. A. Speer and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. A. Ward filed his petition against Smith, sheriff of Troup county, Eady-Baker Grocery Company, the Troup Company, George A. Speer, J. G. Oglesby, Jr., and W. F. Hogg, and made the following case:

On January 4, 1915, W. F. Hogg was indebted to the plaintiff in the sum of \$10,369.82, and to secure payment of this sum he executed and delivered to Ward his deed conveying certain lands, subject to a prior mortgage

deed to the Penn Mutual Life Insurance Company for \$14,300, and to a mortgage deed in favor of Eady-Baker Grocery Company, on which there was due approximately \$15,000, and one to the Troup Company, on which was due about \$8,000. On May 30, 1914, said Hogg, for the purpose of securing an indebtedness to George K. Johnson and J. W. Hamer, as trustees, executed and delivered to them deeds of conveyances to the same tracts of land embraced in said deed to Ward. These trustees obtained judgment on said indebtedness against Hogg, and sold all the lands embraced in their deeds, except the home place of Hogg, containing 240 acres. From the proceeds of this sale the judgment of said trustees was paid in full, and a balance was left in the hands of the sheriff. On June 15, 1914, Hogg executed and delivered to Eady-Baker Grocery Company his deed to the lands so conveyed to said trustees. This deed is alleged to have been given to secure the sum of \$6,130.88. The latter company obtained a judgment against Hogg on said indebtedness. The debt or demand of the said Eady-Baker Grocery Company against Hogg is and was infected with usury, and the deed to secure its payment is therefore void. Eady-Baker Grocery Company is claiming under its deed the remainder of the proceeds arising from the sale of Hogg's lands embraced in the above deeds under the judgment of said trustees. On November 13, 1914, Hogg executed and delivered to the Troup Company his deed conveying to the said company, to secure \$8,000, certain real estate therein described, embracing some of the tracts of land conveyed as above to the plaintiff. The Troup Company has reduced its claim to judgment, and claims a lien superior to that of plaintiff upon the lands embraced in his security deed. The debt due by Hogg to the Troup Company is tainted and affected with usury, and by reason thereof the deed from him to this company is void. The *fi. fa.* issued upon the judgment in favor of the Eady-Baker Grocery Company against Hogg has been assigned and transferred to George A. Speer, who bought the same after maturity, and is chargeable with all the equities to which his assignor was subject.

The plaintiff is entitled to the fund remaining in the hands of the sheriff after the satisfaction of the *fi. fa.* in favor of Johnson and Hamer, trustees. Speer, transferee of the Troup Company, is threatening to levy upon said home place of Hogg. Plaintiff prays that the sheriff be restrained from paying out any of the proceeds of the sales of the lands of Hogg; that the Eady-Baker Grocery Company, Speer, and the Troup Company be enjoined from interfering with the present status, and from proceeding to transfer or levy or enforce any of their said claims against Hogg; and that the deed from Hogg

to Eady-Baker Grocery Company and from Hogg to the Troup Company be decreed to be null and void. By amendments the plaintiff set up the various items of usury embraced in the indebtedness of Hogg to Eady-Baker Grocery Company; that on March 4, 1919, he obtained judgment on his indebtedness against Hogg for \$14,001.93; that the note of Hogg to Eady-Baker Grocery Company for \$8,100.80 is void by reason of the fact that the sum of \$900.35 was paid on said note at the time of its execution, as a scheme and device by which a greater sum might be collected than allowed by law; that various payments were made on said note, aggregating \$1,145.84, which by error were included in the judgment on said note; that Hogg is insolvent; that there is embraced in said note \$3,003 of usury; and the plaintiff prayed that said company and Speer be compelled to receive only the principal and legal interest due upon the *fi. fa.* issued upon the judgment obtained upon said notes. By another amendment he alleged that at the time Hogg executed said note to Eady-Baker Grocery Company he was indebted to said company in the sum of only \$4,048.81, and that the balance of said note was without consideration.

Speer answered, denying usury in Hogg's note and security deed to Eady-Baker Grocery Company, and denying all payments on said note alleged by plaintiff. He denied that the plaintiff was entitled to the proceeds from the sales of Hogg's lands in the hands of the sheriff. He further set up that Ward received his deed from Hogg, subject to the indebtedness of Hogg to Eady-Baker Grocery Company.

On the trial the issues involved were submitted to the jury upon questions, and they found that the deed from Hogg to Eady-Baker Grocery Company was not infected with usury, that there was no overcharge or error in the amount claimed on the *fi. fa.* in favor of Eady-Baker Grocery Company against Hogg, and that the items of 10 per cent., which were added to the account of Hogg, were not interest, but made to cover the credit price of goods sold. The plaintiff filed his motion for new trial, on the general grounds. By amendment he added five grounds, numbered 4, 5, 6, 7, and 8. In the fourth ground he complained that the court forced him to trial before all of the books and other documentary evidence mentioned in his notice to produce had been produced (the notice to produce called for all books of Eady-Baker Grocery Company from 1902 to 1914, inclusive), and that the court erred in requiring plaintiff's counsel to proceed to trial without an opportunity to examine said books. An order had been granted by the court allowing the plaintiff to examine these books, which had been previously done by an auditor acting for the plaintiff.

The fifth, sixth, and eighth grounds of the amended motion are expressly abandoned by the plaintiff's counsel in his brief. In the seventh ground the plaintiff complained that the court erred in permitting S. M. Fuller to testify as to the purpose and meaning of an entry of \$4,084.81 upon the ledger of the Eady-Baker Grocery Company on August 29, 1917, and to testify in answer to a question if this entry referred to the amount he got on the *fi. fa.* Counsel for plaintiff objected to this testimony, on the ground that the writing was the highest and best evidence.

Richard B. Russell and Robt. L. Russell, both of Atlanta, and Henry Reeves, of La Grange, for plaintiff in error.

Hatton Lovejoy and L. B. Wyatt, both of La Grange, for defendants in error.

HINES, J. Judgment affirmed. All the Justices concur.

(153 Ga. 160)

HIGHTOWER et al. v. HADDOCK et al.
(No. 2963.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

Mortgages ~~¶~~ 224—Assignment of security deed held to transfer title with all rights of assignor for enforcing collection of debt.

J. D. Haddock brought ejectment against Charles and Gene Hightower. After evidence had been introduced and both sides had closed, the court directed a verdict for the plaintiff, and judgment was entered thereon. The defendant filed a motion for a new trial, on the general grounds, and also on the special ground that the testimony adduced in the trial, with all reasonable deductions therefrom, did not demand a verdict for the plaintiff. The brief of evidence shows that Gene Hightower executed to the Citizens' Bank of Blakely a security deed containing a power of sale and a provision that the person exercising the power might become the purchaser at the sale, and that "a transfer of said indebtedness by contract or operation of law shall operate to vest this power in the transferee," conveying the land in dispute, dated March 28, 1918, recorded May 15, 1918. A written transfer was entered on the back of this deed, as follows: "Georgia, Early County. For value received we hereby transfer and convey to John D. Haddock the within security deed, together with all right, title, and interest we may have in the property described therein. In witness whereof we hereunto set our hand and seal. Citizens' Bank [Corporate Seal], by R. O. Waters, Cashier. Signed, sealed, and delivered in the presence of R. C. Howell, John G. Butler, N. P., Early County, Georgia. [Seal.]" There also appears in the brief of evidence a warranty deed from Gene Hightower (signed by John D. Haddock, his attorney in fact), to John D. Haddock, dated July 13, 1919, recorded June 10, 1919, conveying the land in dispute; also, advertisement of sale of said land under power

of sale, showing that said advertisement was published as required under the terms of the security deed; also, warranty deed from Mrs. S. N. J. Sirmons to Gene Hightower, dated March 28, 1918, filed for record March 29, 1918. There was oral evidence tending to show the circumstances under which the foregoing instruments were executed; that the debt secured by the deed was due and unpaid and that there was no tender of payment; also, the death of Gene Hightower, the appointment of his administrator, and the making of such administrator a party to the suit. The court refused to grant a new trial, and the defendant excepted. The assignment by the Citizens' Bank of Blakely to John D. Haddock entered on the back of the security deed was executed with the formalities of a deed, and, though referring to the deed itself for a description of the property, was sufficient to transfer legal title to the land, and to authorize the transferee to exercise all of the remedies of the assignor or transferor for enforcing the collection of the debt. *Hunt v. New England Mortgage Sec. Co.*, 92 Ga. 720(1), 19 S. E. 27. The verdict for the plaintiff was demanded, and the court did not err in directing the verdict accordingly.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by J. D. Haddock and others against Charles Hightower and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Wm. I. Geer, of Colquitt, for plaintiffs in error.

Glessner & Collins, of Blakely, for defendants in error.

GILBERT, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 757)

RYALS v. WILSON. (No. 2521.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Evidence §372(4)—Recitals in old administrator's deed held sufficient to entitle to admission.

The court erred in refusing to admit in evidence the administrator's deed described in the facts reported herewith. The recitals therein, and its age, are sufficient, in the absence of proof to the contrary, to show that the judgment of the court of ordinary ordering the sale of the property was based upon a compliance with the provisions of law in such cases.

2. Ejectment §90(2)—Deeds in chain of title from the state admissible without proof of possession.

The court erred in refusing to admit in evidence other deeds in the chain of title (the chain beginning with a grant from the state

and connecting the plaintiff therewith) on the ground that possession had not been shown.

3. Nonsuit held erroneous.

The judgment of the court declaring a nonsuit, made necessary by reason of the rejection of the deeds mentioned in the foregoing headnotes, was erroneous.

(Additional Syllabus by Editorial Staff.)

4. Executors and administrators §363—Sale of land required to be held in county where situated.

Under Acts 1826, p. 98, a sale in 1853 on land in Decatur county by an administrator under an order granted by the ordinary of Elbert county was required to be held at the place of public sales in the county where the real estate lay.

5. Appeal and error §232(2)—Only objections to deeds shown by bill of exceptions could be considered.

Where the bill of exceptions stated that deeds "conveying" the land in controversy were offered and excluded on certain grounds, the appellate court cannot consider other reasons justifying their exclusion, as that they were defective in execution, not recorded, and the like.

Error from Superior Court, Decatur County; R. C. Bell, Judge.

Action by Hollis Ryals against Peter Wilson. Judgment for defendant, and plaintiff brings error. Reversed.

Hollis Ryals brought a common-law action of ejectment against Peter Wilson, to recover a 50-acre tract in the northwest corner of lot of land No. 218 in the Sixteenth district of Decatur county. To this action the defendant filed a plea of not guilty. The case proceeded to trial, and after the introduction of evidence by the plaintiff the court granted an order declaring a nonsuit. The plaintiff excepted. The evidence submitted by the plaintiff was all documentary. The bill of exceptions recites as follows:

"The plaintiff offered in evidence the following documents, to wit: Plat and grant from the state of Georgia to Henry Bourne, dated November 26, 1842, to lot of land No. 216 in the Sixteenth district of Early county, Georgia. Certified copy of order of the court of ordinary of Elbert county, dated April 5, 1852, appointing Thomas I. Turman as administrator of the estate of Henry Bourne. Certified copy of the following order from the minutes of the court of ordinary of Elbert county, to wit: 'It appearing to the court that the notice required by law has been given, and no cause having been shown to the contrary: It is ordered by the court that Thomas I. Turman, administrator of the estate of Henry Bourne, dec'd, be and he is hereby authorized to sell all the lands belonging to the estate of said Henry Bourne, deceased, late of Elbert county, this 2d day of August, 1852.' (Minutes of Court of Ordinary, Elbert County, Georgia, 1849-1853, pp. 214-232.) Which three men-

tioned documents were by the court admitted in evidence. Plaintiff offered in evidence the following deed, to wit: Administrator's deed executed by Thomas I. Turman, administrator of Henry Bourne Estate, to S. S. Mann, dated November 1, 1853, and executed in the county of Decatur, conveying lot of land No. 218 in the Sixteenth district of Decatur, formerly Early county, Ga., and reciting an order of the court of ordinary of Elbert county on the 2d day of August, 1853, for the sale of the real estate of grantor's intestate (legal notice of the application being given in one of the public gazettes of this state for two months previous to the granting of the order aforesaid), and whereas the said Thomas I. Turman, as administrator aforesaid, having first given 40 days' notice of said sale and of the time and place thereof in one of the public gazettes of this state, to wit, the Chronicle and Sentinel, and at the courthouse in the county of Decatur, did on the 1st day of November, 1853, at the place of public sales in said county of Decatur aforesaid, expose to sale at public outcry under and by virtue of the order aforesaid the premises hereinafter mentioned, etc.

"Defendant objected to the admission of said deed in evidence, upon the grounds: (1) That there was no proper application for the sale of the specified land conveyed by the deed. (2) Because there was no proper order of the court of ordinary of Elbert county, authorizing the sale of lot of land No. 218 in the Sixteenth district of Decatur county. (3) Because said land was sold in Decatur county, Ga., when the administration upon the estate was had in Elbert county, Ga., and there was no order of the court of ordinary of Elbert county authorizing the advertisement and sale of said land beyond the limits of Elbert county, Ga. (4) Because said deed was void for want of authority on the part of the administrator to sell said land. The court sustained said objections and excluded said deed from evidence, to which ruling and judgment plaintiff in error then and there excepted and here and now excepts and assigns the same as error because contrary to law. Plaintiff offered in evidence deed from S. S. Mann to Thomas Parker, dated November 22, 1894, conveying lot of land No. 218 in the Sixteenth district of Decatur, formerly Early county, Ga. Defendant objected to the admission of said deed, upon the ground that same was irrelevant and no possession was shown in grantor, which objection was by the court sustained and said deed excluded. To which ruling and judgment plaintiff in error then and there excepted, and here and now excepts and assigns error thereon, because contrary to law. Plaintiff offered in evidence deed from Thomas Parker to James Ryals, dated September 23, 1916, conveying lot of land No. 218 in the Sixteenth district of Decatur county, Ga. Defendant objected to said deed upon the ground that no possession was shown in grantor and no title, which said objection was by the court sustained and said deed excluded. To which ruling and judgment of the court plaintiff in error then and there excepted, and here and now excepts and assigns the same as error, because contrary to law. Plaintiff offered in evidence deed from James Ryals to Hollis Ryals, dated June 28, 1916, conveying 50 acres in the northwest corner of lot of land No. 218

in the Sixteenth district of Decatur county, Ga. Defendant objected to said deed upon the ground that no title and no possession was shown in grantor, which said objection was by the court sustained and said deed excluded. To which ruling and judgment of the court plaintiff in error then and there excepted and here and now excepts and assigns the same as error, because contrary to law. Upon motion of defendant's counsel the court ordered a nonsuit, to which ruling and judgment of the court plaintiff in error then and there excepted, and here and now excepts and assigns the same as error, because contrary to law, and because the plaintiff had shown a complete chain of title from the state, and because a prima facie case had been made out according to law."

J. C. Hale and W. V. Custer, both of Bainbridge, for plaintiff in error.

T. S. Hawes and H. G. Bell, both of Bainbridge, for defendant in error.

GILBERT, J. [1] 1. The court erred in rejecting the deed from Turman, administrator of the estate of Henry Bourne, to S. S. Mann. Civil Code 1910, § 4030, declares:

"The recital of a compliance with legal provisions in the administrator's deed shall be prima facie evidence of the facts."

This provision was contained in the Code of 1861, § 2520, and was the law of this state prior to the judgment granted in this case by the ordinary. *Clements v. Henderson*, 4 Ga. 148 (3), 48 Am. Dec. 216. The administrator's deed does not in terms recite that an application to sell was filed, but it does not negative the fact. It does recite that "the notice required by law has been given," and, in the absence of proof to the contrary, the ordinary will be presumed to have complied with the law. This judgment authorizing the sale of the land is more than 60 years old.

"The presumptions in favor of the regularity of a judgment increase with the lapse of years. It has been said that almost any reasonable presumption of fact will be conclusively indulged in order to sustain rights asserted under a decree which is 20 years old. To sustain an ancient judgment, time may authorize the presumption of an extraneous fact which the record does not contradict, and which it was not indispensable to the validity of the judgment that the record should exhibit." *Copelan v. Kimbrough*, 149 Ga. 683, 686, 692, 102 S. E. 162.

[4] Furthermore, at the time the order was granted by the ordinary of Elbert county, authorizing the sale of the land of the estate lying in Decatur county, the existing law provided that such lands be sold "at the place of the public sales in the county where such real estate may lie." Acts of 1826, p. 98. This has already been noted by this court in the case of *Patterson v. Lemon*, 50 Ga. 231 (2), 236. It should be noted that in the opinion, on page 236, by inadvertence the

act of the General Assembly was erroneously referred to as the act of 1816, when it should have been the act of 1825, which was an act amending the act of 1816.

[2, 3] 2. All other deeds in the chain of title, except the grant from the state, offered by the plaintiff, were rejected by the court, on the ground that no possession was shown in the grantor and because the deeds were irrelevant. The rejection of these deeds requires a reversal of the judgment granting a nonsuit. Though one objection was on the ground that the deed was irrelevant, we will assume that the court deemed all of the deeds inadmissible on the ground that no possession of the land was shown by the plaintiff or by any of the grantors named in the rejected deeds. "It is well established that, if the plaintiff in an action of ejectment or in the nature thereof relies on a record or paper title, he must show a regular chain of title from the government, or from some grantor in possession, or from a common source from which each of the litigants claims. No length of chain or paper title which does not reach the sovereignty of the soil is sufficient in itself to constitute prima facie evidence of title." 9 R. C. L. 848, § 15, and authorities cited in the footnote. In this case the plaintiff offered in evidence a complete chain of title, beginning with a grant from the state down to the plaintiff. The Civil Code (1910), § 3798, provides as follows:

"The title to all lands in this state originates in grants from the government; and, since its independence, from the state."

When a grant from the state is introduced, no proof of possession is required. It is when the chain of title is not connected with a grant from the state that possession in one of the grantors in the chain must be shown. *Dodge v. Irvington Land Co.*, 158 Ala. 91, 48 South. 383, 22 L. R. A. (N. S.) 1100, and annotations; *Krause v. Nolte*, 217 Ill. 298, 75 N. E. 362, 3 Ann. Cas. 1061; *Cottrell v. Pickering*, 33 Utah, 62, 88 Pac. 696, 10 L. R. A. (N. S.) 404, and annotations. Section 5586 of the Civil Code, which declares, "A plaintiff in ejectment may recover the premises in dispute, upon his prior possession alone, against one who subsequently acquires possession of the land by mere entry, and without any lawful right whatever," has no application to this case. In this case the plaintiff relies, not upon a bare possession, but upon a complete chain of paper title derived from the state of Georgia.

[5] The briefs of counsel for defendant in error mention other reasons why the deeds were inadmissible, such as that the deeds were defective in execution, were not recorded, and the like. We cannot consider the reasons stated in the brief of counsel which do not appear in the record in the case. The bill of exceptions contains the only state-

ment of the matter which we can consider. There it is stated in regard to each deed in question that plaintiff offered in evidence deed from a named grantor to a named grantee, "conveying" the land in question. Accepting this verification as the truth, the deeds which were offered by the plaintiff and rejected by the court had all requisites of valid deeds, and did in fact convey the land in question each from a predecessor in title to a subsequent predecessor in title.

Judgment reversed.

All the Justices concur.

(152 Ga. 750)

DE VAUGHN et al. v. GRIFFITH.
(No. 2508.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 204(4)—Receipt of affidavits subject to objection which was not made not ground for reversal.

The bill of exceptions assigns error on an interlocutory order refusing to appoint a receiver, and to enjoin a second sale of land by an administrator after a former sale had been set aside in accordance with the decision of this court in *De Vaughn v. Griffith*, 149 Ga. 697, 101 S. E. 794. *Held:*

The assignment of error complaining of the action of the court in receiving in evidence certain affidavits after the case was submitted shows no cause for reversal. It affirmatively appears that the affidavits were received subject to objection by the plaintiff in error; and it does not appear that he made any objection to the receipt of the affidavits, or that he was prevented from doing so by an action of the court or of opposing counsel.

2. Appeal and error \S 725(1)—Assignment of error, complaining of consideration of plea, insufficient when not showing demurrer or objection.

The assignment of error, complaining that the court erred in considering a plea of *res adjudicata*, fails to show that any demurrer or objection was filed or made to the plea, and is insufficient to require a reversal.

3. Appeal and error \S 728(1)—Assignment of error, not showing motion to rule out evidence or grounds of objection, insufficient.

Certain returns made by the administrator were admitted in evidence. The assignment of error, alleging that the court should have ruled the returns out of evidence, fails to state that the plaintiff in error moved to rule out the evidence, or upon what ground, if any, its admission was objected to before the trial court. The assignment of error is without merit.

4. No error in granting judgment.

Upon the pleadings and evidence properly before the court, the judge did not err in granting the judgment in favor of the defendant, upon which error is assigned.

Error from Superior Court, Douglas County; F. A. Irwin, Judge.

Action by Oscar De Vaughn and others against S. A. Griffith, administrator. Judgment for defendant, and plaintiffs bring error. Affirmed.

James & Bedgood, of Atlanta, for plaintiffs in error.

J. R. Hutcheson and Astor Merritt, both of Douglasville, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(158 Ga. 128)

NELSON et al. v. MADDOX GROCERY CO.
(No. 2926.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

Ejectment \S 65—Petition in action by heirs held insufficient, when not negating grant by ancestor or showing that he died seized of the land.

A. L. Nelson et al., as the sole heirs at law of Adam Nelson, brought an action for land against Maddox Grocery Company. The petition alleges, in substance, that the father of Adam Nelson died in 1872 or 1873, leaving a will, which was duly probated, the third item of which, devising the land in question, was as follows: "I give and devise to my son, Adam Nelson, and the heirs of his body, and in default of said heirs at the time of his death to my daughter, Delphia," described land, including the land sued for herein; that the testator held title to the land at the time of his death; that plaintiffs claim fee-simple title under their father, Adam Nelson, who died on April 4, 1915, leaving his wife, who is still in life, and plaintiffs, who are his children; that there has been no administration upon the estate of Adam Nelson; and that the defendant is in possession of the land and also claims under Adam Nelson. The court sustained a general demurrer to the petition, and the plaintiffs excepted.

The petition contains no allegation that Adam Nelson died seized and possessed of the land in controversy, nor does it negative a grant by him. It does allege that the defendant has possession and claims under him. The court did not err in sustaining the general demurrer and in dismissing the petition.

Error from Superior Court, Decatur County; R. C. Bell, Judge.

Action by A. L. Nelson and others against the Maddox Grocery Company. Judgment for defendant on demurrer, and plaintiffs bring error. Affirmed.

W. L. Geer, of Colquitt, for plaintiffs in error.

Hartsfield & Conger and Jno. R. Wilson, all of Bainbridge, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 129)

NELSON et al. v. SANDERS. (No. 2927.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

Case controlled by decision in another case.

This case is controlled by the case of Nelson v. Maddox Grocery Co. (Ga. Sup.) 111 S. E. 417, this day decided.

Error from Superior Court, Decatur County; R. C. Bell, Judge.

Action between A. L. Nelson and others and John Sanders. Judgment for the latter, and the former bring error. Affirmed.

W. I. Geer, of Colquitt, for plaintiffs in error.

Hartsfield & Conger and Jno. R. Wilson, all of Bainbridge, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 167)

JORDAN et al. v. STATE. (No. 2835.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

1. Criminal law \S 1064½—Ground of motion not considered when facts stated therein not approved.

A ground of a motion for new trial which is not approved by the trial judge cannot be considered. Therefore where the trial judge certifies, as to one ground of the amended motion for new trial, that "The court does not approve the statement that W. C. Long was one of the jurors or that he is related. The court's information is that W. C. Long was not one of the jurors trying said case"—such ground cannot be considered.

2. Criminal law \S 1064½—Qualified approval of grounds of motion held not to entitle them to be considered.

Where the certificate of the trial court does not contain an unqualified statement that the grounds of the amended motion for new trial are true, but on the contrary he approves certain grounds thereof to be true "except allegations or statements that defendants did not waive their presence at reception of verdict, and allegations as to alleged relationship of juror," such approval is not an unqualified certification that the grounds of the amended motion are true, and such grounds cannot be considered. Swafford v. Keaton, 147 Ga. 491, 94 S. E. 568; Hayes v. Chapman, 147 Ga. 625, 626(1), 95 S. E. 216.

3. Criminal law §935(1)—New trial properly denied when verdict supported by evidence.

The verdict is supported by the evidence, and the court did not err in refusing a new trial.

Error from Superior Court, Wayne County; J. P. Highsmith, Judge.

Joe Jordan and others were convicted of an offense and bring error. Affirmed.

Jas. R. Thomas, of Jesup, and G. H. Richter, of Savannah, for plaintiffs in error.

Alvin V. Sellers, Sol. Gen., of Baxley, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 112)

BARBOUR v. STATE. (No. 2734.)

(Supreme Court of Georgia. March 17, 1922.)

(Syllabus by the Court.)

No error in denying new trial.

Under authority of *Johnston v. State*, 152 Ga. 271, 109 S. E. 662, the court did not err in overruling the motion for new trial.

Error from City Court of Savannah; John Rourke, Jr., Judge.

Action between T. D. Barbour and the State. Judgment for the latter, and the former brings error. Affirmed.

H. Mercer Jordan, of Savannah, for plaintiff in error.

Walter C. Hartridge, Sol. Gen., of Savannah, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(153 Ga. 117)

BOOKER v. STATE. (No. 2753.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

Homicide §309(4) — Defendant's declarations introduced by state held to require charge on voluntary manslaughter.

Where on the trial of one charged with murder the state introduced evidence of declarations of the defendant after the killing, tending to show that at the time of the homicide the deceased cursed the defendant and drew a pistol on him, when the defendant snatched the pistol out of the deceased's hands and shot him, this evidence required a charge on the law of voluntary manslaughter; and it was er-

ror requiring a new trial for the court to fail to charge the law of voluntary manslaughter as applicable to the case.

Error from Superior Court, Bibb County; H. A. Matthews, Judge.

Luther Booker was convicted of murder, and he brings error. Reversed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

Chas. H. Garrett, Sol. Gen., of Macon, Geo. M. Napier, Atty. Gen., and S. M. Smith, Asst. Atty. Gen., for the State.

HILL, J. Luther Booker was indicted for the murder of Richard Harpe. The jury trying him returned a verdict of guilty, with recommendation to the mercy of the court; and he was sentenced to the penitentiary for life. He filed a motion for new trial on various grounds, which was overruled, and he excepted.

1. The first ground of the amended motion complains that the court erred in not charging the jury the law of voluntary manslaughter as defined in section 65 of the Penal Code of Georgia, which is as follows:

"In all cases of voluntary manslaughter, there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied. Provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for if there should have been an interval between the assault or provocation given and the homicide, of which the jury in all cases shall be the judges, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and be punished as murder."

It is contended that according to the state's evidence an assault was made upon the defendant at the time of the homicide, and that manslaughter was involved in the case. A witness for the state testified, without objection, to the following effect:

"I had the defendant in my custody some time in the early part of April this year, coming from Cincinnati, Ohio. I had a conversation with the defendant; I asked him what was the matter with him and the negro he killed, and he said they had a falling out, and the negro was cursing him and drew a pistol on him, and he was standing pretty close to him, and he stood there for a while, and snatched the pistol out of the negro's hand and shot him four times."

This evidence is in substantial accord with the defendant's statement as to what tran-

spired at the time of the killing. As stated above, this evidence was offered by the state. It tended to show an actual assault upon the defendant, or an attempt by the deceased to commit a serious personal injury on him and to justify the excitement of passion. Under these circumstances it was error requiring a new trial that the court failed to give in charge to the jury the law of voluntary manslaughter.

As the case goes back for another hearing, we express no opinion on the sufficiency of the evidence to authorize the verdict, and we grant a new trial solely upon the ground that the court failed to charge the law of voluntary manslaughter as applicable to the case. The other assignments of error are without merit.

Judgment reversed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 72)

WYATT v. NAILER et al. (No. 2630.)

(Supreme Court of Georgia. Feb. 28, 1922.)

(Syllabus by the Court.)

1. Deeds ¶108—Title in fee to take effect immediately held conveyed by deed requiring grantees to care for grantor.

Mrs. Mary Wyatt executed an instrument which purported, in consideration of love and affection to convey in fee certain town lots, on which were a dwelling and certain outhouses, to her niece, Edith Nailer, and her husband, R. N. Nailer. Following the granting clause were the words: "The said Mrs. Nailer shall come and live in said house with the said Mrs. Wyatt, seeing after her welfare and taking care of her during her natural life, and at her death to see that all her burial expenses are paid; and should there be any personal property left, it shall go to the said Mr. and Mrs. Nailer as their own individual property in fee simple." The instrument was executed under seal by all the parties therein named. Mrs. Wyatt instituted an action against Mr. and Mrs. Nailer, to cancel the instrument on the basis of a breach of the covenant and the insolvency of the defendants. The exception is to a judgment granting a nonsuit. *Held:*

The instrument involved in this case conveyed the legal title in fee to the realty, to take effect immediately.

2. Covenants ¶31—Grantees held required to furnish support and maintenance as well as personal attention to grantor; "seeing after and taking care of."

The words of the instrument, "seeing after her (Mrs. Wyatt's) welfare and taking care of her during her natural life," mean providing for her support and maintenance, as well as for personal attention (Cabeen v. Gordon, 1 Hill Eq. [S. C.] 51, 56; Christy v. Pulliam, 17 Ill. 50, 61; Kelly v. Jeffers, 3 Pennewill [Del.] 286, 50 Atl. 215, 216; 9 C. J. 1286, § 1, note,

52), and, in the connection in which they were used, constituted a covenant by Mr. and Mrs. Nailer that the latter should support and maintain Mrs. Wyatt during her life, in the house conveyed, as well as giving her personal attention.

3. Error in construing instrument.

The judgment granting a nonsuit was predicated on an erroneous construction of the covenant; the judge holding, in effect, that the covenant was restricted to personal attention, and did not cover maintenance and support.

4. Cancellation of instruments ¶16—Breach of covenant to support justifies cancellation when grantees insolvent.

Breach of the covenant, coupled with insolvency of the defendants, will authorize a decree of cancellation of the instrument. *McCardle v. Kennedy*, 92 Ga. 198, 17 S. E. 1001, 44 Am. St. Rep. 85; *Jones v. Williams*, 132 Ga. 782, 64 S. E. 1081; *Wood v. Owen*, 133 Ga. 751, 66 S. E. 951; *Davis v. Davis*, 135 Ga. 116, 69 S. E. 172. The evidence was sufficient to show prima facie breach of the covenant and insolvency of the defendants as alleged.

5. Nonsuit erroneously granted.

Applying the principles announced in the preceding notes, it was error to grant a nonsuit.

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Suit by Mary Wyatt against Edith Nailer and another. Judgment of nonsuit, and plaintiff brings error. Reversed.

J. R. Whitaker, of Cartersville, and Wesley Shropshire, of Summerville, for plaintiff in error.

Maddox & Doyal, of Rome, and J. M. Bellah, of Summerville, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(153 Ga. 20)

ODOM et al. v. HOPPENDEITZEL.

(No. 2634.)

(Supreme Court of Georgia. Feb. 21, 1922.)

(Syllabus by the Court.)

1. Executors and administrators ¶194(6)—Judgment allowing year's support does not attach to property conveyed by decedent in his lifetime.

It is declared in Civil Code 1910, § 4041: "Among the necessary expenses of administration, and to be preferred before all other debts, except as otherwise specially provided, is the provision for the support of the family, to be ascertained as follows: Upon the death of any person testate or intestate, leaving an estate solvent or insolvent, and leaving a widow or a widow and minor child or children, or minor child or children only, it shall be the duty of the ordinary, on the application of the wid-

ow, or the guardian of the child or children, or any other person in their behalf, on notice to the representative of the estate (if there is one, and if none, without notice), to appoint five discreet appraisers; and it shall be the duty of such appraisers, or a majority of them, to set apart and assign to such widow and children, or children only, either in property or money, a sufficiency from the estate for their support and maintenance for the space of twelve months from the date of administration, in case there be administration on the estate, to be estimated according to the circumstances and standing of the family previously to the death of the testator or intestate, and keeping in view also the solvency of the estate. If there be a widow, the appraisers shall also set apart, for the use of herself and children, a sufficient amount of the household furniture. The provision set apart for the family shall in no event be less than the sum of one hundred dollars; and if it shall appear upon a just appraisal of the estate that it does not exceed in value the sum of five hundred dollars, it shall be the duty of the appraisers to set apart the whole of said estate for the support and maintenance of such widow and child or children, or, if no surviving widow, to the lawful guardian of the child or children, for their benefit." *Held*: A judgment of the court of ordinary allowing a year's support for the family of a deceased person under the foregoing statute will not attach to property which has been conveyed away by the deceased prior to his death and is no longer a part of his estate. *Burkhalter v. Planters' Loan & Savings Bank*, 100 Ga. 423, 28 S. E. 236; *Summerford v. Gilbert*, 37 Ga. 59.

2. Executors and administrators §181—Unrecorded deed superior to claim under judgment for year's support.

Where property is conveyed in manner and under circumstances specified in the preceding note, the failure of the grantee to record his deed would not affect his right to the property as against the claim of the family under a judgment for a year's support.

3. Ejectment §109—Verdict properly directed, when facts appeared from uncontradicted evidence.

Under application of the foregoing principles, it appearing on the trial of an ejectment suit, from the uncontradicted evidence, that the plaintiff's lessor claimed title to the land in dispute under a judgment by the court of ordinary setting it aside as a year's support for the family of a deceased person, and that several years prior to the death of the deceased such person had conveyed the land by an absolute fee-simple deed to the defendant's predecessors in title, and that such deed was not recorded until after the judgment setting apart a year's support, the judge did not err in directing a verdict for the defendant.

Error from Superior Court, Bibb County; *Malcolm D. Jones*, Judge.

Action by Owens Odom and others against H. B. Hoppendeltzel. Judgment for defendant, and plaintiffs bring error. Affirmed.

H. F. Strohecker, of Macon, for plaintiffs in error.

Sidney W. Hatcher, of Macon, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(153 Ga. 119)

PEAVEY v. STATE. (No. 2768.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

1. Criminal law §165, 171—When prisoner "in jeopardy" stated; no error, when proceedings taken without arraignment, to arraign defendant and repeat proceedings.

"A prisoner is in jeopardy within the meaning of the Constitution, and cannot be tried again, when in a court of competent jurisdiction, and upon a sufficient indictment, he has been arraigned, has pleaded, and the jury has been impaneled and sworn." 2 Enc. Dig. Ga. R. 152; *Newsom v. State*, 2 Ga. 60; *Reynolds v. State*, 3 Ga. 53; *Holt v. State*, 38 Ga. 187; *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281; *Franklin v. State*, 85 Ga. 570, 11 S. E. 876; *Bryans v. State*, 34 Ga. 323.

(a) Applying the above principle to the facts of this case, the court did not err in allowing the solicitor general to arraign the defendant, after the motion for mistrial was made, and after the jury had been impaneled and sworn, and after the state's counsel had read the indictment to the jury and stated his contentions of the case, over objection of defendant's counsel that the defendant had been put in jeopardy before he was arraigned and without the defendant having waived arraignment; nor because the court instructed the solicitor general to swear the same jury again and read the indictment to the prisoner, and required him to enter his plea of not guilty. See *Weaver v. State*, 83 Ind. 289. Nor did the court err in refusing to declare a mistrial. Compare *Bryans v. State*, 34 Ga. 323, *Caswell v. State* (Ga. App.) 107 S. E. 560(3). See *Reddick v. State*, 149 Ga. 822, 102 S. E. 347.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jeopardy (In Criminal Law).]

2. Criminal law §854(5)—Temporary separation of three jurors from the others held not to require reversal.

Where, on the trial of one charged with murder, after all the testimony had been introduced, and two arguments by counsel had been made to the jury, and the court adjourned for the dinner hour, and after the jury had eaten dinner, all of them repaired to the courthouse lawn and seated themselves under the trees in charge of the bailiff appointed by the court to take charge of the jury during the dinner hour, and where "the said jury was allowed to disperse, and the foreman of said jury, H. H. Wilson, and two other members of said jury, separated from the remainder of said jury in said case, and went in charge of

John Brown [the bailiff appointed by the court to take charge of the jury] for a distance of about two city blocks, through the business section of Eatonton, Ga., to the post office," and "the remaining nine jurors were left in charge of one W. H. Bonner, who was the solicitor general's bailiff appointed to attend and wait upon said solicitor general during the term of said court, said Bonner not having been placed in charge of said jury by the court and had no right to be with said jury, or to be in charge of any portion of them," and where the foreman of the jury and the other two jurors who went with him to the post office, and both bailiffs, testified by affidavits that during the five or ten minutes' separation of the jury the case was not discussed by them or either of them, and no mention of the case was heard by them from any source, such temporary separation on the part of the three jurors, in the light of the exculpatory affidavits, will not require a reversal of the judgment. *Daniel v. State*, 56 Ga. 653; *Fitzpatrick v. State*, 149 Ga. 75(6), 99 S. E. 128.

3. Criminal law \S 935(1)—New trial properly refused, when evidence authorized verdict.

The evidence in the case authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Putnam County; J. B. Park, Judge.

Charley Peavey was convicted under an indictment for murder, and he brings error. Affirmed.

G. B. Callaway and Jos. B. Duke, both of Eatonton, for plaintiff in error.

Doyle Campbell, Sol. Gen., and A. Y. Clement, both of Monticello, Geo. M. Napier, Atty. Gen., and S. M. Smith, Asst. Atty. Gen., for the State.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 754)

STEWART v. PATTERSON. (No. 2519.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Executors and administrators \S 29(2)—Action by temporary administrator not enjoined, in absence of direct attack on appointment.

Under the pleadings and the evidence in the case, the court did not err in refusing an interlocutory injunction.

(Additional Syllabus by Editorial Staff.)

2. Pleading \S 34(3)—Court under no duty to supply necessary allegations attacking appointment of temporary administrator.

Where defendant, sued by a temporary administrator, did not by his cross-action directly attack the judgment appointing the administrator, and ask that it be set aside, the

court was under no duty to supply the necessary allegations and prayers to make the answer a direct attack on the judgment.

3. Executors and administrators \S 32(2)—Revocation of temporary letters of administration without notice of no effect.

An order of the ordinary, authorizing one named as executor in a will not yet probated to hold the decedent's personal property, and declaring letters of temporary administration revoked, as having been granted inadvertently, without necessity and authority, was without effect, where the temporary administrator was served with no notice of any proceedings to revoke his letters.

4. Executors and administrators \S 29(2)—Failure to qualify is defense to action by temporary administrator.

A temporary administrator's failure to file his bond and have it approved, and otherwise to qualify, is a ground of defense in an action at law for trover.

5. Executors and administrators \S 29(2)—Lack of authority to make appointment is defense at law, and resort to equity unnecessary.

If the judge was without jurisdiction to appoint a temporary administrator, the order appointing him was void, and this was a complete defense to the administrator's trover suit, and no resort to equity by a cross-action was necessary to make such defense available.

6. Executors and administrators \S 29(2)—Voidable appointment must be directly attacked.

If a judgment appointing a temporary administrator was merely voidable, or subject to attack on grounds not appearing on the face of the record, a direct attack should be made on it for the purpose of having it set aside, and appropriate allegations and prayers should be contained in the petition.

Error from Superior Court, Cook County; R. G. Dickerson, Judge.

Action by A. W. Patterson against Dan Stewart. Judgment for plaintiff, and defendant brings error. Affirmed.

J. P. Knight, J. O. Smith, and R. A. Hendricks, all of Nashville, for plaintiff in error. Branch & Snow, of Quitman, Jackson & Jackson, of Adel, and W. D. Bull, of Nashville, for defendant in error.

FISH, C. J. On the 7th day of November, 1919, W. B. Parrish made a will devising to Dan Stewart all of his property of every nature, and on the same day made warranty deeds conveying to Stewart all of the real estate owned and possessed by him. On the 3d day of March, 1920, Parrish died in Cook county, Ga. On the 4th day of March, 1920, Dan Stewart, named as executor of the will of the deceased, filed for probate in solemn form the will, and the application for probate was made returnable to the April, 1920,

term of the court of ordinary. Citation was duly issued, and all the heirs of the deceased were served. Caveat to the probate was filed, and by consent the case was appealed to the superior court, where it is now pending. On the 21st day of May, 1920, A. W. Patterson was granted temporary letters of administration on the estate of the deceased, upon his application reciting that he was an uncle of the deceased by marriage. In the order of the court of ordinary appointing him temporary administrator, Patterson was directed to make his returns to the next term of the court on the first Monday in July, 1920. On May 28, 1920, the court of ordinary passed an order reciting that Patterson "was inadvertently granted temporary letters of administration on the estate of the said W. B. Parrish, when in point of fact there was no necessity or authority therefor," and permitted Dan Stewart, who was named executor in the will, to give bond for the faithful preservation of the estate and the accounting for and surrender of the same to the court of ordinary, or to the named caveators in the event the latter should prevail. On the 17th day of August, 1920, Patterson, as temporary administrator, brought an action of trover against Stewart for certain personalty belonging to the estate of the deceased and in the possession of Stewart. To this suit, which was filed in the superior court of Cook county, the defendant filed his answer in the nature of an equitable cross-action, which was passed upon by the court on the 15th day of December, 1920. An interlocutory injunction was denied to the defendant, and the plaintiff in the trover suit was allowed to proceed with the same. To this judgment and order of the court the defendant excepted.

[1-3] The court did not err in refusing an injunction. It appears that Patterson had been selected as temporary administrator by a court of competent jurisdiction. If the court under the facts of the case was not authorized to make this appointment, the plaintiff in error should have instituted proceedings in the court making the appointment, or should have sought in his equitable cross-action, by direct attack upon the judgment and order appointing the temporary administrator, to have it set aside. It may be that the pleader intended, in his answer in the nature of a cross-action filed to the trover suit, to make an attack upon the judgment and to ask that it be set aside. But he did not do so, and the court was not under duty to supply the necessary allegations and prayers to make that answer a direct attack upon the judgment appointing Patterson temporary administrator on the ground of a want of jurisdiction and authority to make such appointment, and without

such direct attack the court could not set aside that judgment. The order granted by the ordinary appearing in the record, authorizing Stewart to hold the personal property of the decedent upon giving bond, and containing the recital also that Patterson was inadvertently granted temporary letters of administration, "when in point of fact there was no necessity or authority therefor," and declaring such letters revoked, was without effect, as there is no evidence that Patterson was served with any notice of the institution of any proceedings to revoke the letters granted him.

[4-6] It is alleged that Patterson failed to file and have approved his bond and to otherwise qualify as temporary administrator. If that be true, it will be ground of defense in the action at law, the trover suit. And if it also appears on the face of the record, in the matter of Patterson's application for appointment and the judgment appointing him, that under the allegations contained in the application the judge was without jurisdiction to make the appointment, then the order appointing him temporary administrator would be void, and this could also be urged as a complete defense in the trover suit (*Wash v. Dickson*, 147 Ga. 540, 94 S. E. 1009), and the resort to equity was not necessary to make such defense available to the plaintiff in error. If, however, the judgment appointing Patterson was merely voidable, or it was necessary to attack it on grounds not appearing on the face of the record, then Stewart should have made, as we have pointed out above, a direct attack upon it for the purpose of having it set aside, and his petition should have had allegations appropriate to that purpose, as well as prayers for that specific relief, which were wanting in the equitable answer which he filed, and upon the consideration of which the judge refused the injunction.

Judgment affirmed.

All the Justices concur.

(152 Ga. 822)

GOWER et al. v. NEW ENGLAND MORTG. SEC. CO. et al. (No. 2598.)

(Supreme Court of Georgia. Feb. 21, 1922.)

(Syllabus by the Court.)

1. Judicial sales §50(1)—Purchaser only required to see that officer has competent authority to sell, and is apparently proceeding under prescribed forms.

The purchaser at a judicial sale is not required to see that the officer has "complied fully" with the regulations prescribed in such cases. Irregularities create questions and liabilities between the officer and the parties interested in the sale. The innocent purchaser is bound only to see that the officer has competent authority to sell, and that he is "apparent-

ly" proceeding to sell under the prescribed forms.

2. Execution \S 221—Not invalidated because sale commenced shortly before prescribed hour of beginning.

Even if a sale by a sheriff be begun a short interval of time before the prescribed hour for beginning such sale, and concluded after the prescribed hour of beginning, such slight variation from the prescribed manner of sale will not invalidate the sale, in the absence of fraud, collusion, or surprise.

3. Execution \S 250—Gross inadequacy of price not sufficient ground alone for setting aside sale.

Inadequacy of price, though gross, is not a sufficient reason to set aside a sheriff's sale, in the absence of fraud, collusion, or surprise.

4. No sufficient ground for reversal.

No sufficient reason appears for reversing the judgment under review.

(Additional Syllabus by Editorial Staff.)

5. Trial \S 255(7)—Where petition attacked sheriff's sale of three parcels, charge as to invalidity of sale of one or more should have been requested.

Where an intervening petition attacked the entire sale of three parcels on execution because sold before 10 o'clock, and the charge submitted the issue so made, a charge that, if one or more of the parcels were sold before 10 o'clock, the sale would be void as to such parcels, should have been requested, if desired.

6. Execution \S 222(2)—Sale not void because advertised in violation of restraining order, in anticipation of its dissolution.

Even though an advertisement of an execution sale in anticipation of the dissolution of an order restraining any sale or attempt to sell was a violation of the order, the sale held after dissolution of the order was not void, in the absence of fraud, collusion, or surprise.

7. Sheriffs and constables \S 84—Successor of sheriff making levy may sell land.

Under Civ. Code 1910, \S 4914 (6), the successors of a sheriff, making a valid levy on land and thereafter going out of office, may sell the land under such levy.

8. Trial \S 259(1)—Desired instructions as to difference between standard and sun time should be timely requested in writing in proceeding to set aside execution sale.

In a proceeding on an intervening petition seeking to set aside an execution sale because made before 10 o'clock, a timely written request for instructions on the difference between standard time and sun time should have been submitted, if they were desired.

Error from Superior Court, Polk County; Moses Wright, Judge.

Suit by the New England Mortgage Security Company against one Brewer and others, in which W. M. Gower and others inter-

vened. Judgment for plaintiffs, and the interveners bring error. Affirmed.

Bunn & Trawick, of Cedartown, for plaintiffs in error.

Mundy & Watkins, of Cedartown, for defendants in error.

FISH, O. J. This case is a sequel to *Brewer v. New England Mortgage Co.*, 144 Ga. 548, 87 S. E. 657. W. M. and Lula Gower intervened in the case cited. Interveners attacked, on various grounds, a sheriff's sale of three parcels of land, sold separately, and prayed that the sale be set aside, and the deeds of sheriff made pursuant to the sale be canceled. The sheriff and purchasers were made parties defendant to the intervention. An amendment to the petition was offered, alleging, in substance, that plaintiffs were owners of the lands in question, which are worth more than the entire balance due on the execution under which they were sold, and twice as much as the aggregate bids at the sale, that on a fair sale they would bring \$3,500 or more, and that plaintiffs were the successors in title to one Godard, the defendant in the execution. The amendment was disallowed, and the plaintiffs excepted *pendente lite*. The case proceeded to trial, and resulted in a verdict for the defendants. The plaintiffs filed a motion for new trial, which was overruled, and they excepted.

[1, 2] The following appears in the brief of evidence:

"It was agreed between counsel that there was no issue as to the Gowers claiming title to the lands; the one issue in this case being as to the time of the sheriff's sale on June 8, 1919."

Under this stipulation the only matter which requires investigation, so far as the motion for new trial is concerned, is whether any error was committed at the trial which would require the granting of a new trial on the single issue as to the hour of the sale in question. The hours of sheriff's sales were fixed by the Judiciary Act of 1799, "between the hours of ten and three." *Cobb's Digest*, 509. The hours were later changed to between the hours of 10 a. m. and 4 p. m., by the act of 1821. *Cobb's Digest*, 509 (note). They have so remained to the present time. While some changes have been made in the act of 1799, as to hours, advertisement, and the like, the present law as to substantial matters is the same as the original law. *Civil Code*, \S 6060. In *Brooks v. Rooney*, 11 Ga. 424, 56 Am. Dec. 430, it was said:

"The acts which make it the duty of the sheriff to advertise the sale of property in a particular way, and to sell between certain hours of the day, are merely directory to the

officer. His neglect to observe these directions may subject him to a suit for damages, at the instance of the party injured by the neglect; but it will not affect the title of the purchaser, unless there be collusion between him and the sheriff."

It was also said:

"The purchaser depends upon the judgment, the levy and the deed; * * * all other questions are between the parties to the judgment and the officer." 11 Ga. 427, 428, 56 Am. Dec. 430.

The question in that case was whether there must be recitals in a sheriff's deed showing that the formalities of law respecting the manner and time of sheriff's sale were actually complied with. It was held that such recitals were not necessary. The question as to the effect upon the sale where such formalities were not complied with was not before the court. What was said on this subject was mere dicta.

In *Johnson v. Reese*, 28 Ga. 356, 73 Am. Dec. 757, the act of 1799 was under consideration, and it was said:

"The first part of the section says: 'No sales' shall be made' 'but on the first Tuesday in each month, and between the hours of ten and three.' * * * This amounts to saying that the sheriff shall not have authority to sell at any other time."

The question before the court was as to the effect of failure to advertise in strict conformity to the statute. Hence what was said in that case on the subject of hours of sale was mere dictum. In *Conley v. Redwine*, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398, an irregularity in the advertisement was involved. There seems to be no authoritative ruling by this court on the question of the validity of a sheriff's sale made before or after the hours prescribed by statute. The Code declares:

"The purchaser at judicial sales is not bound to look to the appropriation of the proceeds of the sale, nor to the returns made by the officer, nor is he required to see that the officer has complied fully with all those regulations prescribed in such cases. All such irregularities create questions and liabilities between the officer and parties interested in the sale. The innocent purchaser is bound only to see that the officer has competent authority to sell, and that he is apparently proceeding to sell under the prescribed forms." Civil Code 1910, § 6059.

We think the phrases in this section, "complied fully," and "apparently proceeding to sell under the prescribed forms," are peculiarly significant. They appear for the first time, in our law regulating judicial sales, in the Code of 1863, § 2584. Prior to that time the courts were not agreed on the effect of a variation from prescribed regulations as to advertisement, hours of sale and the like. See *Brooks v. Rooney*, 11 Ga.

424, 56 Am. Dec. 430. The codifiers were aware of the conflict of opinion, and no doubt desired to prescribe a safe and conservative rule for the future. The purchaser was not to be burdened with the duty to see that the officer had "complied fully" with all regulations as to the time and manner of sale. A variation would not vitiate which was not material and did not show the officer was wholly or substantially disregarding prescribed forms. Where the variation from the prescribed hour of sale was so slight that witnesses present seriously conflict with each other as to whether the sale began a short time before 10 o'clock, or on the hour, or a short time thereafter, it is manifest that the officer was "apparently" proceeding under the prescribed forms. The statute only requires an apparent condition, not an actual condition, not a full compliance condition. The sale began near the hour of 10. The land was sold in three parcels. It is clear from the evidence that the sale was completed after the hour of 10 o'clock, and it is inferable that the greater part of the time consumed in the sale was after 10 o'clock. A jury might have found that one parcel was cried and possibly knocked off before 10 o'clock. On the other hand, there might have been a finding that the entire sale was after 10 o'clock. While it was possible for the jury to find that the sale began before 10 o'clock, we think they were constrained to find that the officer was apparently proceeding under prescribed forms. There was no charge of collusion or fraud. The sale was valid as against an objection that the officer had not "complied fully" with the regulations as to the hour of sale.

[6] Complaint is made that the judge failed to charge that, if one or more of the parcels were sold before 10 o'clock, the sale would be void as to such parcels. Under the view we have taken, there was no error in such failure to charge. In addition to this the petition attacked the entire sale of the three parcels. The charge submitted the issue made by the pleadings. It might be further said that, if a charge on the subject was desired, there should have been a request, and that the charge as given was a sound proposition, and the complaint is that another sound proposition was not also given.

[3] It is contended that the lands were sold for less than their value; that is, the prices were inadequate. There was no averment and no evidence of fraud or collusion. Inadequacy of price, though gross, will not be sufficient to set aside a sheriff's sale, unless it appears there was fraud or collusion in the levy or the sale. *Palmour v. Roper*, 119 Ga. 10 (5), 45 S. E. 790; *Gunn v. Slaughter*, 83 Ga. 124 (3), 9 S. E. 772; *Van Dyke v. Martin*, 53 Ga. 221 (2).

[8-8] Complaint is also made that the land was advertised for sale by the sheriff while an order was in force restraining a sale, and that the sale was had on June 3, when the order dissolving the restraining order was dated June 2. The order restrained the plaintiffs, their attorneys and agents, "from selling or attempting to sell" the land in question. Even if the advertisement of the sale in anticipation of a dissolution of the restraining order was a violation of the order, in the absence of evidence of fraud, collusion, or surprise, the sale would not be void. The sheriff and the attorney, who were responsible for the violation of the order, if there was such violation, might be in contempt; but the sale would be valid. If a sheriff makes a valid levy on land and goes out of office, his successors may sell the land under such levy. Civil Code 1910, § 4914(6). If any instructions to the jury on the difference between standard time and sun time were desired, a timely written request should have been submitted.

[4] The record discloses no sufficient reason for reversing the judgment under review. Judgment affirmed.

All the Justices concur.

(153 Ga. 86)

COOPER v. LYNES et al. (No. 2626.)

(Supreme Court of Georgia. March 2, 1922.)

(Syllabus by the Court.)

1. Verdict properly directed.

Under the pleadings and the evidence, and the law applicable thereto, the court did not err in directing a verdict for the defendants.

(Additional Syllabus by Editorial Staff.)

2. Judgment §780(3)—Vendor transferring notes has such interest in land as is subject to judgment on the notes.

One giving a bond for title, and taking purchase-money notes, which she indorsed and transferred, and which had not been paid, had such an interest in the land as was subject to a judgment obtained against her by the transferee on the notes.

3. Vendor and purchaser §272—Transferee of bond for title bound to do equity by paying notes before he could have sale enjoined.

A transferee of a bond for title seeking to enjoin a sale of the land under a judgment on the purchase-money notes obtained by a transferee of the notes against the vendor is bound to do equity by paying the purchase price.

4. Adverse possession §114(1)—Evidence insufficient to show seven years' possession under color of title.

Where a transferee of a bond for title permitted the land to be sold for taxes which he had not agreed to pay, and took a conveyance from the tax purchaser, evidence held insufficient to show that he had acquired title by pre-

scription under color and seven years' possession as against a judgment on the purchase-money notes.

5. Vendor and purchaser §190—Facts held to show tax sale and transfer to transferee of bond for title was fraudulent scheme.

The facts surrounding a tax sale of land and conveyance by the purchaser to a transferee of a bond for title held to indicate a fraudulent scheme on the transferee's part to obtain title to the land without payment of the purchase price.

Error from Superior Court, Polk County; Moses Wright, Judge.

Suit by J. J. Cooper against J. C. Lynes and others. Judgment for defendants, and plaintiff brings error. Affirmed.

This is a petition brought by J. J. Cooper against A. E. Wiggins, J. C. Lynes, W. A. Camp, and T. P. Lyon as sheriff. On the trial the following facts appeared from the evidence: On September 9, 1909, Wiggins sold to Hobbs for \$350 a certain lot of land in Polk county, containing 40 acres, taking from Hobbs five promissory notes for the purchase price, one for \$50, maturing October 1, 1911, and the others for \$75 each, maturing on the 1st day of October of each of the next succeeding four years. Wiggins gave Hobbs a bond to make title upon the payment of the notes. Hobbs went into possession under the bond, and on December 13, 1910, transferred Wiggins' bond to Cooper, who then went into possession. Cooper did not agree to pay taxes on the land for the year 1910. It did not appear what consideration Cooper paid for this transfer. On December 20 a general tax execution was issued against Hobbs for \$5.24 for his state and county taxes for the year 1910, besides costs, which was levied on the land, which was sold by the sheriff on the first Tuesday in March, 1911 (the seventh day of the month), to Leonard for \$17.05. On March 15, 1911, the sheriff executed to Leonard a deed in pursuance of the tax sale, and on the same date Leonard conveyed the land to Cooper, who had remained in possession of the same since the transfer to him by Hobbs of Wiggins' bond. Leonard never went into possession; and he testified, that, in purchasing the land at sheriff's sale, he acted for himself, paid his own money, and had no arrangement with Cooper to purchase it at the sheriff's sale, and that Carmichael asked him (Leonard) to purchase the land. He testified further:

"I went to him [Cooper] and offered to make him a deed afterwards. I didn't offer to make him a deed; I sold it to him."

After paying the taxes, \$5.24, and the costs, out of the \$17.05, which Leonard paid the sheriff on his bid at the tax sale, the

balance, by the direction of Hobbs, was paid to Cooper.

On February 8, 1916, Wiggins sued Cooper for the land, and on the trial a nonsuit was granted. Wiggins transferred to Lynes the five notes which Hobbs had given for the purchase price of the land, and at the time indorsed them, as did Camp. On September 14, 1917, Lynes brought suit on these notes against Hobbs, as maker, and Wiggins and Camp as indorsers. Hobbs pleaded that the notes had been materially altered since he executed them, and without his knowledge or consent. Wiggins and Camp made no defense. On the trial, March, 21, 1918, a verdict was rendered in favor of Hobbs, and a judgment against Wiggins and Camp, for the aggregate amount of the five notes. An execution issued upon this judgment was levied on the land in question as the property of Wiggins. Cooper has remained in possession of the land since he took a transfer of Wiggins' bond for title. He did not testify on the trial.

At the conclusion of the evidence the judge ruled that he would direct a verdict for Cooper if he would pay the purchase money due on the land for which Lynes had obtained a judgment, and that a decree would be so moulded as to protect Cooper in all respects as to his title to the land, and from any further liability in respect of the same. Cooper, by his counsel, refused to make such payment; whereupon the judge directed a verdict for the defendants. Cooper moved for a new trial; the motion was overruled, and he excepted.

Mundy & Watkins, of Cedartown, for plaintiff in error.

H. A. Etheridge, of Atlanta, for defendants in error.

FISH, C. J. (after stating the facts as above). [1, 2] Cooper in his petition alleged that the suit brought by Lynes against Hobbs, Wiggins, and Camp was collusive, and that the verdict and judgment against Wiggins and Camp was obtained by fraud. On the trial there was not sufficient evidence to sustain such allegation. The suit by Wiggins against Cooper in which a nonsuit was granted is of no materiality in the case. It appeared on the trial that no part of the purchase money for the land had ever been paid. In the circumstances set forth in the foregoing statement, Wiggins had such an interest in the land as was subject to the judgment obtained by Lynes against her on the purchase-money notes which she had indorsed.

[3] Cooper came into a court of equity asking affirmative relief—that is, that a sale of the land under a judgment on the purchase-money notes should be enjoined and the land decreed to belong to him. Before he could

obtain such affirmative equitable relief he was bound to do equity—that is, to pay the purchase price of the land. This he refused to do on the trial.

[4, 5] In view of the evidence on the trial, it did not appear that Cooper had a good title by prescription under color and seven years' adverse possession of the land. Only one witness testified as to Cooper's possession, and his testimony was merely to the effect that Cooper had possession since he took a transfer of Wiggins' bond for title, and since Leonard's deed to him on March 21 1911. The circumstances as to this tax sale by the sheriff, the purchase thereof by Leonard, and conveyance by him to Cooper on the same day of the execution of the sheriff's deed to Leonard, the fact that Carmichael requested Leonard to purchase the land at the tax sale, the absence of any evidence as to the consideration of the conveyance by Leonard to Cooper as to any consideration for the transfer by Hobbs to Cooper of Wiggins' bond, the possession by Cooper at the time of the levy of the tax execution and the sale of the land thereunder, and the payment by the sheriff to Cooper, under the direction of Hobbs, of the balance of the amount paid by Leonard for the purchase of the land at the tax sale, clearly indicated a fraudulent scheme on the part of Cooper to obtain title to the land without payment of any of the purchase price. We accordingly hold that the court did not err in directing a verdict in favor of the defendant.

Judgment affirmed.

All the Justices concur.

(153 Ga. 1)

CITY OF ATLANTA et al. v. SCOTT et al.
(No. 2637.)

(Supreme Court of Georgia. March 4, 1922.)

(Syllabus by the Court.)

1. Municipal corporations §971(2)—Determination of mayor and council that emergency exists, justifying additional tax, not conclusive.

The provision in the charter of the City of Atlanta, "in addition to the ordinary tax herein allowed, the mayor and councilmen and aldermen may, in case of emergency, to be judged of by them, levy an extraordinary tax, not exceeding one-half of one per cent. (on taxable property of said city), the said extraordinary tax to be added to the ordinary tax, and collected at the same time, and used for the same purpose," does not authorize the mayor and council to conclusively determine that an emergency exists, so as to justify the exercise of the charter authority to levy an additional tax. The power to levy such tax is dependent upon the existence of an emergency in fact, and a declaration by the mayor and

council that an emergency in a given case does exist is open to inquiry by the courts.

2. Municipal corporations \Leftrightarrow 971 (2)—Evidence insufficient to show emergency, justifying additional tax levy.

The evidence in this case was insufficient to show the existence of an emergency within the meaning of the charter of the city of Atlanta, upon which to base the levy of an additional tax.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by H. B. Scott and others against the City of Atlanta and others. Judgment granting an interlocutory injunction, and defendants bring error. Affirmed.

The charter of the city of Atlanta provides:

"For the purpose of raising revenue for the support and maintenance of said city government, the said mayor and general council shall have full power and authority, and they shall provide by ordinance for the assessment, levy, and collection of an ad valorem tax on all real and personal property within the incorporate limits of said city, not exceeding one and one fourth per cent. thereon, which shall include the school tax, which, under the laws of this state, is subject to taxation: Provided, nevertheless, that all assessments of real property shall be made at the cash market valuation. * * * In addition to the ordinary tax herein allowed, the mayor and councilmen and aldermen may, in case of emergency, to be judged of by them, levy an extraordinary tax, not exceeding one-half of one per cent. (on the taxable property of said city), the said extraordinary tax to be added to the ordinary tax, and collected at the same time, and used for the same purpose." City Code of Atlanta of 1910, §§ 121, 124.

An ordinance was adopted, January 17, 1921, by the mayor and general council, and approved January 18, 1921, by the mayor, as follows:

"An ordinance levying an emergency tax for forty-five one-hundredths of one per cent., as provided by the charter of the city of Atlanta in cases of emergency, being found in section 124 of the City Code of 1910, and for other purposes.

"Whereas, the charter of the city of Atlanta provides that in addition to the ordinary tax allowed to be assessed by the mayor and general council of this city, such body may, in case of emergency, to be judged of by them, levy an extraordinary tax, not exceeding one-half of one per cent., on the taxable property of said city, said extraordinary tax to be added to the ordinary tax and payable at the same time as the ordinary tax is made payable and in the same installments; and whereas, an emergency now exists, in the opinion and discretion of the mayor and general council of this city, and in order to meet this emergency it is necessary to use the power granted to

this body by said section of said charter, to the extent of levying an extraordinary tax of forty-five one-hundredths of one per cent., for the year 1921 only: Therefore be it ordained by the mayor and general council of the city of Atlanta as follows:

"Section 1. That a case of emergency now exists, in the opinion of the mayor and general council; and same is hereby adjudged to exist in the opinion of the mayor, aldermen, and councilmen of the city of Atlanta.

"Sec. 2. That an extraordinary tax of forty-five one-hundredths of one per cent. is hereby levied on all the real and personal property within the limits of and subject to taxation by the city of Atlanta, as shown by the returns thereof for the year 1921, upon the tax digests prepared and on file in the office of the city tax receivers and assessors, to be known as an extraordinary tax and to consist of forty-five one-hundredths of one per cent. of the value of said property as shown by said returns, and to cease with the current fiscal year.

"Sec. 3. That the tax herein provided for shall be and is hereby assessed upon the property now on the tax books of said city, at the value placed thereon for and during the year 1921. The foregoing extraordinary tax, levied as herein provided because of an existing emergency, is hereby made payable at the same time as the ordinary tax is made payable and in the same installments.

"Sec. 4. That all the usual machinery provided by the charter and ordinances of this city shall be and is hereby applied to the assessment of this tax and the collection of same, and, if not paid on or before October 15, 1921, all the existing provisions of the charter and ordinances of the city of Atlanta, as to interest, defaults, costs, executions and sales to pay taxes, are hereby ordained and are of force and effect, and shall be used to carry into effect the levy and assessment and collection of the extraordinary tax herein provided for and levied because of an emergency now existent in the city of Atlanta.

"Sec. 5. That this emergency and extraordinary tax shall be extra and additional to the regular annual tax levy authorized by existing charter and ordinance provisions, and shall be added to the ordinary tax and collected at the same time and used for the same purpose, and same shall end with this levy and with the current fiscal year.

"Sec. 6. That, in case any persons desire to pay same, as provided by existing charter provisions, such payment shall be allowed, and the first installment thereof shall be payable on or before May 1, 1921, and the second installment shall be payable on or before July 1, 1921; the third installment on September 1, 1921, and the existing provisions of the said charter and ordinances, with reference to bearing interest on said installments, shall be effective on and after May 1, July 1, and September 1, 1921, as above named, as to the installments unpaid on either of said dates; and the other provisions of the charter and ordinances governing such installment payments, with reference to discount, etc., are hereby ordained as of full force and effect, and shall be applied as to the payments of the extraordinary tax herein ordained, same being in addition to

the ordinary tax levied for the current year 1921.

"Sec. 7. That the sums raised by the levy of this extraordinary tax, ordained and levied because of an emergency which now exists in the city of Atlanta, in the opinion and discretion of the mayor and general council, shall go into the general fund of the city of Atlanta and shall be used for the same purposes as the ordinary tax is levied.

"Sec. 8. That all ordinances and parts of ordinances in conflict with this ordinance be and the same are hereby repealed."

On April 21, 1921, the foregoing ordinance was amended by striking out the provisions for forty-five one-hundredths of 1 per cent. and inserting in lieu thereof a provision for a levy of an emergency tax of one-eighth of 1 per cent. The amendment also provided:

"That the facts alleged in said ordinance, approved on the date above stated, are hereby reaffirmed, and the mayor, aldermen, and councilmen again state that an emergency now exists and is adjudged to exist in the opinion of said mayor, aldermen, and councilmen, and said extraordinary tax is necessary to preserve the health, order, and general welfare of the City of Atlanta, and that same cannot be preserved during the year 1921 without the levy and collection of the emergency and extraordinary tax provided for in the original ordinance and provided for in this amended ordinance. Since the original ordinance was adopted and approved, a bond issue has been passed by a vote of the people, and this will relieve enough of the current revenue to permit of the reduction to the amount provided by this amendment. The emergency existed at the time of the original ordinance as well as now. The amount necessary to meet the emergency can be and is hereby reduced by reason of the proceeds of the bond issue relieving current income, as above stated, so that this reduction is made possible."

On February 4, 1921, which was prior to the amendment last above stated, Henry B. Scott, B. D. Watkins, Albert S. Adams, and Jonas H. Ewing, as citizens and taxpayers of the city of Atlanta, instituted an action, in behalf of themselves and other citizens and taxpayers, against the city of Atlanta as a municipal corporation, Walter Taylor as city clerk, F. F. Smith as city tax collector, and W. E. Harwell as city marshal, seeking to have the ordinance and tax levy therein contained declared to be null and void, and to enjoin the collection of taxes thereunder. The grounds upon which the relief was based were alleged in part as follows:

"(1) Because no emergency existed, so as to justify its enactment. (2) Because said ordinance is unreasonable. (3) Because no facts existed upon which the mayor, councilmen, and aldermen of the city of Atlanta could reasonably, fairly, or justly base any finding that an emergency existed in the city of Atlanta, authorizing the imposition of an extraordinary tax, under the charter of the city of Atlanta. (4) Also because said ordinance was not passed in good faith and for the purpose of dealing

with any such emergency, but was passed with knowledge on the part of the mayor, aldermen, and councilmen of the city of Atlanta that no such emergency did exist, and was passed in the form in which it was passed for the purpose of evading and avoiding the provisions of the charter of the city, and of violating that portion of the charter of the city wherein it is provided that the power of the mayor and general council of the city of Atlanta to levy ad valorem tax should not exceed $1\frac{1}{4}$ per cent. on the ad valorem value of the property within said city, by reciting a conclusion which the mayor, aldermen, and councilmen of the city of Atlanta knew at the time was not warranted by the facts as they existed. (5) Because said ordinance was not passed for the purpose of raising money for the purpose of meeting an emergency, but for the purpose of applying the same to the support and maintenance of schools, and of making ordinary repairs on school buildings and building new school buildings in said city, as to which no emergency existed. (6) Because said ordinance does not comply with the intent and spirit of the charter of the city of Atlanta, in that it does not specify or set forth any emergency that exists, such as to justify the imposition of the extraordinary tax which it purports to impose. (7) Also because it does not comply with the provision in the charter of the city which requires the mayor and councilmen and aldermen of the city of Atlanta to judge as to the existence of an emergency before an extraordinary tax beyond the \$1.25 limit can be levied; for that said ordinance does not set forth, describe, or give any information as to any emergency that does exist as to any matter as to which the mayor and general council of the city of Atlanta are authorized to levy taxation on the inhabitants and taxpayers of said city."

The defendant filed an answer, to which was attached as an exhibit the amendment to the ordinance mentioned above. The answer referred specifically to the several paragraphs of the petition, admitting some in whole or in part, and denying others. It also alleged certain contentions of the city as follows:

"This extraordinary tax was levied just for the reasons stated, to wit: When the city of Atlanta started the year 1921, it was confronted, in the school department and all other departments, with absolute emergency conditions that required more money than could be raised by the \$1.25 per hundred. The public knows that the city of Atlanta is limited to \$1.25 taxation on each \$100 of property, and cannot go beyond this, unless in case of an emergency, when an extraordinary tax may be levied. Therefore when the estimated income for the year, based on this limit of taxation, was gone over, and it was seen that it was not sufficient to meet the absolute and current demands of the city, and also answer the extraordinary demands and emergent demands, not only in the school, but in other, departments of the city, there was nothing for the mayor and general council to do except to order the extraordinary tax to take care of the emergency, and this was done."

On the interlocutory hearing the evidence as to an emergency is summarized in the brief of counsel for the city as follows:

"R. A. Gordon, being the Gordon mentioned in the ordinance, testified: That after the bond election it was decided to reduce the tax levy from $\frac{45}{100}$ of 1 per cent. to one-eighth of 1 per cent. It was necessary to levy this emergency tax, or to close the schools two months earlier. A deficit existed, a part of it during the last year. The finance committee had to take care of the deficit in some way, or close the schools. The first of this year the city met a deficit in the school department, and had to make that up by some appropriation. After passing the bonds, we thought some of the money could be taken care of by the issue, such as improvements on schools. By the levy of $\frac{45}{100}$ of 1 per cent. we thought this would be about \$1,500,000. By the levy of one-eighth of 1 per cent. we thought the proceeds would be \$275,000, or \$325,000. That he was a member of council, and made the statement, when the first ordinance was passed, that, if the bonds passed, he would introduce an ordinance reducing the levy to one-eighth of 1 per cent. The ordinances were considered and discussed by council on both occasions, pro and con, and a decision was reached after deliberation. Council declared that an emergency existed which justified the tax, and it does exist. As to fire, there was a fire some time ago; but we had to pay taxes just the same, and no extraordinary tax was passed. If there was a flood, I do not see how it would have any more effect than this fire. I do not see how a sudden fire or tornado or physical calamity could cause an emergency tax. Some of the proceeds of the $\frac{45}{100}$ of 1 per cent. emergency tax was to be spent for school buildings and improvements. The emergency tax was levied to take care of the expenses of the city. We saw that we had to make this levy, and we could use it wherever we saw fit. The vote on the one-eighth of 1 per cent. was almost unanimous. The tax was made to meet a deficit in the city's income—the effect of the deficit was found to be felt by the schools. It could be felt by the police or fire department; we would have to do away with some department, unless we collect this money."

"Harry Goodhart is a member of general council; was a member when both ordinances were passed; is not a member of the finance committee. The vote on the original ordinance was 15 against and 18 for it. Does not know of any sudden, unusual, or unexpected thing happening in the city affecting its finances or needs, immediately prior to the passage of the original tax ordinance. There has been no fire or tornado, or any extraordinary thing, happened this year. The city was moving along in the normal, usual method. The school board is a separate body from the city council. The school board spent more money than the city appropriated, being the 22 per cent. allowed under the charter. The cause of the deficiency in the school department was increase in salaries and improvements on the school buildings. The general impression is that the schools will have to close a month earlier this year, 1921, unless this emergency tax is levied. They have never closed, and as long as he was

a member of council they never would, if he could keep them from it. The money will have to come from some other source.

"W. D. Hoffman was a member of the general council, reasonably familiar with the city's financial condition. There was no flood or fire at the time of the passage of the 45-mill ordinance; thinks the emergency was a condition of the waterworks. This was the thing that hit him—the condition of the boiler plant. They were in a position where, if they did break down, they would not have sufficient steam to run the boilers. This was discovered in the early part of 1920. There was trouble with the coagulating basin. There was an appropriation in 1921 to take care of the boilers, under the normal tax. Looks upon the emergency tax as a deficit between income and operating expenses. It may be apportioned among certain items, one item bearing a larger proportion than others. If other departments had cut down such charges as charities, parks, gifts to the Georgia School of Technology. I do not know whether there would be enough or not. The city is run with as little money as possible, provided we take care of these other things, and we thought they were necessities. Under the one-eighth of 1 per cent. there would still be a little deficit. This $\frac{45}{100}$, including other things, bonds, would partly take care of it. There have been great fires in Atlanta—tornadoes around this country—these did not cause an extraordinary tax. We need the tax to pay the running expenses of the city—necessary expenses. We could not use this money to replace burned buildings for private owners, if we had it, or to restore houses washed away by flood. Tax money is used to pay the operating expenses of the city. The funds in the treasury of the city are not enough to pay these bills—that is the way I regard it. If a man has not enough money to pay his bills, he simply goes broke. The city has got to have the money called for by this emergency tax, or quit business the last of this year. Unless the money is raised, we have got to go out of business in some department the last of the year, or go broke. The city is now giving the school board 22 per cent. of its entire income. The salaries of the teachers were raised, and the school board had to pay same, and this caused a deficit."

"R. H. Jones, Jr., a member of the general council, was present when the $\frac{41}{2}$ -mill ordinance was passed. Does not know of any sudden, extraordinary, or unusual happening occurring in the city prior to the passage of this ordinance. Did not hear of any unusual action mentioned which would justify the passage of such ordinance. Voted against the ordinance. Did hear a number say that they thought there was an emergency, in the discussion before council. One of the points discussed was the building of a new Tech High School. Considers an emergency like the breaking of the water main. Says there is one water main coming into the city from the pumping station. If that broke, did not know how they would get water from the river to the pumping station. Thinks it would be wise to provide against this emergency by putting another main alongside the one existing. Would consider this an emergency, just as if it had already broken. The waterworks have large

reservoirs, which would supply the city for about 3½ weeks. Does not know how long it would take to repair that pipe. Thinks an emergency might exist, where the city got to the point where it must have money to run on or stop. If the city had to close its doors that would be a dire calamity or emergency. If, at the beginning of the year, it is found that the schools would have to close in November or December, thinks that would justify the position of voting as they did, if they so believed. He would have so voted, if he had so believed. The finance committee discussed the apportionments of the various departments. The salaries are fixed, and all the committee has to do is to pay them. Discusses the fact that fewer books might be used. If the library did not have the books, they would not be doing business as a library to the fullest extent.

"B. G. West, city comptroller, got up the sheet for the present year; prepared the estimates and receipts and expenses; had been connected with this office for 17 years. The income of the city is divided into fixed charges. After these have been made, estimates are made for contingent or street work of about \$300,000. This is used in equipping the different departments; paying the city's part of paving streets, repairing streets. There was an apportionment sheet made during this year. This sheet showed the amount to be expended would balance the amount estimated to be received, but this did not meet the demands of the city. They must equal one another. We cannot exceed, in our expenses, the total amount received. The sheet must balance. The charter so requires. There is hardly a department that has not asked for more money. In 1921, if this tax is enjoined, the city will have to stop operating in some one or more departments. The department in mind is the school department. If the emergency tax is added to the present appropriation, it would probably run through the year by very strict economy. Without the emergency tax it would be impossible for them to run. It will not be possible to change the other departments a little and add to the school fund. No department of the city has more money than it can legitimately use and function as a city. I think the police department and fire departments have their charges fixed. If the other departments are cut down, to the extent of the cutting the schools would be relieved; but the departments so cut down would themselves have to stop. The salaries of the policemen were not increased during the year. This was done during the preceding year. The same thing is true of the teachers' salaries. If the money for the streets is taken for the schools, the street department would have to be closed to the extent of the money so withdrawn from them. If the money was taken from the fire department, it would cut out half of the department houses and raise the insurance rate. The money has been wisely apportioned, and council did the best they could. Several departments this year asked for about twice as much as they received in appropriations. By fixed charges he means interest charges, taking care of bonds, sinking funds, pay of policemen, and firemen, salaries. These are fixed during the preceding year; 22 per cent. of the total income goes to the schools, and of this 22 per cent, apportioned to schools

the school board has the discretion of the use of the money apportioned to it. Private corporations increased salaries during the war. The city had to do the same thing, or close up. During the present year, the city has reduced the appropriation to the sanitary department \$50,000; the street department 10 to 15 per cent.; in other departments, in similar proportions. The total reduction would amount to \$125,000 to \$130,000. Real estate assessments were increased, and these increases take care of the normal demands of the various departments; only about balance them. Many of the items in the sheet are on both sides, such as \$750,000 for loans; also street paving. A good many departments could be closed, if council saw fit to do so; the Cyclorama, Advertising Clubs Convention, Freight Bureau, Advertising Georgia, School of Technology, certain school buildings, certain charities, such as Holmes Institute, Atlanta Medical College, Church Home for Girls, and general benevolences. The city has got to take care of them. If we do not have the emergency tax, and put the deficit in one department, that department must stop."

"James L. Kay, mayor of the city, gives a history of the three levies in detail. Refers to the schools, cyclorama, water mains, etc. Described particularly the Tech. High School, the inadequacy of the schools, some of which he describes as being horrible. Some taught in the afternoon. Some teach three classes a day, one teacher doing this work. Some taught in basement rooms. During the war period, hundreds of teachers left the schools for better pay. It was simply a question of raising their pay or losing the teachers. Described the effect of the bond issue upon the emergency tax. Refers to the waterworks department, the bridge fund, sewer fund, etc. The city was required to meet competition in the employment of its employees. Could not get work done any cheaper than anybody else. Could not buy supplies any cheaper than anybody else. This increased the expenses, and therefore the income must be increased or else stop. These economical conditions had been brought about by war conditions—a sudden, unforeseen upheaval and disturbance of normal conditions. Considers such a condition an emergency, a very great emergency, a very extreme emergency. This condition has been gradually growing worse in the city from time to time, and the point has been reached where it cannot go along any further without an emergency tax."

"W. F. Dykes, superintendent of schools. Has been connected with the school system twenty-six years; with the high school for eleven years. Appropriation for the present year is \$1,185,197.79. The total amount needed to run the schools during the scholastic year is \$1,641,050. This is arrived at after going over the cost of supplies, salaries, and all other matters are considered. If this amount is not secured, the schools will have to be closed the 1st of October. He thinks it better not to open in September at all, for the reason that it takes two or three weeks to get under way, and as the schools would open some time about the 1st of September, it would be useless expenditure of money to run them only two or three weeks. In case the schools close, the teachers will scat-

ter and get positions elsewhere. When they open up next year, it will be impossible to get the same teachers for the same classes, and the schools will be very much hampered. "These are not fanciful things that I am indulging in, but absolute facts, as I see them. Our teachers are being sought now by other cities, and most any of them can get places elsewhere at any time. If the schools are closed, an investment of \$2,000,000 in school buildings will be idle. The city might lose the state appropriation of \$145,000 for not running for the time allowed by the state. Thus the emergency tax is required and necessary. The teachers receive only enough to cover actual living expenses. The high cost of living has made higher salaries necessary. We have lost a great many teachers now, who went into other lines of work. After the first raise, the minimum salary of teachers is \$66 per month. This has been raised to \$88 per month.' Gives a full statement of the schools, cost of labor, cost of supplies, etc. At the conclusion of his testimony he states that he is familiar with the other departments of the city, and thinks they have been cut as closely as possible, and a good many of them have been cut too closely in appropriations. Compulsory education makes additional expenses, such as providing additional schoolrooms, additional help to look after the children, etc."

Upon consideration of the case the judge granted an interlocutory injunction, and the defendant excepted.

Jas. L. Mayson and J. M. Wood, both of Atlanta, for plaintiffs in error.

Little, Powell, Smith & Goldstein, and Moore & Pomeroy, all of Atlanta, for defendants in error.

ATKINSON, J. At the beginning of the year 1921 the mayor and council levied an ordinary tax for the full amount which was authorized under the municipal charter. At the time this was done it was estimated that the amount of taxes so levied would not meet all of the expenditures contemplated by the mayor and council in meeting demands upon the city and current expenses for the year 1921. Thereupon an additional tax was levied, on the hypothesis that the provisions of the charter of the city relating to an emergency tax would authorize the levy of such additional tax. A copy of the provision of the charter referred to follows:

"In addition to the ordinary tax herein allowed, the mayor and councilmen and aldermen may, in case of emergency, to be judged of by them, levy an extraordinary tax, not exceeding one half of one per cent. (on the taxable property of said city), the said extraordinary tax to be added to the ordinary tax, and collected at the same time, and used for the same purpose." City Code of Atlanta 1910, § 124.

The plaintiffs in attacking the ordinance contended that no emergency existed, and therefore that the city did not have authority, under above provision of the charter, to

levy the so-called emergency tax. The city contended, firstly, that the provision of the charter above quoted conferred on the mayor and council absolute power to determine whether or not an emergency existed; and, secondly, the circumstances under which the extraordinary tax was levied were such as to require the trial judge to hold, as a matter of law, that an emergency did in fact exist. These questions will be dealt with in their order.

[1] 1. The first question depends upon a proper construction of the provision of the charter relating to the levy of an extraordinary tax. In a somewhat similar case it was said:

"We are here dealing with the taxing power, proceedings in which are always in invitum—a power which, when exercised under delegated authority by a municipal corporation, is always subject to rigid scrutiny: (1) To determine whether the power actually exists; and (2) to determine whether it has been exercised under the limitations imposed. For, says Sutherland, treating of acts delegating the power of taxation: 'Acts of this class are construed with great strictness. Two concurring principles leading to strict construction apply. Such acts affect arbitrarily private property, and are grants of power.' 2 Lewis Sutherland on Statutory Construction, § 541." *San Christiana Investment Co. v. City and County of San Francisco*, 167 Cal. 762, 141 Pac. 384, 52 L. R. A. (N. S.) 676, 682.

The principle above applied is well recognized and has been frequently applied in this state. *Albany Bottling Co. v. Watson*, 106 Ga. 503, 80 S. E. 270; *Garrison v. Perkins*, 137 Ga. 744, 752, 74 S. E. 541. The case of *San Christiana Investment Co. v. City and County of San Francisco*, supra, involved construction of the charter of the city and county of San Francisco and the validity of an alleged emergency tax. Section 11 of the charter there construed provided, in substance, that the annual levy "shall not exceed the rate of \$1 on each \$100 valuation of the property assessed." Section 13 of the same article and chapter provided:

"The limitation in section 11 of this chapter upon the rate of taxation shall not apply in case of any great necessity or emergency. In such case the limitation may be temporarily suspended, so as to enable the supervisors to provide for such necessity or emergency. No increase shall be made in the rate of taxation authorized to be levied in any fiscal year. Unless such increase be authorized by ordinance passed by the unanimous vote of the supervisors and approved by the mayor. The character of such necessity or emergency shall be recited in the ordinance authorizing such action, and be entered in the journal of the board. * * *

The ordinance referred to in the decision was adopted in 1910 and declared:

"Section 1. It is hereby recited, determined, and declared that a great necessity and emer-

gency exists within the city and county of San Francisco, which requires that the limitation of taxation contained in section 11, chapter 1, of article III of the charter of said city and county be temporarily suspended, and that the character of such necessity and emergency is as follows, to wit: On the 18th day of April, 1906, a large number of the public buildings, and other structures, and much of the fire department equipment of said city and county were destroyed by fire, and on said day a large extent of the public sewers of said city and county were damaged and destroyed by earthquake; that a large extent of the public streets of said city and county were damaged by the combined effects of fire and earthquake; also there is danger that the bubonic plague, prevalent in 1907, may recur, and provision should be made to prevent such recurrence; that it has been impossible to pave, repave, and repair streets, reconstruct and repair sewers, construct and repair the public buildings destroyed and damaged as aforesaid in April, 1906, from the appropriations heretofore made, and the great necessity and emergency hereby declared to exist has not been adequately provided for by previous tax levies made by the board of supervisors.

"Sec. 2. That by reason of the great necessity and emergency, herein set forth, large sums of money will be required to be expended by the city and county during the fiscal year ending June 30, 1911, for the paving, grading, repaving, and repairing of streets, for the reconstruction and repair of sewers, construction of and repairs to public buildings, for construction and equipment of fire department buildings, for the purchase of lands for fire department buildings, for the reconstruction of, repairs to, and equipment of school department buildings, for the construction and equipment of police department buildings, and for the purchase of lands for police department purposes, and for the continuation and enforcement of sanitary measures. That the large sums required for the aforesaid purposes cannot be obtained from the annual income and revenue of the city and county, and said necessary expenditures cannot be made without temporarily suspending the limitation upon the rate of taxation provided for in section 11 of chapter 1 of article III of the charter of said city and county."

After a review of a number of authorities, some of which are relied on by plaintiffs in error in this case, the court said:

"In the light of these fundamental principles we come to the immediate question: Does the charter of San Francisco in terms or by necessary implication make the determination of the supervisors as to the existence of a great emergency or necessity conclusive? Manifestly it does not. The language of the charter is not that the dollar limit may be suspended upon the declaration of the supervisors that a great emergency or necessity exists. It is that this limit may be suspended 'in case of [the existence of] any great necessity or emergency.' Moreover, and as persuasive to this view, even were it not so plain as it appears, is the added fact that the supervisors are required to spread upon the journal 'the character of such necessity or emergency.' * * * Webster's Inter-

national Dictionary defines 'emergency' as 'an unforeseen occurrence or combination of circumstances which calls for an immediate action or remedy; pressing necessity; exigency.' This definition is approved in *People v. Lee Wah*, 71 Cal. 80, 11 Pac. 851. It is the meaning of the word that obtains in the mind of the lawyer as well as in the mind of the layman. It was not in contemplation that the supervisors could foster and nurse such an emergency, so as to spread their taxing power over an undetermined number of years. As little was it designed that under the head of emergency or necessity should be imposed taxes not bearing forcefully and directly on the relief, cure, or prevention of this emergency or necessity. Recalling once more to mind the fact that the exercising of the taxing power, for the reasons already given, is subject to strict construction, the trial court will scrutinize the items presented: First, to determine whether or not the great emergency or necessity, within the meaning of the charter, existed at the time of the levy; and, second, whether, if it be found that such emergency or necessity did in fact exist, any of the items in the levy do not fairly come within the purport and scope of such emergency levy. And, finally, it must be said that no argument of hardship or inconvenience will justify a court in setting at naught the written terms of a city's charter, even at the instance of the city's officials. As was said by this court in *Connelly v. San Francisco*, 164 Cal. 101, 127 Pac. 884, 'An inconvenience to the city does not justify the despoiling of its taxpayers.' If these large revenues sought to be raised by the city do not fairly come within the purview of an emergency tax measure, it is for the city to meet the desired end either by the issuance of bonds or by an amendment to its charter. It is not for the courts themselves to amend this charter by striking therefrom any of its salutary and protective provisions."

See, also, *Josselyn v. City and County of San Francisco*, 168 Cal. 436, 143 Pac. 705. For other definitions of emergency, see *Seaboard Air Line Ry. v. McMichael*, 143 Ga. 689, 695, 85 S. E. 891; 20 O. J. p. 499.

The foregoing discussion is pertinent to the case under consideration. Applying the principles therein stated, the provisions of the charter of the city of Atlanta relating to an extraordinary tax do not provide that the mayor and council of the city may levy an extraordinary tax if the mayor and council shall declare an emergency to exist, but the provision is that an extraordinary tax may be levied "in case of emergency, to be judged of by them." If an emergency exists in fact, and if the mayor and council shall so declare, the tax may be levied; if, however, no emergency exists, the declaration by the mayor and council that an emergency exists will not authorize the tax. The provision of the charter does not expressly declare that the finding of the mayor and council that an emergency exists shall be conclusive. The express provision of the charter is "in case of emergency," and the Legislature did not intend to leave to mere implication the power

to conclusively declare the existence of an emergency, in view of the express declaration that an additional tax is authorized "in case of emergency."

[2] 2. The evidence relied on to show the existence of an emergency upon which to base the levy of the additional tax is insufficient for that purpose, and the court did not err in granting the interlocutory injunction.

Judgment affirmed.

All the Justices concur, except GILBERT, J., absent.

(152 Ga. 634)

PHINIZY v. PHINIZY. (No. 2606.)

(Supreme Court of Georgia. Feb. 17, 1922.)

(Syllabus by the Court.)

1. Pleading \S 32, 209—Property agreement not foundation of action so as to require incorporation in libel; demurrer for failure to attach separation agreement does not raise failure to set forth its substance sufficiently.

Jacob Phinizy brought a libel for divorce against his wife, Mary Vason Phinizy, upon the ground of willful and continued desertion for the term of more than three years. He alleged further that he and the defendant entered into a written contract on July 22, 1915, by which plaintiff was to pay defendant a certain monthly allowance which was accepted by defendant in lieu of alimony, both temporary and permanent, which payments have been duly made from the date of the agreement, which binds the plaintiff to pay the sums set forth in the agreement during the lifetime of the defendant. The agreement was entered into in lieu of temporary and permanent alimony, and for that reason plaintiff does not set forth a schedule of his property for the purpose of determining the amount of temporary and permanent alimony that might be due from plaintiff to defendant. The prayer is for process, and for a total divorce between the plaintiff and defendant. The defendant filed a demurrer to the petition, upon two grounds, as follows: (1) "Defendant demurs to paragraph 6 of the petition, on the ground that it does not set out the written contract therein referred to, dated July 22, 1915, and recorded in the clerk's office of the superior court of Richmond county, in Book 8 H, folio 85; and moves to strike said paragraph, and dismiss the petition, unless plaintiff attaches to his petition a complete copy of said contract." (2) "Defendant further demurs to said petition, and moves to dismiss the same, on the following ground: After the filing of said suit for divorce on November 20, 1920, the defendant instituted an ancillary proceeding by way of petition for allowance for attorney's fees, and the plaintiff in said divorce case filed his answer thereto; and in said answer made further reference to said written contract of July 22, 1915; and upon the hearing of said issue, wherein the court allowed attorney's fees, said contract of July 22, 1915, was introduced in evidence, and was embodied in the bill of exceptions now on file

in this court; and the entire record in said ancillary proceedings is now a part of the record in the main case, and consequently said written contract is now before the court as a part of the record, subject to demurrer. And this defendant says that it appears on the face of the record as set out in said contract that there was no desertion on the part of this defendant, as alleged by plaintiff; but, on the contrary, that it was recited therein that the plaintiff and defendant had for some time past been living separate and apart, and 'have already agreed that they shall continue to live separate and apart'; and said contract establishes and perpetuates the relation of husband and wife, living in a state of separation by mutual consent, and necessarily negatives the existence of any state of facts that could constitute legal desertion by the defendant." The court overruled the demurrer, and the defendant excepted. *Held:*

The Civil Code of 1910, § 5541, declares that "copies of contracts, obligations to pay, or other writings should be incorporated in or attached to the petition in all cases in which they constitute the cause of action, or the relief prayed for must be based thereon," etc. The alleged contract relied on to avoid the necessity of attaching a schedule of the plaintiff's property to the petition for divorce was not the foundation of the action, and therefore the provision of the statute referred to does not apply.

(a) If the demurrer had distinctly raised the point that the sixth paragraph did not sufficiently set forth the substance of the contract referred to, it would have presented a different question; but this was not the ground of the demurrer.

2. Pleading \S 210, 216(2)—Speaking demurrer cannot require a contract to be set out in order that it may form basis of demurrer; that contract incorporated in ancillary proceeding does not make it part of petition so as to form basis of demurrer.

Defendant cannot, by a demurrer which is "speaking," require the plaintiff to set out a contract in order for the contract to be a basis for a demurrer. Such a demurrer should be overruled. *Beckner v. Beckner*, 104 Ga. 219 (1), 30 S. E. 622; *Clark v. East Atlanta Land Co.*, 113 Ga. 22, 38 S. E. 323; *Oliver v. Powell*, 114 Ga. 592, 40 S. E. 826; *Reid v. Caldwell*, 120 Ga. 718 (5), 48 S. E. 191; *Haber v. So. Bell Tel. Co.*, 118 Ga. 874 (1), 45 S. E. 696; *Tasley v. Bradley*, 110 Ga. 498 (7), 35 S. E. 782, 78 Am. St. Rep. 113; *East Atlanta Land Co. v. Mower*, 138 Ga. 380 (2), 75 S. E. 418. Compare *Lynch v. Citizens & Southern Bank*, 136 Ga. 344 (2), 71 S. E. 469.

(a) The fact that, in an ancillary proceeding to the divorce, to recover attorney's fees by the defendant, she incorporated the contract therein, and that the defendant in the present bill of exceptions specified the contract which was sent up with the record, cannot avail the defendant as being a part of the present petition, so as to form the basis of a demurrer.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Suit by Jacob Phinzy against M. V. Phinzy. Judgment for plaintiff on demurrer, and defendant brings error. Affirmed.

See, also, 151 Ga. 393, 107 S. E. 53.

Wm. H. Fleming, of Augusta, for plaintiff in error.

O. H. & R. S. Cohen and Callaway & Howard, all of Augusta, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur.

(152 Ga. 711)

CITIZENS' BANK OF MOULTRIE v. ROCK-DALE COUNTY. (No. 2379.)

(Supreme Court of Georgia. Feb. 18, 1922.)

(Syllabus by the Court.)

1. Pleading \S 210—Speaking demurrer should be overruled.

A demurrer which is "speaking" should be overruled.

2. Constitutional provisions.

Under article 7, § 7, par. 1, of the Constitution of this state (Civ. Code 1910, § 6563), no county can incur any new debt without the assent of two-thirds of the qualified voters thereof, "except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein."

3. Counties \S 151—Note held not on its face violative of provision as to incurring new debts.

Where a board of county commissioners adopted a resolution on December 3, 1918, reciting that "there is a casual and temporary deficiency in the public funds in the treasury of the county, * * * and there is a casual and temporary need of money to meet the current expenses of the county government," and an order was passed empowering the commissioners to negotiate a temporary loan for a named sum for such purpose; and where pursuant to such authority the commissioners did borrow the sum of \$5,000 and executed a promissory note therefor, due April 1, 1919, reciting that "each and every act, condition, and thing required to be done, to have happened, and to be performed precedent to and in the issuance of this note has been done, has happened, and has been performed in full and strict compliance with the constitution and laws of the state of Georgia, and that this note is within every debt and other limit prescribed by law, and the faith and credit of the county * * * are hereby irrevocably pledged to the punctual payment of the principal and interest of this note, according to its terms," such note upon its face is not in violation of the provision of the Constitution as quoted in headnote 2, so as to make it unenforceable.

4. Counties \S 222—Petition on note alleging giving for money borrowed to meet casual deficiency held not demurrable.

Where suit was brought on such note by one who had purchased it for value, before due,

and without notice of any defense, alleging that the petition was filed within 12 months from the time it became due, and that the consideration of the note was for money borrowed by the county to meet a casual deficiency in the revenue of the county for the purpose of paying the current expenses of the county, such petition, to which was attached a copy of the order of the commissioners and of the note sued on, was not demurrable on the ground that the plaintiff as the purchaser of the note had taken it with notice that the note was given in violation of the provisions of the constitution above recited.

5. Counties \S 222 — Count not demurrable because showing it was based on note.

Nor was the petition demurrable on the ground that the first count, which sought to recover of the county the amount in controversy for "money had and received" by the defendant, did not state a cause of action, for the reason that the count showed that it was based on a note alleged to have been purchased for value. See Butts County v. Jackson Banking Co., 129 Ga. 801(3), 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244.

6. Counties \S 222—Pleading \S 192(3)—Petition in action on note not demurrable for failure to allege purposes for which money borrowed, etc.; allegation that money borrowed by county paid out on warrant for current expenses not demurrable as conclusion.

Nor was the petition demurrable on the ground that it was not alleged for what purposes the money was received by the treasurer of the county, and how it was expended, or for what legal purposes the money was paid out; and that the allegations of the petition that the sums received were paid out by the treasurer on the warrant of the commissioners of the county, for current expenses, is a mere conclusion of the pleader and not warranted by the facts alleged.

7. Estoppel \S 62(5)—Unauthorized act of officers does not estop public.

Under Civ. Code 1910, § 303, the powers of all public officers are defined by law, and all persons must take notice thereof. The public cannot be estopped by the acts of any officer done in the exercise of a power not conferred.

8. Estoppel \S 62(5)—Public estopped by authorized acts of officers.

But the public will be estopped by the acts of any public officer done in the exercise of a power which is expressly conferred by law.

(Additional Syllabus by Editorial Staff.)

9. Pleading \S 210—Speaking demurrer cannot require further allegations as basis of another demurrer.

In an action against a county on a note for money borrowed to meet a casual deficiency, defendant cannot by a speaking demurrer require plaintiff to state the nature of the casual deficiency in order that it may furnish the basis of a further demurrer.

10. Pleading ~~¶~~210—Demurrer on ground that money was borrowed for purpose different than that alleged is a speaking demurrer.

In an action against a county on a note for money borrowed, where the petition alleged that it was borrowed to supply a casual deficiency, a demurrer on the ground that it was borrowed to defray current expenses was a speaking demurrer and properly overruled.

Error from Superior Court, Rockdale County; John B. Hutcheson, Judge.

Action by the Citizens' Bank of Moultrie against Rockdale County. Judgment for defendant on demurrer, and plaintiff brings error. Reversed.

The Citizens' Bank of Moultrie brought suit against the county of Rockdale to recover the sum of \$5,000. The petition was in two counts, and alleged in substance the following: (1) That the defendant was indebted to plaintiff in the sum of \$5,000, together with interest thereon from April 1, 1919, at the rate of 7 per cent. per annum, for money had and received to the use and benefit of the defendant; that the indebtedness was for money advanced by the plaintiff to the defendant and received by it and used for the benefit of Rockdale county and in discharge of current liabilities of the county and for other lawful county purposes; that the defendant refused to pay the sum sued for or any part thereof; and that plaintiff brought the suit within 12 months from the date it became due and payable. (2) That the defendant was indebted to the plaintiff in the principal sum of \$5,000, together with interest thereon from April 1, 1919, at the rate of 7 per cent. per annum, and the further sum of 10 per cent. of the principal sum and interest as attorney's fees, due upon a certain promissory note, a copy of which was attached to the petition, and which note plaintiff received in due course of business, before maturity, for a valuable consideration from the Frank Scarboro Company. The note was dated Conyers, Ga., December 3, 1918, and was signed by the county of Rockdale, Ga., by the five county commissioners. It recited:

"On April 1, 1919, the county of Rockdale, Georgia, for value received, promises to pay to Frank Scarboro Co., or order, at National Bank of Commerce, in New York, New York, the sum of \$5,000 [both printed and figures], with interest after maturity, together with all costs of collection, including ten per cent. attorney's fees. This note is issued in pursuance of a resolution duly adopted by the commissioners of the county of Rockdale, on December 3, 1918, and duly signed by the commissioners of said county as required by law. It is hereby certified and recited that each and every act, condition, and thing required to be done, to have happened, and to be performed precedent to and in the issuance of this note has been done, has happened, and has been performed in full and strict compliance with the constitution and laws of the state of Georgia,

and that this note is within every debt and every limit prescribed by law, and the faith and credit of the county of Rockdale are hereby irrevocably pledged to the punctual payment of the principal and interest of this note, according to its terms."

The note was formally executed.

After a demurrer to the petition had been filed, the plaintiff amended the second count of the petition, and alleged that the note which is set out above was executed by the county of Rockdale by and through its county commissioners, naming them, for the purpose of obtaining a temporary loan to supply casual deficiencies of revenue existing at the time of the execution of the written instrument, and that the note was executed pursuant to a resolution duly passed by the county commissioners for the purpose aforesaid. A certified copy of the resolution was attached to the note, as follows (omitting the formal parts):

"Whereas there is a casual and temporary deficiency in the public funds in the treasury of the county of Rockdale, and whereas, there is a casual and temporary need of money to meet the current expenses of the county government, therefore be it resolved: First, that to cover said casual and temporary deficiency, in order to meet the current expenses of the county government, we hereby authorize and empower the commissioners of the county of Rockdale to negotiate a temporary loan for the sum of \$15,000 for the county of Rockdale, upon the best rate of interest possible; said loan to be made with any bank, bankers, trust company, or individual; and we hereby empower said commissioners to execute and deliver notes in the name of the county of Rockdale for said loan of money. Said notes to be payable first day of April, 1919. Second, that this resolution be spread upon the minutes of the board. Passed in the regular session held the 3rd day of December, 1918."

This resolution was certified to by the clerk. Also attached to the note was a certificate of the attorneys for Rockdale county, as follows:

"To Whom it may Concern: Referring to the attached note given by the county of Rockdale and executed by the board of commissioners, dated December 3, 1918, for \$5,000, payable April 1, 1919, I wish to advise that in my opinion said note is valid and binding obligation of the said county of Rockdale, Georgia. A. C. & J. H. McCalla, Attorneys for Rockdale County, Georgia."

The plaintiff alleged that, relying upon the resolution of the commissioners and the certificate of the attorneys, it purchased the note from the Frank Scarboro Company for full value, less the usual discount in such cases, before maturity of the note, and without notice of equities existing between the original parties; that under article 7, § 7, par. 1, of the Constitution of this state, the defendant, Rockdale county, had the authority to borrow money for the purpose of sup-

plying casual deficiencies in the treasury of the county; that the debt of \$5,000, which is evidenced by the note sued upon in this case, is within the power of the county to contract for the purpose of supplying a casual deficiency in the treasury of the county; and that the plaintiff purchased the note on the faith of the statements contained in the note and on the faith of the resolution of the county commissioners attached thereto, and the certificate of the county attorneys that the indebtedness was a valid and binding obligation of the county, and was to supply a casual deficiency in the treasury of the county.

The defendant renewed its demurrer to the petition as amended, upon the grounds that neither of the counts of the petition sets forth a cause of action against the defendant, and that the petition is "multiplicitous and contradictory" and sets out two separate and inconsistent causes of action. It demurred generally to the first count, on the ground that on its face it shows that it is based on a purported note alleged to have been purchased for value, and not on money had and received by the defendant. The second count was demurred to on the ground that it was based upon a note which the defendant had no authority to execute or deliver, and which was therefore void and unenforceable. The second count was specially demurred to as amended, on the ground that the allegation that the plaintiff purchased the note on the strength of certain resolutions and recitals made by certain officials of Rockdale county is insufficient, inasmuch as their authority to act for and in behalf of Rockdale county is limited by law under which they were appointed, and they cannot by any recital or resolution bind or estop the county; also, on the ground that the petition does not set up or show the nature of the casual deficiency in revenue alleged to have existed at the time of the execution of the note, nor does it set up any facts from which the court can determine whether or not such a casual deficiency in revenue actually existed. The first count was demurred to specially on the grounds that it is not alleged for what purposes the money received by the treasurer of Rockdale county was expended, or for what legal and legitimate purposes; and that the allegations that the sums received were paid out by the treasurer on the warrant of commissioners of the county for current expenses is a mere conclusion of the pleader not warranted by any facts alleged. Both counts were demurred to upon the ground that the money borrowed by the county and evidenced by the note sued on was borrowed for the purpose of defraying and paying current expenses of the county in anticipation of the collection of taxes, and not for the purpose of supplying a casual deficiency in revenue. The demurrers were sustained by the court upon each and all of the grounds

thereof, and the case was dismissed. To this judgment the plaintiff excepted.

Dowling & Whelchel and Askew & Mather, all of Moultrie, for plaintiff in error.

J. H. McCalla, of Conyers, and Jones, Park & Johnston and C. Baxter Jones, all of Macon, for defendant in error.

HILL, J. (after stating the facts as above). [1, 2, 3, 4] 1. We are of the opinion that the court erred in sustaining the demurrer to the petition, the substance of which is set out in the foregoing statement of facts. Article 7, § 7, par. 1, of the Constitution of the State (Civil Code 1910, § 6563), provides that—

"The debt hereafter incurred by any county, municipal corporation, or political division of this state, except in this Constitution provided for, shall not exceed seven per centum of the assessed value of the taxable property therein, and no such county, municipality, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof at an election for that purpose, to be held as may be prescribed by law," etc.

The petition was in two counts. The first declared an obligation due on the part of the county for money had and received by it; the second was based upon a note executed by the county through its county commissioners, upon the authority of an order previously passed by the county commissioners, wherein it was recited that a casual and temporary deficiency existed in the treasury of the county of Rockdale, and that there was a casual and temporary need of money to meet the current expenses of the county government, and in order to cover that casual and temporary deficiency, and to meet the current expenses of the county government, the county commissioners were authorized to negotiate a temporary loan for that purpose. That order was dated December 3, 1918, and the note executed by the commissioners on the same date for the sum of \$5,000 was payable on April 1, 1919. The petition was demurred to on a number of grounds, as will be seen from the foregoing statement of facts. One of the special grounds of demurrer thus set up was to the effect that the petition does not show the nature of the casual deficiency in revenue alleged to have existed at the time of the execution of the note, and that it does not set up any fact from which the court could determine whether or not such a casual deficiency in revenue actually existed. We are of the opinion that this ground of the demurrer is without merit. Whatever ground for defense this may afford the defendant on the trial of the merits of the case, we are of the opinion that the defendant cannot, by a demurrer which in its nature

is "speaking," require the plaintiff to set out a state of facts merely for the purpose of furnishing the basis of a further demurrer. See, in this connection, *Phinizy v. Phinizy*, 152 Ga. —, 111 S. E. 433, and cases there cited. For like reasons we think that the special demurrer on the ground that the petition does not allege for what purpose the money received by the treasurer of Rockdale county was expended, or for what legal and legitimate purposes the sums were paid out by the treasurer on the warrant of the commissioners of the county for current expenses, is without merit. Primarily it is for the county commissioners (or the proper county authorities, where there are no commissioners) to decide when a casual deficiency in revenue exists; and, where it is affirmatively alleged that the county commissioners have declared by resolution that such casual deficiency does exist, we are of the opinion that this is sufficient as against a "speaking" demurrer which insists that the petition does not sufficiently allege that the deficiency does so exist; and, where it is alleged that such casual deficiency existed and money was borrowed by the county in order to meet that deficiency, it is matter of defense on the trial of the issue made in such case, rather than to require the plaintiff to set out in his petition how such deficiency occurred and how the money borrowed by reason thereof was expended.

[10] 2. Both counts of the petition were demurred to upon the ground that the money borrowed by the county of Rockdale, as evidenced by the note sued on, was borrowed for the purpose of defraying and paying current expenses of the county in anticipation of the collection of taxes, and not for the purpose of supplying a casual deficiency in revenue. This ground of the demurrer is also "speaking" in character, and was properly overruled for that reason, if for no other. See cases cited in *Phinizy v. Phinizy*, supra. The petition does distinctly allege that the money was borrowed by the county "for the purpose of supplying a casual deficiency in the treasury of said county, and petitioner purchased said note on the faith of the statements contained in said note, on the faith of the resolution of said commissioners attached thereto, and on the certificate of the county attorneys that said indebtedness was a valid and binding obligation of said county and was to supply a casual deficiency in the treasury of said county." On demurrer these allegations are to be taken as true, and when so taken they fall within the exception to the provisions of the Constitution set out in Civil Code 1910, § 6563, forbidding the creation of a debt without a vote of the people of the county.

[3, 4] 3. We cannot say as matter of law from the pleadings in this case, which have been fully set out in the foregoing statement of facts, that the contract sued on created

"a new debt," and is therefore unconstitutional as being in violation of article 7, § 7, par. 1, of the Constitution of 1877. That provision of the Constitution expressly provides for a temporary loan or loans to supply casual deficiencies of revenue, and it is alleged here that this debt was created for that purpose; and we cannot say as matter of law on demurrer that that is not true. It is not objectionable on the ground alone that the note was executed on December 3, 1918, and was payable on April 1, 1919. Mayor, etc., of Hogansville v. Planters' Bank, 147 Ga. 346, 94 S. E. 810. It is true generally that a county cannot borrow money and "create a debt" within the meaning of the Constitution above cited, without the sanction of two-thirds of the qualified voters of the county at an election held for that purpose; but the exception is that the county may, within the limitations provided in that provision of the Constitution, secure a temporary loan to supply casual deficiencies of revenue, not to exceed one-fifth of 1 per centum of the assessed value of taxable property within such political division of the state, without creating "a debt" such as is contemplated by the Constitution. Mr. Justice Cobb, in a very able opinion rendered in the case of *City of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, at page 717, 32 S. E. 907, at page 915, defines a "casual deficiency" as follows:

"And if, during the period in which the expense was incurred and the tax was levied, by some oversight the levy was not of sufficient amount to pay the expenses, the deficiency, casual in its nature, which was contemplated by the Constitution, arose and could be supplied by a temporary loan."

The question arises, therefore, in the present case, whether a casual deficiency existed in the revenue of Rockdale county, under the allegations of the petition. It is alleged that such deficiency did exist; and the county commissioners of that county, who had the raising of revenue for the county in charge, asserted in the resolution they adopted, and in the note they executed in pursuance of the authority granted in the resolution, that such casual deficiency did exist; and, when such facts appear in the petition almost in the language of the Constitution itself, we are forced to the conclusion that the present case falls within the exception stated in article 7, § 7, par. 1, of the Constitution. But it is argued that the recital in the resolution of the county commissioners, and in the note executed in pursuance thereof, that the note was executed for the purpose of supplying a casual deficiency in the revenue of the county, "in order to meet the current expenses of the county," was notice to the purchaser of the note that the money was not procured to cover a casual deficiency, but to pay the current expenses of the county, which is obnoxious to the Constitution. We are of the opinion that so far as the petition and de-

murrer are concerned, if a casual deficiency did in fact exist, and for that reason there was no money in the treasury with which to pay current expenses, the county could make a temporary loan to supply such casual deficiency, even if the money thus obtained was used to pay current expenses. Making such a temporary loan would not create a debt within the meaning of the Constitution above quoted, provided "a sufficient sum * * * to discharge the liability can be * * * raised by taxation during the current year." *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244. In the case of *Bird v. Franklin*, 151 Ga. 4, 105 S. E. 834, it was held, quoting from the decision in *Manly Building Co. v. Newton*, 114 Ga. 245, 40 S. E. 274:

"County authorities may, without being said to create a debt within the meaning of the Constitution, contract for the building of a courthouse to be paid for out of available funds in the treasury, or with the proceeds of taxes that have been or may lawfully be levied during the year in which the contract is made."

And in *City of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907, *supra*, Mr. Justice Cobb, delivering the opinion of the court in that well-considered case, said, while considering the same provision of the Constitution now under construction:

"The power to make a temporary loan for a casual deficiency, *being expressly conferred* [italics ours], but emphasizes the fact that the constitutional plan was that there should be balancing of accounts at stated periods of time, at the end of the calendar year or the fiscal year of the corporation, when the amounts raised by taxation on the one hand should be applied to the sums incurred as expenses on the other; and if, during the period in which the expense was incurred and the tax was levied, by some oversight the levy was not of sufficient amount to pay the expenses, the deficiency, casual in its nature, which was contemplated by the Constitution, arose and could be supplied by a temporary loan. The period marked by the calendar year or an arbitrary fiscal year, was evidently in contemplation by the framers of the Constitution, as that is in accord with the custom so long existing in this state. * * * So far as we are concerned, we are satisfied that the policy of the Constitution, which, as we believe, demands annual adjustments of municipal expenses and municipal taxes, with the requirement that the expenses each year shall be discharged by the taxes of that year, save only in the two cases provided for in the Constitution—consent of the inhabitants of the municipality, and a casual deficiency in the revenue."

And see *Monk v. City of Moultrie*, 145 Ga. 843, 845, 90 S. E. 71; *Wilson v. Gaston*, 141 Ga. 770, 82 S. E. 136; *Wright v. So. Ry. Co.*, 146 Ga. 581, 91 S. E. 681; *Mayor, etc., of Hogansville v. Planters' Bank*, 147 Ga. 346, 94 S. E. 810.

In the case of *Butts County v. Jackson*

Banking Co., 129 Ga. 801, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244, in another well-considered opinion delivered by Mr. Presiding Justice Evans, it was held:

"The general fiscal policy outlined in the Constitution of 1877 for political subdivisions, such as counties and municipalities, was to provide a system of finance for subordinate public corporations, under which there could be made each year contracts for the expenses of the year, and these were to be paid out of moneys arising from taxes levied during the year. *A liability for a legitimate current expense may be incurred* [italics ours], provided there is, at the time of incurring the liability, a sufficient sum in the treasury of the county or municipality which may be lawfully used to pay the liability incurred, or if a sufficient sum to discharge the liability can be raised by taxation during the current year."

[7, 8] 4. It is true that the powers of all public officers are defined by law, and all persons must take notice thereof; and the public cannot be estopped by the acts of any officer done in the exercise of a power not conferred. *Civil Code* 1910, § 303; *Dent v. Cook*, 45 Ga. 323. But the converse of this proposition is equally true, that the public can be, and will be, estopped by the acts of any public officer done in the exercise of a power which is expressly conferred by law. The power to borrow money to supply a casual deficiency is expressly conferred by the Constitution of the State of Georgia. Article 7, § 7, par. 1 (*Civil Code* 1910, § 6563); *Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 734, 32 S. E. 907; *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244. Where authority to borrow money is conferred upon certain political divisions of the state by the Constitution, and in pursuance of that authority the proper authorities of one of those political divisions (in this case the county commissioners of a certain county) borrowed money and gave a promissory note in which are recitals of facts showing the authority of such officers to borrow the money for a certain legal purpose, such recitals will estop the county, in a suit by a purchaser of the note *bona fide*, for value, before due, and without notice, from having dismissed the suit on demurrer on the ground that such note created a debt prohibited by the Constitution of the state. *Town of Climax v. Burnside*, 150 Ga. 556, 104 S. E. 435; *Block v. Cohen*, 52 Ga. 621; *County of Mercer v. Hackett*, 68 U. S. 83, 17 L. Ed. 548; *Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 581; *Marcy v. Oswego*, 92 U. S. 637, 23 L. Ed. 748; *Stanly County v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126; *Gunnison v. Rollins*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 669; *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552.

[5] Considering the petition in this case in connection with the order of the county commissioners and the note sued on, and un-

der the foregoing authorities, we conclude that the petition as amended set out a cause of action, and therefore that the court erred in sustaining the demurrer and in dismissing the petition.

Judgment reversed.

All the Justices concur.

(28 Ga. App. 418)

DAVIS, Agent, etc., v. SEIGEL.

(No. 12782.)

(Court of Appeals of Georgia, Division No. 2.
April 1, 1922.)

(Syllabus by the Court.)

Carriers \S 91, 94(1½), 111—Action against carrier maintainable where failure to deliver occurs; failure to deliver or to deliver in good order is breach of contract and also tort.

Where a carrier fails to deliver goods at destination, section 2798 of the Civil Code of 1910 confers jurisdiction of the case for resulting damage on the courts of the county where the failure to deliver occurred—that is, the county of the destination of the goods—whether the action be ex contractu or ex delicto. Civ. Code 1910, \S 2798. The failure to deliver at destination, or to deliver in good order, is a breach of the contract of carriage, and also a breach of the carrier's public duty, the latter being a tort, both theoretically located at the place of performance, the destination of the shipment.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by Dora Seigel, administratrix, against Jas. C. Davis, Agent, etc. Judgment for plaintiff, and defendant brings error. Affirmed.

Hartsfield & Conger, of Bainbridge, and Pope & Bennet, of Albany, for plaintiff in error.

John R. Wilson and H. C. Harrison, both of Bainbridge, for defendant in error.

HILL, J. This suit was brought in the city court of Bainbridge, for the purpose of recovering the value of certain dry goods alleged to have been shipped from Baltimore, Md., to Bainbridge, Ga. The suit was brought against James C. Davis, Federal Agent, operating the Merchants' & Miners' Transportation Company and the Atlantic Coast Line Railroad. The defendant demurred to the petition, contending that it was impossible to tell whether the suit was a suit on contract or a suit for a tort, and whether the suit was against James C. Davis as Federal Agent in control of railroads generally and as to all of the transportation lines in the United States, or was against James C. Davis, Federal Agent, in respect to

the transportation effected by the Merchants' & Miners' Transportation Line of steamers, or whether it was a suit against James C. Davis, Federal Agent, in respect to the transportation effected on the Atlantic Coast Line Railroad alone, or whether it was a suit against James C. Davis, Federal Agent, in respect to the transportation effected by both the Merchants' & Miners' Transportation Line and the Atlantic Coast Line Railroad. After the filing of the demurrer the petition was amended, and, if there was any doubt as to who was the defendant in the petition as originally filed, this doubt is fully solved by the allegations of the petition as amended.

The writer of this opinion does not think that the petition fully merits the criticisms aimed against it by counsel for the defendant. It seems to this writer that the original petition makes it clear against whom the suit was filed and why it was filed. It alleges, in substance, that the plaintiff is the duly qualified administratrix of the estate of Sam Seigel, late of Bainbridge, Ga., who died on February 4, 1921; that the defendant thereafter named has damaged petitioner's intestate in the sum of \$325 by reason of the facts thereafter alleged; that on or about August 5, 1919, the Merchants' & Miners' Transportation Company, a carrier engaged in the handling of freight for hire, and with a place of business in the city of Baltimore and state of Maryland, was under the control and operation of the United States of America, as was the Atlantic Coast Line Railroad Company, a common carrier with a line of railroad extending from Savannah, Ga., to Bainbridge, Ga., and that both of said common carriers were then under the direction and control of Walker D. Hines, Director General of Railroads, by virtue of an act of Congress which authorized the President to take over said transportation lines during the war and for a certain period thereafter.

The petition was subsequently amended by striking the name of Walker D. Hines and substituting that of James C. Davis. Whether or not there was any obscurity which warranted doubt as to who was the defendant in the suit, that doubt is fully solved by the amendment filed to meet the demurrer. This amendment is in the following language:

"First. (a) Plaintiff amends the sixth paragraph by adding thereto the following allegations, to wit: That said two cases of goods were turned over by the Merchants' & Miners' Transportation Company to the Atlantic Coast Line Railroad at Savannah, Ga., on or about the 15th day of August, 1919, and said Atlantic Coast Line Railroad's agents and employees accepted said shipment at Savannah, Ga., and, after having accepted the same from the Merchants' & Miners' Transportation Company did fail to deliver said shipment to Sam Seigel, the consignee, at point of destination, at Bainbridge, Ga., but, on the contrary, either lost or

converted said entire shipment, and the same was never delivered to your petitioner's intestate. (b) That subsequent to the receipt of said shipment at Savannah, Ga., your petitioner's intestate did pay to the Atlantic Coast Line Railroad, at Bainbridge, Ga., on or about September 2, 1919, seven dollars freight charges for transporting said shipment."

The petitioner amended the third paragraph of the petition by alleging the character and quantity of the cases of merchandise shipped, and delivered to the Merchants' & Miners' Transportation, and by them delivered to the Atlantic Coast Line Railroad, and that the plaintiff's intestate had paid to the Atlantic Coast Line Railroad, at Bainbridge, Ga., the freight charges on the shipment, aggregating \$7, and that, in addition to having paid the freight, petitioner has suffered a loss by reason of interest on the amount involved, aggregating \$40 or other large sum. The plaintiff amended the seventh paragraph of the original petition by striking the word "plaintiff," which appeared on the sixth line of said paragraph, and inserting in lieu thereof the word "defendant," so that said paragraph as amended discloses the said James C. Davis, as Federal Agent of defendant. This amendment was allowed, subject to demurrer. The demurrer was made and overruled and this is the error alleged.

In the demurrer it was contended that it was impossible for the defendant to make a defense, because it cannot be decided with any degree of certainty whether the suit was brought against Davis as Director General of the Merchants' & Miners' Transportation Company, at Baltimore, which was then being operated by the United States under the control of said Davis, or against the Director General Davis in charge of the Atlantic Coast Line Railroad, at Bainbridge, and whether the case is a suit on contract or in tort. The petition as amended plainly and distinctly alleges that the goods were shipped from Baltimore and delivered at that point to the Merchants' & Miners' Transportation Company, which was under the control of Davis as Director General, etc., and transported by the carrier to Savannah, Ga., and there delivered to the Atlantic Coast Line Railroad Company, to be delivered to the consignee at Bainbridge, Ga., and that the shipment was lost by the latter carrier and never delivered to the consignee. It was plainly a suit on contract for failure to deliver at destination in good order the freight

which had been delivered to the Atlantic Coast Line Railroad Company by the connecting carrier at Savannah, Ga. In other words, the damages alleged were damages from a breach of contract which took place in the county in which Bainbridge is located, which was the county of the destination of the consignment and where the carrier undertook by its contract to deliver the goods which had been delivered to it at Savannah by the connecting carrier at that point. It has been repeatedly held that, where a carrier fails to deliver the goods at destination, or delivers them in bad order, section 2798 of the Civil Code of 1910 confers jurisdiction of the action for the resulting damages on the courts of the county where the failure to deliver them in good order occurred, and it is immaterial whether the action be *ex contractu* or *ex delicto*. *Burns v. Louisville & Nashville R. Co.*, 6 Ga. App. 614, 65 S. E. 582; *Louisville & Nashville R. Co. v. Warfield*, 129 Ga. 473, 59 S. E. 234.

It is perfectly clear that the shipment was delivered at Baltimore to the Merchants' & Miners' Transportation Company for the purpose of being transported to Savannah and there delivered to the connecting carrier, to be by that carrier taken to Bainbridge and delivered to the consignee. The suit is one against the last carrier for failure to carry out the contract, and necessarily it was against the Director General, who, at that time, as the courts will recognize, was in charge of the Atlantic Coast Line Railroad Company under the legislation of the United States and for the failure of the Atlantic Coast Line Railroad Company to deliver the shipment to the consignee. If these facts are proved on the trial of the case, to the satisfaction of a jury, it is manifest that the plaintiff would be entitled to a verdict for the value of the shipment. In the opinion of the writer there is no element of doubt in this case, so far as the allegations of the petition as amended are concerned, and this does not merit the criticism of the distinguished and learned counsel, nor the severity of the argument in support of the demurrer filed by the defendant. We think that the judge who heard the demurrer was right in his ruling.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 366)

SAVANNAH WAREHOUSE & COMPRESS CO. v. HAYES. (No. 12976.)(Court of Appeals of Georgia, Division No. 1.
March 9, 1922. Rehearing Denied April
11, 1922.)*(Syllabus by the Court.)*Trial \S 295(1)—Excerpts from charge to be read in light of entire charge.

This case has been before this court before, and is reported in 25 Ga. App. 356, 103 S. E. 270. The evidence for the plaintiff authorized a verdict in his favor, and the verdict has the approval of the trial judge. The assignments of error upon several excerpts from the charge of the court, when considered in connection with the entire charge and the pleadings and evidence, show no harmful or reversible error. It was not error to overrule the motion for a new trial.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by John Hayes against the Savannah Warehouse & Compress Company. Judgment for plaintiff, and defendant brings error. Affirmed.

O'Byrne, Hartridge & Wright, of Savannah, for plaintiff in error.

Lawrence & Abrahams, of Savannah, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 406)

HODGES v. SAVANNAH KAOLIN CO.
(No. 12799.)(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)*(Syllabus by Editorial Staff.)*

Parent and child \S 7(3)—Parent cannot recover for injury from illegal employment with his consent.

A parent consenting to the employment of her minor child, in violation of Park's Ann. Civ. Code, \S 3149a et seq., and receiving his wages, held estopped from recovering for injury to the minor proximately caused by the illegal employment; the employer being free from any other negligence than the illegal employment.

Error from Superior Court, Wilkinson County; Jas. B. Park, Judge.

Action by Minnie Hodges against the Savannah Kaolin Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Sibley & Sibley, of Milledgeville, for plaintiff in error.

Harris, Harris & Witman, of Macon, for defendant in error.

HILL, J. 1. "The employment of a minor under the prescribed age in a factory, in disobedience of a statute prohibiting such employment (Park's Civil Code, \S 3149 [a] et seq.) is negligence per se." Elk Cotton Mills v. Grant, 140 Ga. 727 (1), 79 S. E. 836, 48 L. R. A. (N. S.) 656. But where such a minor is so employed with the consent of a parent, and the parent receives the wages of the minor, the parent is estopped from recovering for injury to the minor, proximately caused solely by the illegal employment, the master being free from any other negligence than the illegal employment of the minor under the age prescribed by the statute. "One whose negligence has brought about a calamity to a little one whom he is legally bound to watch over and protect from injury cannot be allowed to profit by the result of his own inexcusable, if not criminal, neglect and misconduct. * * * The object of the rule is not to shield a negligent defendant from the penalty of his wrongdoing, but merely to deny aid to a plaintiff who, though equally guilty, nevertheless comes into a court of justice and demands the fruits of his own unpardonable neglect of both a moral and a legal duty." Atlanta, etc., Ry. Co. v. Gravitt, 93 Ga. 381, 383, 20 S. E. 550, 28 L. R. A. 553, 44 Am. St. Rep. 145. The court did not err in directing a verdict for the defendant.

2. The grounds of the motion for a new trial, based upon the rulings as to the admission of evidence, are without merit. The court did not err in refusing the grant of a new trial.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 392)

MONTEZUMA LIVE STOCK CO. et al. v. DOVER.**DOVER v. MONTEZUMA LIVE STOCK CO.**
et al.

(Nos. 12682, 12633.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1922. Rehearing Denied
April 1, 1922.)*(Syllabus by the Court.)*

1. Parties \S 97(1)—Misjoinder cured by amendment striking party.

This was a suit by the owner of certain cattle against a partnership for damages resulting from their alleged negligence in releasing his stock from a railroad pen where they were confined awaiting shipment. Three items of damage were claimed: Loss in market value of such of the cattle as were recovered; expenses of feeding the cattle and labor incurred in their recovery; and the market value of three

head which were never recovered. Defendants demurred generally and specially to the petition. The court overruled the grounds of the general demurrer, and those of the special demurrer attacking the sufficiency of the claim for the value of the lost cattle, but sustained the grounds which attacked the remaining items of damage as being inadequately set forth. To these rulings both parties filed exceptions pendente lite. A verdict was found for the plaintiff. In their bill of exceptions, the defendants assign error on the refusal of a new trial and on the exceptions taken pendente lite to the adverse rulings on the demurrers.

The petition set out a cause of action; and, as the record shows that the original alleged misjoinder of the present defendants with the railroad company in whose pen the cattle were placed was cured by an amendment striking the latter party from the petition, these grounds of demurrer are without merit.

2. Appeal and error ⇨1040(11)—No reversal for insufficiency of paragraph of petition when another paragraph not demurred to and supported by evidence.

It appears that the item of damage for the value of three head of cattle which were lost is set forth in both paragraph 7 and paragraph 8 of the amended petition. Both of these allegations were sufficient as against general demurrer. Only the sufficiency of the allegation as set forth in paragraph 8 is attacked by special demurrer. It follows that, since the proof supported the allegation as set forth in paragraph 7, the court would be unauthorized to set aside the judgment on account of alleged insufficiency of the allegation in paragraph 8.

3. New trial ⇨70—Denial not abuse of discretion when verdict supported by evidence.

The motion for new trial containing only the general grounds, and the verdict for the plaintiff being fully supported by evidence, the trial judge did not abuse his discretion in refusing a new trial.

4. Animals ⇨44—Appeal and error ⇨267 (1)—Damages ⇨148—Bill of exceptions containing no exception to final judgment insufficient as main bill; allegation of damages from negligence in release of stock from pen held subject to special demurrer.

The plaintiff's bill of exceptions, certified by the judge after his certification of the defendants' bill of exceptions, assigns no error on any final judgment, but only upon the antecedent ruling sustaining the special demurrer as to two of the items of damages claimed in the petition. Treated as a cross-bill, as the failure to except to the final judgment renders it insufficient as a main bill (*Mertins v. Pritchard*, 135 Ga. 648[2], 70 S. E. 328; *Prater v. Crawford*, 143 Ga. 709, 85 S. E. 829), it is not subject to the motion to dismiss as having been filed too late, or as not properly assigning error on the ruling actually complained of. Whether or not the questions thus presented by the plaintiff, in the absence of a proper main bill of exceptions filed by him, should be considered, under the general rule and practice of dismissing a cross-bill of exceptions where the judgment on the main bill is affirmed, except

where the cross-bill presents the controlling question in the case, the exceptions taken, upon full examination of the allegations both in the original petition and in the amendment numbered 4 to paragraph 8 of the petition, are without merit.

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Action by H. A. Dover against the Montezuma Live Stock Company and others. Judgment for plaintiff, and defendants bring error, and plaintiff brings a cross-bill of exceptions. Affirmed on both bills.

S. F. Underwood, of Byron, and Jule Felton, of Montezuma, for plaintiffs in error.

Gilbert O. Robinson and Jere M. Moore, both of Montezuma, for defendant in error.

JENKINS, P. J. Judgment affirmed on both bills of exceptions.

STEPHENS and HILL, JJ., concur.

On Motion for Rehearing by Plaintiff in Error in the Cross-Bill.

JENKINS, P. J. We have considered the plaintiff's exceptions pendente lite presented in a bill of exceptions which can only be entertained as a cross-bill, for the reason that it fails to except to the final verdict and judgment, although the general rule and practice is to dismiss the cross-bill where the judgment on the main bill is affirmed. While it is unnecessary to plead evidence, it is essential as against timely special demurrer to plead the ultimate facts with reasonable particularity to show a right of recovery and to permit the opposite party to make his defense. The amendment claiming in a lump sum \$189.95 as loss in market value "by reason of the excitement, running, and driving of said cattle in returning them to petitioner's stable" is the only item relating to market value mentioned in the exceptions pendente lite. As to this, the pleading fails to set forth that the defendants' act in opening the stock pen was responsible for the alleged excitement and running in returning them, or to show whether the alleged depreciation was caused by resulting physical injuries, loss in weight, or in what manner, and as to which animals, and the amount upon each, such damage was claimed. As damages on account of expenses, plaintiff alleged that "in the recovery of the cattle aforesaid he was put to the expense of \$127.35 as set out in the itemized statement" attached. How or for what reason he was put to such alleged expenses is nowhere shown, except that the stock were brought from somewhere to petitioner's stable, the location of which is not stated. The failure to show this, and the necessity for incurring the various items, such as feeding the cattle for several weeks,

as well as the indefiniteness of the other items such as, "To Kelly Bros. \$13.00," and "15 cows (Monk) \$80.00," rendered these allegations subject to special attack. The item for the value of the three lost head, as appears from the second headnote, was sustained not because of the sufficiency of the allegation, but because of the defendant's failure to specially demur to a paragraph containing the same.

Motion denied.

(28 Ga. App. 364)

CATER v. AYERS et al. (No. 12834.)

(Court of Appeals of Georgia, Division No. 1.
March 9, 1922.)

(Syllabus by the Court.)

New trial \S 99—Newly discovered cumulative impeaching evidence not likely to change result not sufficient ground.

This suit was for certain money and the value of a bank certificate of deposit which the plaintiff alleged the defendants converted to their own use. Under the evidence introduced by the plaintiff the court did not err in granting a nonsuit as to Mrs. Ayers, one of the defendants. Under all of the evidence adduced upon the trial, the verdict against the remaining defendant for \$80 principal and \$14.76 interest was authorized. The alleged newly discovered evidence is impeaching and cumulative, and would not likely produce a different result upon another trial. No ground of the motion for a new trial approved by the trial judge shows reversible error.

Error from Superior Court, Carroll County; C. E. Roop, Judge.

Action by J. M. Cater, administrator, against W. M. Ayers and others. Judgment for plaintiff against one of the defendants, and he brings error. Affirmed.

S. Holderness, of Carrollton, for plaintiff in error.

Boykin & Boykin, of Carrollton, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 367)

MARTIN v. PENN MUT. LIFE INS. CO.
(No. 13114.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1922.)

(Syllabus by the Court.)

Insurance \S 515—Only premium recoverable under policy, where insured committed suicide within one year.

The life insurance policy sued upon contained the following clause: "The contract shall be incontestable after one year from its date of issue, except for nonpayment of premium;

but, in case of suicide, whether sane or insane, within one year from the date of this policy, the liability of the company shall be limited to the amount of the premium paid hereon." The jury were abundantly authorized to find that within less than one year from the date of the policy the death of the defendant was caused by suicide. This being true, under the provision of the policy the jury properly rendered a verdict against the insurance company for only the premium which had been paid by the insured.

2. No error committed, and new trial properly denied.

Considering the note of the trial judge upon the motion for a new trial, and the several excerpts from the charge of the court complained of, there was no harmful error upon the trial. The plaintiff has had a legal trial of her cause, and the evidence authorized the verdict, which verdict has the approval of the trial judge, and for no reason assigned was it error to overrule the motion for a new trial.

Error from City Court of Dawson; M. C. Edwards, Judge.

Action by A. R. Martin against the Penn Mutual Life Insurance Company. Judgment for plaintiff for an insufficient amount, and he brings error. Affirmed.

R. R. Jones, of Dawson, for plaintiff in error.

Yeomans & Wilkinson, of Dawson, and Madison Richardson, of Atlanta, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 350)

FLOURNOY v. STATE. (No. 13038.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1922.)

(Syllabus by the Court.)

Criminal law \S 935(1)—New trial should be granted, when evidence insufficient.

The evidence was insufficient to show the defendant's guilt beyond a reasonable doubt. It was therefore error to overrule the motion for a new trial.

Error from Superior Court, Putnam County; J. B. Park, Judge.

Jeff Flournoy was convicted of an offense, and he brings error. Reversed.

Stubbs & Duke, of Eatonton, for plaintiff in error.

Doyle Campbell, Sol. Gen., and A. Y. Clement, both of Monticello, for defendant in error.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 363)

KNIGHT et al. v. STATE. (No. 13159.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1922.)*(Syllabus by the Court.)***1. Sufficiency of evidence.**

The evidence authorized the trial judge (who was sitting without the intervention of a jury) to find the defendants guilty.

2. No ground for new trial.

Under all the facts of the case, no ground of the motion for a new trial shows reversible error.

Error from City Court of Savannah; John Rourke, Jr., Judge.

Israel Knight and others were convicted of offenses, and they bring error. Affirmed.

Shelby Myrick, of Savannah, for plaintiffs in error.

Walter C. Hartridge, Sol. Gen., and Wm. W. Gordon, both of Savannah, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 364)

J. J. WILLIAMSON & CO. v. GAINESVILLE & N. W. R. CO. (No. 12606.)(Court of Appeals of Georgia, Division No. 1.
March 9, 1922.)*(Syllabus by the Court.)***1. Sufficiency of evidence.**

This action was for alleged damage to certain cotton in shipment. The evidence authorized a verdict for the defendant.

2. Trial \S 295(1), 296(7)—Charge to be read in its entirety; inapt charge on burden of proof not error, when rule was immediately and fully explained with respect to presumption in plaintiff's favor.

The criticisms urged as to several excerpts from the charge of the court are without merit, when the charge is read in its entirety. In charging upon the burden of proof, the court did not aptly charge the rule with respect to burden of proof, but immediately and in connection therewith the rule was fully explained with respect to the presumption arising in favor of the plaintiff.

3. Denial of new trial not error.

The verdict has the approval of the trial judge, and for no reason assigned was it error to overrule the motion for a new trial.

Error from City Court of Hall County; W. B. Sloan, Judge.

Action by J. J. Williamson & Co. against the Gainesville & Northwestern Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

O. N. Davie and Ed Quillian, both of Gainesville, and F. A. Hooper & Son, of Atlanta, for plaintiff in error.

Dean & Wright and W. A. Charters, all of Gainesville, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 365)

TALLULAH FALLS RY. CO. v. DAVIS. (No. 12956.)(Court of Appeals of Georgia, Division No. 1.
March 9, 1922.)*(Syllabus by the Court.)*

Trial \S 171, 260(1)—Requested charge covered by the charge given previously refused; refusal to direct verdict not error.

This case was before this court once before, and is reported in 28 Ga. App. 215, 105 S. E. 712. The only special grounds of the motion for a new trial insisted upon in the brief of counsel for the plaintiff in error relate to the failure of the court to charge as requested, and the refusal to direct a verdict. The charge of the court, when read in its entirety, sufficiently covered the principle embraced in the request to charge; and, under repeated rulings of the Supreme Court and of this court, it is never error to refuse to direct a verdict. A careful examination of the record discloses that the evidence authorized the verdict, which has the approval of the trial judge, and for no reason assigned was it error to overrule the motion for a new trial.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by Annie Davis, administratrix, against the Tallulah Falls Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 28 Ga. App. 215, 105 S. E. 712.

I. H. Sutton, of Clarkesville, and Charters, Wheeler & Lilly, of Gainesville, for plaintiff in error.

R. R. Arnold, of Atlanta, and Howard Thompson, of Gainesville, for defendant in error.

LUKE, J. Judgment affirmed.

BLOODWORTH, J., concurs.

BROYLES, C. J., disqualified.

(28 Ga. App. 414)

BIRD v. MOON et al. (No. 12701.)(Court of Appeals of Georgia, Division No. 2.
April 1, 1922.)*(Syllabus by the Court.)*

1. Witnesses \S 172—Party cannot testify in his own favor as to transactions with decedent, whose personal representative is adverse party.

In a suit instituted by the personal representative of a deceased person, an opposite party is incompetent to testify in his own favor as to transactions or communications with the decedent.

2. Witnesses \S 172—Husband testifying in his own favor in suit on note, when testifying to gift by decedent to wife.

Where the administrator of the payee of a promissory note, which was signed jointly by a husband and wife, sued them upon it, and the defense set up was that gift of the note had been made by the payee to the wife, and that the plaintiff therefore had no title, the husband was incompetent to testify in his own favor as to transactions and communications between the decedent and the wife.

Error from Superior Court, Newton County; John B. Hutcheson, Judge.

Action by J. T. Bird, administrator of Mrs. N. C. Bird, against Amanda Moon and husband. Judgment for defendants, and plaintiff brings error. Reversed.

J. T. Bird, as administrator of Mrs. N. C. Bird, sued Amanda Moon and her husband, R. M. Moon, upon a promissory note payable to the decedent and signed by the defendants jointly. The defendants filed an answer, in which it was alleged that a gift of the note had been made by Mrs. Bird to Mrs. Moon, and that therefore the plaintiff was not entitled to recover. J. T. Bird was a stepson, and Mrs. Moon was a sister, of Mrs. Bird. During the trial of the case the court permitted Mr. Moon, the husband, to testify as follows:

"I have heard conversations between Mrs. Bird and my wife in regard to this note (the note sued on). She told my wife she gave it to her, and retained the note for the purpose of collecting the interest. She gave that note to my wife, and kept it in her possession for the purpose of collecting the interest. That is all there is to it. She delivered the note to my wife, and my wife had the note in her possession, and delivered it back to her for the purpose of collecting the interest. Mrs. Bird and my wife had this conversation right down there at my house when the note was given—right

down there. She gave the note there, and told her right there and then that all she wanted with the note was to collect the interest. She delivered the note to my wife then, and my wife gave it back to her to keep, to collect the interest. The first conversation was down here in the Bank of Newton County, when the note was made, and I heard the same conversation again when my wife had the note in her possession again. After taking this note then and there in the bank, she delivered the note to Mrs. Moon. She said: 'This is your note. I give you this note.' She always called her 'Sister'; that is, Amanda Moon. This transaction of this note being turned over to Mrs. Moon, nobody but myself and Mrs. Bird knew it."

This testimony was objected to by the plaintiff at the time it was offered. The verdict was for the defendants, and the plaintiff made a motion for a new trial, in which he excepted to the admission of the evidence set out above. The case is before this court on exceptions to the overruling of the motion for a new trial.

King & Johnson, of Covington, for plaintiff in error.

Rogers & Tuck, of Covington, for defendants in error.

HILL, J. (after stating the facts as above). [1, 2] The defendant husband did not deny his liability on the note, but contended that his liability was to his wife, instead of the administrator, on account of the fact that the note had been given to his wife. His denial of title in the plaintiff, however, was his defense. He was a party defendant to the case. The suit was instituted by J. T. Bird, the personal representative of Mrs. N. C. Bird, deceased. Mr. Moon was an opposite party. The effect of the evidence was to relieve Mr. Moon from liability to the plaintiff. He was permitted to testify to transactions and communications with the decedent, the effect of which was to sustain his defense. This testimony was therefore in his own favor. The evidence was inadmissible, and the court erred in not granting a new trial. Park's Civil Code, § 5858(1).

There were other grounds in the motion for a new trial, but there was no error set forth in them which would require the grant of a new trial.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(132 Va. 193)

**DIRECTOR GENERAL OF RAILROADS
et al. v. HUBBARD'S ADM'R.**(Supreme Court of Appeals of Virginia.
March 16, 1922. Rehearing Denied April
8, 1922.)

1. Railroads \Leftrightarrow 5½, New, vol. 6A Key-No. Series—Corporation not suable for injury during federal control.

A judgment cannot be rendered against a railroad company for the death of an employee caused by a train operated by the Director General of Railroads.

2. Master and servant \Leftrightarrow 137(4)—Failure to notify employee of transfer of west-bound train to east-bound track held not negligence.

Where a railroad signal maintainer was proceeding west in his motorcar on the west-bound track, and had passed the last telegraph station at which he could have been reached before the accident when a west-bound train was transferred to the east-bound track, failure to notify him of the change of tracks was not negligence which rendered railroad liable for his death when he set his motorcar over on the east-bound track on hearing the train, without looking to see which track it was on.

3. Master and servant \Leftrightarrow 137(2)—Railroad not negligent in using double tracks interchangeably for traffic in different directions.

Even though a railroad ordinarily used one of its double tracks for traffic in one direction, and the other for traffic in the opposite direction, it was not negligence for it, as it frequently did, to transfer a train to a track ordinarily used for trains moving in the opposite direction.

4. Master and servant \Leftrightarrow 278(18)—Evidence held to show locomotive engineer could not have seen employee at curve.

Evidence held to show that the engineer of a train, which came out of a cut where the track was curving to the left and struck a signal maintainer, pushing his motorcar on the track while it was still on the curve, could not have seen the other employee if he had been looking constantly, so that his failure to see him was not negligence.

5. Master and servant \Leftrightarrow 137(4)—Railroad not chargeable with negligence for fireman's failure to keep lookout while firing.

The primary duty of a locomotive fireman is to fire his engine, and the railroad is not chargeable with negligence because the fireman failed to keep a lookout for an employee on the track ahead of him while he was engaged in firing the engine.

6. Master and servant \Leftrightarrow 278(18)—Evidence held to show locomotive fireman could not have seen employee at curve.

In an action for the death of a railroad employee, struck by a train at a point where the tracks curved to the fireman's side of the engine, evidence held to show that the fireman could not have seen decedent because of an in-

tervening bluff before he began to fire his engine, just before striking decedent.

Sims, J., dissenting.

Error to Circuit Court, Alleghany County.

Action by the administrator of Lewis Hubbard, deceased, against the Director General of Railroads and the Chesapeake & Ohio Railway Company. Judgment for plaintiff against both defendants, and defendants bring error. Reversed, and action dismissed.

J. M. Perry, of Staunton, for plaintiffs in error.

Geo. A. Revercomb and R. C. Stokes, both of Covington, for defendant in error.

BURKS, J. This is an action against the Chesapeake & Ohio Railway Company and the Director General of Railroads to recover damages for the death of the plaintiff's intestate, who was killed by a passenger train on the Chesapeake & Ohio Railway on March 31, 1919, while that company was under the control of the federal government and operated by the Director General of Railroads. After the evidence was all in, the defendants demurred thereto, and the trial court overruled the demurrer and entered judgment against both defendants for the sum of \$8,000, the amount of the damages assessed by the jury in their verdict. To that judgment a writ of error was awarded by one of the judges of this court.

The defendant was operating a double-track railroad from Covington to Jerry's run, a distance of about 16 miles. Between these two points there are two other block signals, one at R. S. cabin and another at Moss run. Between Moss run and Jerry's run there is no telegraph station, and no means of communicating with trains. Trains may be diverted from one track to the other at B. S. cabin and Moss run by "crossovers" and by switches at Jerry's run. Just west of Jerry's run is Lewis tunnel, about seven-eighths of a mile long, and through which the track is single. About half a mile east of Jerry's run there is a disused signal station, known as "Old Jerry's run," on the north side of the railroad, which is occupied by a Mrs. Fridley as a dwelling. From Moss run to Jerry's run is upgrade. Just east of Mrs. Fridley's house and Old Jerry's run tower the railroad passes through a cut, the bank of which is 18 feet high on the south side—the fireman's side going west. The western portal of this cut is 30 feet east of Old Jerry's run tower. Trains going west come around a right-hand curve along the base of the mountain until it reaches the western portal of a cut nearly a quarter of a mile east of Mrs. Fridley's house, from thence the track is straight for 830 feet to a point in the cut just east of Mrs. Fridley's house.

It then turns to the left, and continues to the left on a three-degree curve to and beyond the point of the accident. Mrs. Fridley's house is 35 feet from the east-bound track, and has one window fronting the railroad and another looking west along the railroad track. There is a high bluff on the right or north side of the railroad just west of Mrs. Fridley's house. From a point on the railroad just opposite Mrs. Fridley's front window to the point of set-over hereinafter mentioned is 228 feet 5 inches, and from the latter point to the point of accident is 311 feet, thus making 539 feet 5 inches from Mrs. Fridley's window to the point of the accident. From the point of the accident, looking east, to the curve in the cut just east of Mrs. Fridley's, is 754 feet 6 inches.

Lewis Hubbard, the plaintiff's intestate, was a signal maintainer of the Chesapeake & Ohio Railway Company, and at the time of his death had 18 months' experience as such. For the purpose of discharging his duties, he was provided with a gasoline motorcar. On March 31, 1919, in discharge of his duties, he set out with a companion, Saville, on the motorcar, to make the trip from Covington to Jerry's run. He arrived at Moss run cabin at 7:50 a. m., and went into the telegraph office and inquired about the running of trains. He was told that a west-bound freight was approaching and where it was, and that the west-bound express train No. 1 was following the freight. He inquired "if there was any show of east-bound No. 1 going by the east-bound track," and the operator told him that he did not know; that he had had no orders to that effect. It was seven miles from there to Jerry's run. With this information Hubbard left Moss run at 8:12 a. m. and put his motorcar on the west-bound track, and when last seen he and his companion were making good time going west. The freight train (No. 742) passed Moss run at 8:22 a. m., and proceeded west on the west-bound track without stopping. At that time no orders had come to the operator with reference to diverting the express train No. 1 to the east-bound track, but as the freight train passed the operator at Moss run was instructed to "watch No. 1," which he explained was for the purpose of putting the operator on guard for orders for No. 1. At 8:30 a. m., 20 minutes after Hubbard had left on the west-bound track, the operator at Moss run received orders to divert No. 1 to the east-bound track, and at 8:43, 30 minutes after Hubbard had left, No. 1 arrived at Moss run, and was diverted from the west-bound to the east-bound track in accordance with these orders. After leaving Moss run, Hubbard and his companion had trouble with the motor on their car, and were pushing it along the west-bound track when they

passed Mrs. Fridley's house at Old Jerry's run cabin. After they had passed her house about 200 feet, Mrs. Fridley heard the whistle of No. 1 some distance east of her house, but the windows and doors were shut and it was a quite blustery morning, and she could give no idea as to how far the engine was at that time east of her house. However that may be, looking through the side window of her house, which was closed, to the west-bound track, when she heard the whistle blow, she saw Hubbard and his companion set the motorcar over from the west-bound track to the east-bound track and proceed to push it along the upgrade on the east-bound track, without ever at any time turning their heads to look back. While they were thus pushing their car along the east-bound track, Mrs. Fridley was still standing at her window and saw No. 1 when it passed on the east-bound track, and she continued to watch the train and Hubbard and his companion until the engine struck them, killing Hubbard and severely injuring his companion. The point at which Hubbard was struck was 311 feet west of the point of set-over. Mrs. Fridley was examined as a witness for the plaintiff, and testified that she was looking out of the window facing the track when No. 1 passed, and she could see through the windows of the engine, and that there was no one on the engineer's seat or on the fireman's seat when the train passed her house, and that there was a curtain hanging down at the back of the cab between the engine and tender, and that she could see through the gangway, but saw no one there. She also testified that she could see no glow from the fire in the engine when it passed her house, and that if the fire box had been opened there would have been such glow and she would have seen it. Leffel, a witness examined for the plaintiff, testified that from the point of set-over down to what he calls the whistle post looking east is a distance of at least a quarter of a mile, although he did not measure it, and that the track is nearly straight for that distance. He also testified, however, that there is a curve in the cut just east of Mrs. Fridley's house, and from there to the point of the accident, a distance of 754 feet 6 inches, the view of the engineer would be cut off. There were offered in evidence two photographs, one marked Exhibit A, and taken from the point of the accident looking east, and showing the track and the Fridley house. The other, marked Exhibit B, taken from a point in front of Mrs. Fridley's house (Old Jerry's run cabin), looking west, to the point of the accident, and a diagram showing the cut and bluff east of Mrs. Fridley's house, and the bluff west of her house and the immediate surroundings.

The location of what is spoken of by Leffel

in his testimony as the whistle post is not definitely fixed by the testimony, nor can it be told from the testimony, where the engine was at the time of the whistle spoken of by Mrs. Fridley. The engineer testified that it was customary to blow for Old Jerry's run cabin, and at some times it was done and at others not after the removal of that station, and that he had no recollection as to whether the whistle was blown for Old Jerry's run on the morning of the accident or not. Unless the engineer or fireman could have seen the point of set-over, or the deceased after the set-over, it is unimportant as to the point at which the whistle was blown, except to show the time and place of the set-over, and the distance traveled after the set-over and before the accident. The engineer estimated that he was traveling at the rate of from 15 to 17 miles an hour, and as Hubbard and his companion traveled 311 feet after the set-over before the accident, it would seem that they were walking at the rate of about 3 miles an hour. If the engine was traveling at the rate of 15 miles an hour and Hubbard was walking at the rate of 3 miles an hour after the set-over, it would place the engine about a quarter of a mile off when the whistle was blown.

[1] A motion was made in the trial court to dismiss the action against the Chesapeake & Ohio Railway Company on the ground that, if there was any liability, the Director General was solely liable, but the motion was overruled and exception taken. This is assigned as error. This ruling of the trial court was erroneous, and its action in this respect will be reversed, and judgment will be entered in this court dismissing the action as to the Chesapeake & Ohio Railway Company with costs. *Missouri Pac. R. Co. v. Ault*, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. —, *N. & W. Ry. Co. v. Arrington* (Va.) 109 S. E. 306.

[2, 3] One of the grounds of negligence alleged in the declaration was the failure of the defendants to notify the plaintiff's intestate of the transfer of the train which killed him from the west-bound track, where such train would usually go in the ordinary course of traffic, to the east-bound track. The transfer was made while the decedent was between telegraph stations and could not be notified, but there was no necessity to notify him as he was in a place of safety, and had only to remain there to avoid danger from the train which was transferred. He was going west on the west-bound track, and the train was transferred to the east-bound track, and the transfer was really in his interest. So, also, there was no necessity to notify the crew of the train that the decedent had gone ahead on the west-bound track. They were on different tracks, and could not collide as long as they remained

there. Moreover, while it was the custom to run trains going west over the west-bound track, and trains going east over the east-bound track, the railroad company had the right to use its track interchangeably for trains going in either direction (*Imler v. Northern P. R. Co.*, 89 Wash. 527, 154 Pac. 1086, L. R. A. 1916D, 702, Ann. Cas. 1917A, 933), and it was its constant habit to so use them whenever circumstances made it desirable to do so. The engineer who ran the train in the instant case testified that such changes were made over the identical piece of track, as often as three days out of seven in the week. The rules of the company gave full warning of this fact, and the evidence is abundant to show that the decedent had full and ample notice and actual knowledge of these facts. No negligence on the part of the company was shown in this respect.

Another ground of negligence charged in the declaration was that the servants of the defendant operating the train which killed the plaintiff's intestate "did see and discover the plaintiff's decedent upon the track ahead of said train a sufficient distance to have stopped said train before it struck him," and a sufficient distance to have warned him of its approach, but failed and neglected to do so. There was no evidence to support this allegation, and it need not be further noticed.

[4] The only remaining ground of negligence alleged was the failure of the servants operating the train to discover the plaintiff's decedent on the track and warn him of the approach of the train. These servants were the engineer and fireman of the train which struck Hubbard. We will inquire, therefore, Could the engineer have seen the place of set-over, or beyond that point? The track makes a curve in the Old Jerry's run cut, and after reaching this the curve is against the engineer, and he could not see the track 6 feet beyond his engine. This is fully and clearly established by the testimony of several witnesses. Before reaching this curve there is a piece of straight track 830 feet long. From the engineer's seat on the seat box to the front end of the engine is 45 feet. This seat is on the right of the engine, and there rises above him on the left the boiler and smoke box, thus obstructing his view to the left, so that his lookout is practically straight in front of him. The point of set-over is 443 or 460 feet (measurements differ) from the west end of the straight track, and this curve is to the left and against the engineer, and continues against him to the point of the accident. In addition to this, even if the engineer, while traversing the straight track, could have seen to the left, his view was obstructed by the bluff 18 feet high in the cut just east of Mrs. Fridley's house. But he does not claim that his view was obstructed because

he couldn't see it from his side of the engine. He says:

"I don't say it obstructed my view, because I could not see that bluff from my side of the engine, but what I meant to say, if a man had been looking out of the left side, he would not see anything on that track until he got by the bluff." (Italics supplied.)

And the division engineer of the company testified that—

The straight track "is blocked off from the scene of the accident by a big bluff 18 feet high. The same bluff blocked off the view of the point of set-over."

The engineer further testified, as to the extent of his view while along the little piece of straight track before you get to the end of the cut, that, looking ahead from his position, "you could see the Old Jerry's run, and then you see into another bluff, which is 100 feet high, I reckon."

If we look to the blueprint used on the re-argument, not for the purpose of adding to the evidence, but to visualize the testimony of the witnesses, we find that a straight edge placed along the piece of straight track and extended beyond the curve in the cut strikes the bluff west of Mrs. Fridley's house on the north side of the west-bound track, and leaves the place of set-over and the track up to the place of the accident out of the line of vision of the engineer, thus by the physical facts confirming the testimony of the engineer. The photograph (Exhibit A) and drawing (Exhibit 2) seem also to demonstrate the fact that the point of set-over was not in the line of vision of the engineer. The engineer testified also that he was on his seat and constantly on the lookout from the time he came in sight of Old Jerry's run until the deceased was struck, and did not see him. The testimony of Mrs. Fridley to the contrary, if credible, can make no difference, for the curve was against the engineer when the engine passed her house, and continued so until the deceased was killed, and no amount of diligence or outlook on the part of the engineer could have discovered his presence on the track.

We conclude, therefore, that there was no negligence on the part of the engineer in failing to discover the deceased at the point of set-over or thereafter.

Could the fireman have seen the point of set-over or beyond that point?

[5, 6] It is the duty of a fireman, primarily, to fire his engine, and his employer cannot be charged with negligence for his failure to keep an outlook at a time when his duties require him to be firing. *Brammer v. Norfolk & W. R. Co.*, 104 Va. 50, 51 S. E. 211; *O'Brien v. Wis. C. R. Co.*, 119 Wis.

7, 96 N. W. 424. His train was running up-grade, and he was approaching a long tunnel in which it was desirable to minimize the smoke and gas from the coal, and at the time of the accident he had his engine "just as hot as I could get it." It is important, however, to ascertain when or where he began firing. From the west portal of the cut just east of Mrs. Fridley's to the point of the accident the curve was in his favor, and if he had been on his seat box the deceased would have been in plain view, and he could have warned him of his danger. His testimony as to the places and distances is not very accurate, and must be read as a whole, and taken in connection with the testimony of other witnesses, to ascertain the facts. It is true that, in answer to the question where he began firing, the witness stated that it "must have been just west of the tower, not very far west of the tower, that is, Old Jerry's run tower," but in answer to the question immediately preceding the present answer he had confused the points of the compass, and said west when he meant east, and it seems manifest from other answers given by him, as well as the testimony of other witnesses, that he began the firing east of the tower, and not west, as he stated. In answer to other questions he stated that as he went into Old Jerry's run he "was putting in fire"; that before he got to Jerry's run he had "dropped off his seat" and was "down at the time"; that he had not come in sight of the deceased when he dropped off his seat box to put in the fire; that he was looking out that day before he got down to put in coal, but was not looking out when he came into Old Jerry's run. In addition to this, Mrs. Fridley, the plaintiff's own witness, testified that he was not on his seat in the engine when the train passed her house, which was very close to the west portal of the cut, and the engineer, that at the time of leaving the straight track and taking the curve in the cut he was putting coal in the engine. We are satisfied that when the engine emerged from the west portal of the cut and passed Mrs. Fridley's house, the fireman was engaged, and properly, in firing his engine. We do not attach great importance to the fact that Mrs. Fridley did not see any glow from the fire box at that time of the day, and under the exciting circumstances detailed by her; for it may be, as suggested by counsel for the defendant in error, that he had not yet opened the door of the engine, and was simply preparing to fire his engine. If he was down in the gangway between the engine and tender making the necessary preparations to fire, he was as much engaged about his business and as free from negligence as if he had the door open and was actually shoveling coal into the

engine. We do not think that the evidence sustains the suggestion that the fireman could have seen the place of set-over or beyond that point while traversing the straight track before entering the cut just east of Mrs. Fridley's house. Exhibit A and Exhibit No. 2, hereinbefore referred to, seem to negative the possibility of his seeing it. But photographs and drawings do not always give us as accurate ideas of what may be seen from the locus in quo as the testimony of unimpeached witnesses who have been on the ground and have observed the situation, and testify as to what can and what cannot be seen from a given point. Such photographs and drawings, however, when consistent with the testimony of witnesses, are strongly corroborative of their testimony. In this case, it appears that on the south side of the railroad in the cut just east of Mrs. Fridley's house there is a bluff 18 feet high, and that it blocks off the view from the straight track. This bluff is on the fireman's side of the engine going west. Division Engineer Beall was examined as to the straight track, and testified, amongst other things, as follows:

"Q. And that straight track you just spoke of is blocked off from the scene of the accident by a big bluff 18 feet high, isn't it? A. Yes, sir."

And the engineer testified that while on the straight piece of track in the cut, "if a man had been looking out of the left side he would not see anything on the track until he got by the bluff." This is all the testimony there is on the subject, and it is supported by the exhibits referred to. It is admitted that this bluff falls away rapidly to the south, but it does not appear that it ceases to obstruct the view from the straight track. It is also claimed by the defendant in error that the testimony of his witness Leffel is to the contrary, because he states that a person standing on the west-bound track at the point of set-over could see an engine come into view for a distance of about a quarter of a mile, and from that counsel argue:

"And vice versa a person on an engine going west on the east-bound track could see the point on the rails of the west-bound track where decedent was, and at which he set over his motorcar, for a distance of about a quarter of a mile."

This is plainly a non sequitur. If he had said he could see the engineer or the fireman, his conclusion might have followed, but not "an engine come into view." The evidence of what could have been seen from the engine by the fireman is not sufficient to establish negligence on the part of the fireman in failing to see the set-over and the deceased thereafter. On the contrary, it neg-

atives the idea. The burden was on the plaintiff to establish that fact.

Upon the whole case, we are of opinion that the trial court erred in overruling the defendant's demurrer to the evidence, and hence its judgment must be set aside, and this court will enter judgment sustaining said demurrer to the evidence and dismissing the case at the plaintiff's costs.

Reversed.

SIMS, J. (dissenting). I find myself unable to concur in that portion of the majority opinion which holds that the evidence of what could have been seen by the fireman is not sufficient to establish negligence on part of the fireman in failing to see the set-over and the deceased thereafter as he was pushing the motorcar and moving along the east-bound track in front of the approaching train in obvious unconsciousness of his peril.

The evidence on this subject is conflicting, but the defendant demurred thereto, and, as I view the case, there was evidence for the plaintiff in direct conflict with the testimony for the defendant, which is referred to in the majority opinion, on the subject of what the fireman could or could not have seen of the set-over and the subsequent perilous position of the deceased when and after the whistle was blown, and before the fireman got down off his seat to fire his engine; so that, under the well-settled rule pertaining thereto, such evidence for the defendant should be disregarded by us.

This is true of the testimony of the fireman which is in conflict with the testimony of Mrs. Fridley on the subject of when the fireman got down from his seat. But, aside from that, the following conclusions, it seems to me, should be reached, on considering the evidence upon the demurrer thereto:

In the first place it should be noted that, if the engine which killed the deceased was traveling at the rate of 15 miles an hour and the deceased at the rate of 3 miles an hour after the set-over, as stated in the majority opinion, the engine was traveling just five times as fast as was the deceased. So that, while the deceased was traveling the 311 feet from the place of set-over to the place at which he was killed, the engine traveled only 1,555 feet, a little over a quarter of a mile. This would place the engine a little less than a quarter of a mile off from the deceased when the whistle was blown.

It would follow from this that the whistle was blown just about the time the engine came upon the east end of the piece of straight track referred to in the majority opinion, which was a point 830 feet, plus 754 feet 6 inches (equal to 1,584 feet 6 inches), from the place where the deceased was killed. Now, bearing in mind that, according to the direct testimony for the plaintiff, the

set-over occurred immediately following the blast of the whistle, it is plain that the crucial question, as affecting the inquiry concerning the negligence of the fireman in the matter of the lookout kept by him, is what could he have seen of the scene of the set-over and subsequent perilous position of the deceased, which was present in front of the on-rushing engine as it passed from about the east end of the straight piece of track, for a distance of about 830 feet, plus 100 feet about, making about 930 feet, to a point somewhat east, but near, the western portal of the cut, where the fireman got down from his seat to fire his engine according to his own testimony? (Just here it should be noted that the west end of the 830 feet of straight track is at a point in the cut 100 feet east of the west portal of the cut, and, according to the fireman's own testimony, after correcting his first error in confusing "west" with "east," referred to in the majority opinion, he did not get down from his seat to fire his engine until the engine had about reached the west portal of the cut.) The evidence makes it clear that it was during this time that the set-over occurred, and the deceased traveled somewhat over half the distance of 811 feet from the place of set-over to the place where he was overtaken and killed, and that, if the piece of straight track aforesaid was not so much out of line with the place of set-over and the section of railroad track immediately west of that point as to cause the front of the engine to obstruct his view of the scene of the set-over and the conduct of the deceased immediately following, the engineer could and should have seen this scene; and, further, that if, because of the reason mentioned, the front of the engine did cut off the view of the engineer of such scene, the drama was in plain view of the fireman from his seat, unless the bluff which formed the wall of the south side of the cut obstructed the fireman's view.

Now, as the evidence which was introduced before the jury appears in the record, without the aid in its interpretation which is supplied by the blueprint used in the re-argument, it seems plain that on demurrer to the evidence the inference which must be drawn from Leffel's testimony is that either the engineer or the fireman—more probably the engineer—had an unobstructed view of and would have seen the scene aforesaid and the consequent perilous position of the deceased, before the engine reached the west end of the piece of straight track, had they discharged the duty of lookout resting upon them: that if this was true of the engineer, the front of the engine did not at any time obstruct that view of the engineman while the engine was on the straight track; that if this was true of the fireman, the bluff which formed the wall on the south side of

the cut did not obstruct the view of the fireman at any time while the engine was on the straight track, or while it was passing over most of the farther distance of 100 feet from the west end of the straight track to the west portal of the cut.

As bearing upon the conclusion just mentioned, the following should be borne in mind: The testimony of the division engineer referred to in the majority opinion, in regard to "the scene" being "blocked off" by the "big bluff 18 feet high," which is the bluff aforesaid which forms the south wall of the cut above mentioned—this testimony has reference to "the scene of the accident," the view from the engine of the place where the deceased was struck and killed, which was 311 feet west of the scene of the set-over. This testimony did not even contradict the testimony for the plaintiff tending to show that from the point where the engine was immediately following the blast of the whistle, namely, about the east end of the straight track, until the engine had reached the west end of the straight track, which was before the fireman got down from his seat to fire the engine, either the engineer or the fireman, if they were in their then place of duty and on the lookout ahead, had the scene aforesaid of the set-over and the moving of the deceased along the east-bound track for a distance therefrom of some 150 feet or more, in obvious unconsciousness of his peril, in plain and unobstructed view. It is immaterial if the engineer or fireman did not, in addition to the set-over, see the deceased traverse the whole 311 feet until he was struck. It is enough to impose the liability in question on the defendant, if the engineer or fireman saw the set-over and the deceased going on in the attitude he presented for 150 feet and more from the place of set-over until he passed out of sight of the engineer or fireman.

Further: According to the engineer's testimony, when the engine was on the east-bound track at the west end of the straight track, he could see the west-bound track 6 feet west of Mrs. Fridley's house. Another engineer, a witness also for the defendant, testified that going west on the east-bound track, on the straight stretch of track, he could see along the railroad west of Mrs. Fridley's house "about halfway between the house and the point of the cañon," the point of the cañon being the place of set-over, which is about 108 feet west of the west end of Mrs. Fridley's house, instead of 6 feet, as testified to by the first-named engineer, and about 108 feet from the place of set-over. The defendant's own testimony, therefore, showed to the jury that the testimony of the engineer in charge of the engine in question at the time the deceased was killed, with respect to how far along the tracks he

could have seen while the engine was on the straight track, was unreliable.

Further: The line of vision of the engineer from his seat in the engine in question was not absolutely straight ahead. The front of the engine, extending only 45 feet ahead of the engineer's cab, was not an obstruction which presented a perpendicular side along which the engineer had to look, but a side cylindrical in form, and several feet below the eyes of the engineer, curving to the south up to the smokestack, so that the line of vision of the engineer was from his cab window obliquely to his left, along by the north side of the smokestack, at a considerable angle to the southwest of the direct line in which the engine was pointed as it traversed the straight track. Indeed, it is a matter of common knowledge that an engineer can see the whole track directly in front of his engine at no great distance ahead, when traversing a straight track. And it is also a matter of common knowledge that the farther and farther ahead, when moving along a straight track, the engineer projects his line of vision, the wider is the radius of that line of vision; such radius gradually crossing the track, then passing to the side of it on the left of the engineer, so that when he looks, say a quarter of a mile ahead, his line of vision to his left side will extend a great many feet to the left of the line toward which the engine is directly pointed.

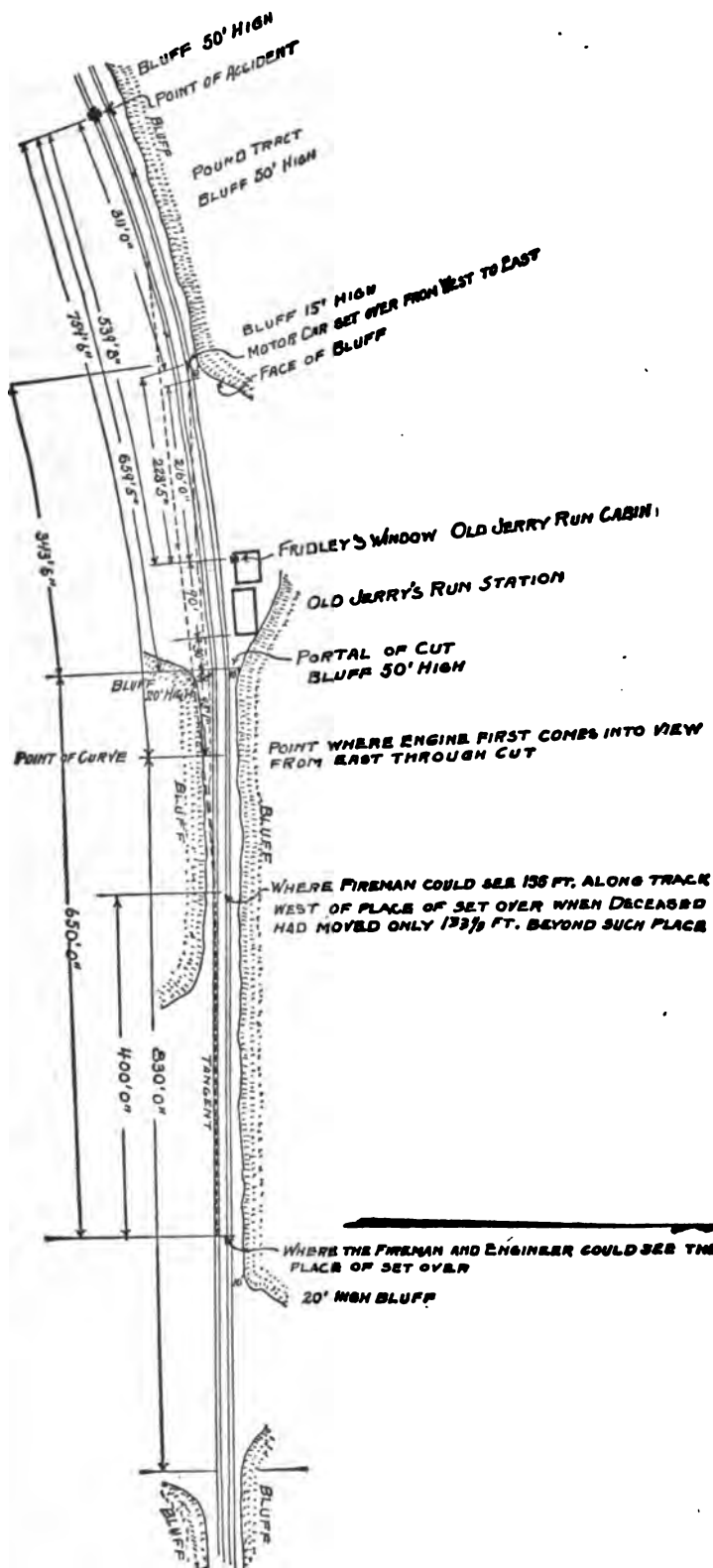
The testimony for the defendant with respect to how far the engineer could see ahead ignores the physical facts just referred to—it does not distinguish between how far ahead the engineer on the engine which struck the deceased could have seen along the tracks from his seat on the engine when it was near the east end of the straight track, as compared with when it was at the west end of the straight track. And the engineer whose testimony as to how far he could see ahead is referred to in the majority opinion, expressly testifies only to how far he could see ahead along the tracks from the engine as it started "to leave the straight track," or "as it leaves the straight track," i. e., from a point which is at the west end of the straight track. The locality from which the drama aforesaid was to have been seen by the engineer, if seen at all by him, was east of such place, namely, before the engine reached that place, and while it was passing from the east end of the straight track to the west end of it, the distance of about 830 feet, immediately after the whistle was blown. The jury had the right to bear this fact in mind and to conclude that the testimony of the engineer last mentioned was

in truth not in conflict with the testimony of Leffel, which tended to show that, from the place where the engine was when the drama aforesaid was acted, the engineer would have seen it if he had looked ahead.

Or, to say the least of the evidence in favor of the plaintiff, on demurrer, it appears, when the petition of the engine at the crucial point of time and place aforesaid is visualized in the mind, that the position of the engine was such that if the line of vision of the engineer was too far to his right for him to have seen the drama aforesaid acted before him, that line of vision came so near to the scene of action of the deceased that it is manifest that the fireman at that same time, sitting in the engine cab on the other side of the engine, had a line of vision which would have passed through the cut above the right of way of the railroad, and embraced so much of the scene as is material, unobstructed by the bluff which formed the south wall of the cut. And this was the situation when the engine was ample distance away from the deceased for it to have been stopped by the exercise of reasonable diligence on the part of the defendant, before it ran around the curve upon the deceased, and when the fireman, according to his own testimony, was not occupied by his duty of firing the engine, and had not yet gotten down from his place.

When we come to consider the blueprint used on the reargument, that does show that, while the line of vision of the engineer, when the engine was at the crucial point of time and place aforesaid, put the initial movement of the set-over in plain view of the engineer, however, as the engine moved westward, the engine front probably cut off the view of the engineer of the set-over on the east-bound track and the movement thence of the deceased from that point onward. But a straight edge, placed from such crucial point on the straight track to the point of set-over, and having its westward end moved to a point, say, of about halfway from the point of set-over to the place where the deceased was struck and killed (covering a space along the track of, say, 150 feet including and beyond the place of set-over), demonstrates that the fireman, from the time the whistle was blown until he got down from his seat as the engine was near the western portal of the cut, had the scene aforesaid, or so much thereof as is material, in his plain view, unobstructed by the bluff aforesaid which formed the south wall of the cut.

The material part of the blueprint aforesaid, on a reduced scale, and with some additional lines and notations thereon, is here copied:



As appears from the blueprint, following the blast of the whistle, the line of vision of the fireman, where it was nearest to the tangent to the curve of the railroad, would have passed over the ditch on the south side of the railroad, in covering the scene of the set-over. And, as that action of the deceased must have occupied an appreciable length of time, the engine, during that occurrence, moving westward at the rate of approximately 15 miles an hour, must have been moving so far along the straight track, when the deceased moved off after the set-over, that that movement, for a distance of certainly 150 feet, more probably for over 200 feet, must have been within the line of vision of the fireman before he got down from his seat, according to his own testimony, which line of vision would have passed, where it was nearest to the tangent of the curve of the railroad, along the inclined side of the bluff which formed the south wall of the cut, not higher up than halfway of its 18 feet of height, and hence would have been unobstructed by such bluff. This clearly appears from the dotted lines I have drawn and the notations I have made on the said blueprint.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 713)

MOHLER v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Criminal law §627½—Trial court should compel attorney to permit opposing counsel to have access to transcript of evidence of previous trial.

Transcripts of the evidence given on a previous trial or hearing, when brought into court for use, cease to be strictly private property, and opposing attorneys should then have equal access thereto, and, if not accorded as a matter of courtesy, the trial court, when the question is first raised during the trial, should exercise all its powers to that end.

2. Criminal law §627½—Party having transcript of evidence of prior trial can only require payment for copy by opposing counsel.

The only condition which an attorney possessing a transcript of the evidence on a prior trial or hearing has any right to impose in advance of the trial is payment by the opposing attorney demanding the transcript of the amount necessary to pay for a copy thereof.

3. Criminal law §1169(5), 1170(3)—Error in admitting or excluding evidence may usually be cured by contrary ruling before submission.

While it is important that all legal testimony should be promptly admitted and all that is illegal promptly excluded, it is usually suffi-

cient that errors in this respect be corrected as promptly as possible and before the case is submitted to the jury.

4. Criminal law §1169(2)—Testimony that witness had heard insignia discussed not harmful, when there was otherwise sufficient identification.

Where the military insignia on deceased's clothing were otherwise sufficiently identified, it was not harmful error to permit a witness to testify that he had heard the different badges discussed.

5. Criminal law §488—Qualified witness, who tested stains by serum which he first tested, properly permitted to testify they were blood stains.

Where the Richmond city coroner, who was fully qualified as an expert in such chemical analyses, tested stains with a serum purchased from recognized chemists, after first testing the serum, his testimony that the stains were blood stains was properly admitted.

6. Criminal law §318, 351(8)—Evidence held not to warrant inference that accused was trying to secure false testimony, but admissible if it did.

Where a witness had been sent for by accused while in jail, her testimony that she thought he wanted her to testify about blood stains, but that she could not tell what was not so, did not warrant the inference that defendant was endeavoring to secure false testimony; but, if it did, the prosecution was entitled to introduce it in a case dependent entirely on circumstantial evidence.

7. Criminal law §450, 1169(9)—Testimony of witness as to his own remark expressing opinion as to guilt held inadmissible and prejudicial.

Where the prosecution relied on circumstantial evidence on a trial for murder, testimony of a witness that he was shown something that must have been blood, and thereupon said, "This is enough for me," was inadmissible and prejudicial, as it amounted to the expression of his opinion that defendant was guilty.

8. Homicide §338(4)—Admission of evidence harmless when struck out and jury told to disregard.

The admission of testimony that deceased told the witness, on the day he disappeared, that he was going to defendant's home that night, was harmless, when the court struck it out and told the jury to disregard it, especially where the inference that deceased expected to meet defendant that night was otherwise proved and practically admitted by defendant.

9. Homicide §174(8)—Conversations with defendant relative to deceased's disappearance held admissible.

Conversations between accused and a witness with reference to the disappearance of deceased were admissible on a trial for murder.

10. Criminal law §419, 420(10), 1169(1)—Testimony that third person said defendant knew about crime held hearsay and prejudicial.

Where a witness testified that accused gave her a flashlight looking like one she had previously loaned to deceased, her further testimony that, in connection therewith, her brother and brother-in-law said they had told her all the time that defendant "knew about this," was hearsay and prejudicial, where the evidence was circumstantial.

11. Criminal law §450, 1169(9)—Admission of opinions as to guilt improper and not excusable because court had told jury they could not be considered.

That a trial was unnecessarily prolonged, and that the judge often told the jury he thought they fully understood that they could not consider opinions of others as to defendant's guilt, does not relieve the appellate court of the obligation to require the rules of law to be maintained, and mere opinions of non-experts upon the main fact to be decided by the jury should have been excluded, and failure to do so was prejudicial error.

12. Criminal law §1170(2)—Exclusion of impeaching question asked witness not available error when matter fully developed subsequently.

The refusal to require a witness to answer a question, asked for the purpose of discrediting her, as to whether she had tried to get a forged prescription for morphine filled, was not ground for reversal, where the whole matter was fully developed later in the trial.

13. Criminal law §4169(2) — Admission of evidence harmless when same testimony adduced on cross-examination.

The admission of testimony as to conversations, agreements, and engagements with deceased in the absence of accused, was harmless, where the same testimony was adduced by accused's counsel on cross-examination.

14. Criminal law §451(2)—Testimony that witness thought object which he saw covered up was a man's body admissible under collective facts rule.

Where a witness testifying that he saw something which looked like a man's body covered by a coat or sacks or something, stated all the facts which he observed, it was not error, under the collective facts rule, to permit him to testify, in response to a juror's question whether it might have been a pile of rags or something, that he thought it was a man's body.

15. Criminal law §1169(5)—Opinion of witness as to guilt harmless when promptly excluded.

Testimony that, from defendant's looks, the witness considered him the guilty man, was harmless, when promptly excluded from the jury's consideration.

16. Witnesses §240(4)—Improper for commonwealth's counsel to ask whether defendant's conduct did not convince witness and himself of defendant's guilt.

Where a witness was apparently not as emphatic in his imputations against accused as

was expected, it was improper for the commonwealth's attorney to ask him whether it was not the fact that defendant's conduct and actions "told you and me to go on ahead," thus conveying his own more positive impression of defendant's guilt and using language unnecessarily rude.

17. Criminal law §450—Statements of counsel testified to by himself held inadmissible as opinions of guilt.

The testimony of the attorney for the commonwealth that in investigating the case he said to another, "I have got all I want," and, "I am done," held inadmissible as amounting to expressions of his opinion that defendant was guilty.

18. Witnesses §224—Testimony of commonwealth's attorney subject to same limitations as that of other witnesses.

Where an attorney, and particularly the prosecuting attorney, deems it his duty to testify, he is, while a witness, subject to all the limitations imposed on other witnesses.

19. Witnesses §277(2)—In court's discretion to permit introduction of exhibits during defendant's cross-examination.

It was not error for the court in its discretion to permit accused to be cross-examined concerning rocks and stains thereon over the objection to any new exhibits at that stage of the trial.

20. Criminal law §1153(4)—Discretion as to time for admitting exhibits not interfered with unless abused.

The exercise of the trial court's discretion as to permitting the introduction of exhibits during defendant's cross-examination is not ground for reversal unless such discretion is abused.

21. Criminal law §706—Witnesses §277(2) — Cross-examination of defendant held improper as amounting to argument before testimony was presented.

A question, asked defendant on cross-examination, whether he meant to tell the jury that he was not mad at a woman who had charged him with murder and gone on the stand and on different occasions "made statements which if believed will put you where the lights don't burn," was improper, as the prosecuting attorney should respect the presumption of innocence and not argue the case until the evidence has been fully presented.

22. Criminal law §364(2)—Statements by deceased that he was going to defendant's place held admissible as res gestæ.

Statements by deceased to witnesses within a mile of the scene of the murder, and while deceased was going in that direction and on the last occasion on which any witness positively identified him as having been seen alive, that he was going to defendant's place and had been invited up there, was admissible as part of the res gestæ, where the fact that deceased intended to meet accused and had expressed his intention of so doing and promptly proceeded to execute such intention was otherwise indicated.

23. Witnesses \Leftrightarrow 337(1), 343—Defendant may be impeached by proof of reputation for truth and veracity at time of trial.

When defendant testifies in his own behalf, his credibility may be attacked like that of any other witness, and the question is his reputation for truth and veracity at the time at which he testifies, and not prior to the commission of the crime.

24. Homicide \Leftrightarrow 163(1)—Reputation as peaceable and law-abiding man limited to reputation at time of crime.

On a trial for murder, one who proves his reputation as a peaceful and law-abiding man up to the time of the commission of the offense is entitled to have it considered as it existed at that time, and not as it may have been subsequently affected by the accusation of the crime.

25. Witnesses \Leftrightarrow 37(4)—Testimony that witness had never heard another's reputation for truth questioned properly admitted.

Where a witness, introduced by way of defense to repel an attack on the reputation of another for truth and veracity, testified that he had known the other witness well for many years and had never heard his reputation for truth and veracity discussed and would believe him on oath, a motion to exclude was properly overruled, though on cross-examination, in answer to a question whether he knew the other's reputation for truth and veracity, he answered, "No."

Error to Circuit Court, Rockbridge County.

Addison Mohler was convicted of murder in the second degree, and he brings error. Reversed and remanded.

Hugh A. White and Chas. S. Glasgow, both of Lexington, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

PRENTIS, J. The accused has been convicted of murder in the second degree, and is here assigning numerous errors.

[1, 2] Exception No. 2 arose out of these circumstances: There had been an inquest over a dead body, alleged to be that of Aubrey Tyree, and a stenographic report of the evidence taken at that inquest had been made at the expense of the attorney for the commonwealth; but the coroner, as it was charged, had not filed that transcript, but had merely a synopsis thereof with the inquest. Then there had been a previous trial of the case, and the jury had failed to agree. The attorneys for the accused had a stenographic report of the evidence taken on that trial, and they desired the transcript which had been made at the coroner's inquest, while the prosecutor desired that which had been made at the first trial. Each refused to furnish the other with these documents. There was a wordy controversy

growing out of this, in which a personal difficulty was threatened, which, if not unseemly, was certainly lacking in that courtesy which should always characterize proceedings in court for the investigation of the truth. Such bickerings needlessly consume the valuable time of the court as well as that of the jurors and witnesses whose attendance is enforced. They justify, in some measure, the criticisms of the administration of justice, and hinder the ascertainment of the truth by diverting the attention of the jury from the evidence from which alone the issues of fact presented must be by them determined. It is, moreover, proper here to emphasize the fact that, whatever the character of the case, attorneys at law are duly sworn to aid in the administration of justice, can never be under any obligation to defeat it by withholding any pertinent fact, and only by absolute frankness can the appearance of evil be avoided. The witnesses had been examined on several occasions with reference to the accusation, and it is a manifest advantage to an attorney to have a stenographic copy of the testimony previously given so as to elicit all the facts by him deemed pertinent. The opposing attorney should not be denied an equal advantage. Such transcripts of the evidence previously given, when brought into court for use, cease to be strictly private property, and opposing attorneys should then have equal access thereto. This access is so essential in the interest of justice that if the courtesy usually accorded is not sufficient to secure it, and the question is raised during the trial for the first time, then the trial court should exercise all of its powers to that end. The only condition which an attorney possessing such a transcript has any right in advance of the trial to impose is to require of the opposing attorney, who demands it, the amount which is necessary in order to pay for a copy thereof. In this case, after this angry unnecessary wrangle, and at the suggestion of the court, the transcript was furnished to the attorney for the accused; so that the occurrence does not support the assignment of error.

Brown v. Commonwealth, 90 Va. 676, 19 S. E. 447, can be distinguished from this case because there the stenographic copy was not brought into court by its owner for use, but the accused sought during the trial to enforce its production for his own use.

[3] Exception No. 3 and several others relate to testimony which the court at one time refused to admit, and thereafter admitted, or to evidence which was at one time admitted and thereafter excluded. While it is most important that all legal testimony should be promptly admitted and all that is

illegal promptly excluded and prevented, if possible, still, as this is practically impossible, all that is necessary in most cases is that the trial court shall correct its errors of this character as promptly as possible and before the case is submitted to the jury. There is no other practical way of administering justice, and to hold such errors in procedure ground of reversal in every case would lead to many reversals, when upon the merits the case has been properly decided. We find here that the trial court corrected most of them which were material, and this exception is not well taken. *Carpenter v. Smithey*, 118 Va. 533, 88 S. E. 321; *Hollen v. Crim & Peck*, 62 W. Va. 454, 59 S. E. 172.

[4] The fourth error assigned is based upon certain testimony of R. R. Ruff. The deceased was a discharged soldier of the Twenty-Ninth Division, sometimes called the "Blue and Gray," and in identifying the body it appeared that he had on a uniform with the insignia of that division. The objectionable testimony is that this witness, having testified that he knew nothing about these insignia, said that he had heard the various service stripes discussed; it being suggested by other testimony that there might be some doubt as to whether the deceased belonged to the "Blue and Gray" Division or to the "Blue Ridge" Division. The insignia on the clothing were otherwise sufficiently identified, and we find no harmful error—indeed, if there be any error at all—in permitting the witness to testify that he had heard these different badges discussed.

[5] Assignment No. 5 relates to the evidence of Dr. J. H. Whitfield, a medical expert, who testified that in his opinion certain stains submitted to him for examination were made by human blood, and that the substances submitted to him for tests were human blood. This witness is the coroner of the city of Richmond and fully qualified as an expert in such chemical analyses. He testified that he first undertook to produce the serum which was necessary by inoculating rabbits, but for reasons which he explained determined not to use the serum so made by himself in a test of such a delicate nature and probably having such far-reaching consequences. Instead thereof, he bought a serum prepared for the express purpose of making such blood tests by Parke, Davis & Co., who are recognized chemists; that before using it he fully tested it, in order to discover whether it was reliable, upon samples of blood which he knew to be human blood as well as upon samples of the blood of a chicken, a hog, a mule, and a sheep; and that when thus fully tested it indicated that it had been properly prepared and was in all respects suitable for such a test. The testimony of this

witness is singularly clear and satisfactory, was properly introduced in every respect, and worthy of the consideration of the jury in their determination of the fact which the commonwealth was endeavoring to establish. The assignment is clearly without merit. *Lindsay v. People*, 63 N. Y. 156; *State v. Knight*; 43 Me. 133.

[6] Assignment No. 6 grew out of the fact that a witness, Mrs. Dale, was sent for by the accused while he was in jail, and asked whether or not, when she at one time occupied the cabin in which the alleged human blood had been discovered, her son had not cut his foot and bled there. She told him that she knew of no such occurrence, and in response to one question of the court she said:

"Well, I think he wanted me to testify about that blood, but you know I can't tell what was not so."

The inquiry of the accused was perfectly natural, consistent with his innocence, his motive therefor was obvious, and he had the right to secure the evidence of the fact suggested, if true. She could, however, only supply the information which she possessed, and this answer only emphasized what was already apparent. There appears to us no sufficient reason for the jury to infer therefrom that the prisoner was endeavoring to secure false testimony, and, if we are mistaken about this, the interview took place, and in a case like this, so entirely dependent upon circumstantial evidence, the prosecution was entitled to have the jury consider it.

[7] The seventh assignment is more serious in its nature. It grows out of the admission of certain testimony of the witness Frank Miller. Bearing in mind that the prosecution is relying upon circumstantial evidence to convict the prisoner, we find that this witness testified that on one occasion he went into the unoccupied cabin hereinbefore referred to but did not notice any stains of any kind, and that on the second occasion he observed certain stains but could not say they were made by blood, and then this question and answer appear:

"What did they look like as near as you can figure out? A. Well, I got me a piece out of a crack that seemed to me it must have been blood. I picked it out of a crack in that burning; in other words, Lon handed it to me and said, 'What do you call this?' and I put it in my fingers and I said, 'This is enough for me.'"

The accused excepted, and the reason for his exception is perfectly manifest. The meaning of the objectionable answer is not, as the commonwealth now claims, merely the opinion of this witness that the substance was blood. The objectionable part of the answer is that the witness said to his companion, "This is enough for me." The accused was under suspicion, and the question of his guilt or innocence was in their minds,

so it is manifest that when the witness said, "This is enough for me," one inference to be drawn therefrom when made, under these circumstances, was that he (the witness) was thereby convinced of the guilt of the accused. If it were clear that he was only expressing his opinion that the substance was blood, we might ignore this as immaterial and harmless. Fairly construed, however, it is the opinion of the witness as to the guilt of the prisoner, and it was allowed to go to the jury, notwithstanding the specific exception of the prisoner. It seems to us that it was highly prejudicial, and that the court should have promptly instructed the jury, as it frequently did during the course of the trial as to other opinion and hearsay testimony, that they should ignore it, that they must decide the case upon legal testimony and draw their inferences from the facts proved, and that the opinion of this witness should not be allowed to prejudice the prisoner's case. The court should have sustained this exception, and the failure to do so was prejudicial error.

[8] The eighth assignment of error is based upon the testimony of the witness Jessie Chaplin, the woman in the case, to the effect that the deceased had told her, on the Saturday that he disappeared, that he was going up to the home of the accused that night. This evidence, however, after being admitted, was struck out by the trial court, who told the jury to disregard it. It might have been harmless for another reason, because the inference that Tyree was expected to meet the accused that night was otherwise fully and sufficiently proved—indeed, it was admitted by the accused himself that the deceased had inquired of him where he would be that night and been told that he would be at home. So that this assignment is without merit.

[9] The ninth assignment of error is clearly without merit, for the exception is to the fact that the witness Jessie Chaplin was allowed to detail alleged conversations between the accused and herself with reference to the disappearance of the deceased, and no authority is needed to support the well-established doctrine that such conversations are admissible testimony.

[10, 11] The tenth assignment is well taken. This witness, Jessie Chaplin, having testified that she had loaned a flashlight to Aubrey Tyree, the deceased, who was last seen alive December 27th, and that thereafter, on January 29th, the accused brought her a flashlight that looked like the flashlight loaned by her to the deceased, was then asked this question: "Whereabouts were you when that was brought to you?" To this she answered:

"I was at home. I had went to Staunton to see my father, and when I came back Addison came down, and he had it in his overcoat pocket and asked if I would know my flash-

light, and I told him I would know whether it was like mine, but I would not know it was mine, and he said that he found one and told me where he found it, and taken it out of his pocket, and I said, 'It is exactly like mine,' and he said that if nobody ever calls for it I could have it. And after that my brother and brother-in-law taken it apart and the battery was cleaned out, and they said, 'Mike, I have told you all the time that Addison knew about this.'"

Exception was promptly taken to this answer, but the court overruled it and permitted the entire answer to go to the jury. The statement that her brother and brother-in-law said, "I have told you all the time that Addison knew about this," is so clearly hearsay, the expression of an opinion by others to the witness, and prejudicial to the accused, that we think it unnecessary to say anything more about it.

The trial was greatly prolonged (consuming 10 days), and as it appears to us unnecessarily, by examination, cross-examination, re-examination, and repetition, often in a way which, if not aimless, was certainly futile, and under such examinations witnesses gave illegal testimony which the trial judge from time to time during the weary process would tell the jury must be excluded from their consideration, and it is doubtless true that he had told them so often that he thought they fully understood that they could not consider the mere opinions of others as to the guilt or innocence of the prisoner. This, however, does not relieve this court of the obligation to require the rules of law to be maintained in such cases. A single error of this sort might be held harmless, but in this case, so clearly dependent upon circumstantial evidence, it is especially important that the mere opinions of nonexperts upon the main fact to be determined by the jury should be carefully excluded. The failure to exclude this opinion was in our judgment erroneous and prejudicial to the accused.

[12] The eleventh assignment relates to the refusal of the court to require this witness, Jessie Chaplin, to answer a question as to whether or not she had tried to get a forged prescription for 50 or 100 grains of morphine to be filled at a drug store, at or about the time of these occurrences. As this whole matter was fully developed at a later time in the trial and was only introduced for the purpose of discrediting the witness, we think there is no merit in the assignment.

[13] The twelfth assignment refers to certain testimony of the witness Jessie Chaplin as to her conversations, agreements, and engagements with the deceased about going to Covington and elsewhere, which occurred at some time previous to the date of the alleged crime and in the absence of the accused. It is sufficient to say that the very same testimony was adduced by counsel for

the accused on cross-examination, and, if the exception was not waived, the error, if any, is harmless.

[14] The thirteenth exception is based upon the refusal of the trial court to strike out an answer of the witness Robert P. Jack to a question asked him while he was under cross-examination by a juror. This witness had testified that he had visited the cabin in which it is alleged that the murder occurred, and that he had there seen apparently lying back against the wall, covered with an overcoat or fertilizer sacks, or something else, an object which looked to him very much like a man. He did not examine it sufficiently to be absolutely certain, but quickly left for fear of getting into trouble himself. The object of this testimony was to show that the body of the deceased had been left in the cabin for some time after his death. The juror's question was, "And it might have been just a pile of rags or something?" to which he answered: "I cannot think it. I think it was a man's body instead of a pile of rags." This answer is objected to as a mere opinion of the witness, and the cases of *Hanriot v. Sherwood*, 82 Va. 1, and *House v. House*, 102 Va. 235, 46 S. E. 299, are cited in support of this contention. This subject has been recently considered by this court in the case of *O. & O. Ry. Co. v. Arrington*, 126 Va. 202, 101 S. E. 415. It is there held that answers of this character, which relate to a matter not requiring expert knowledge, are admissible. Such statements are not mere opinions, but impressions drawn from observed facts, sometimes called the "collective facts rule." It is well stated in the case of *Commonwealth v. Sturtivant*, 117 Mass. 133, 19 Am. Rep. 401, thus:

"The exception to the general rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning; but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury. Such evidence has been said to be competent from necessity, on the same ground as the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice. Nor is it a mere opinion which is thus given by a witness, but a conclusion of fact to which his judgment, observation, and common knowledge has led him in regard to a subject matter which requires no special learning or experiment, but which is within the knowledge of men in general."

In 9 R. C. L. 191, referring to this subject, the rule is thus summarized:

"Facts which are made up of a great variety of circumstances, and a combination of appearances which, from the infirmity of language, cannot be properly described, may be shown by witnesses who observed them; and where their observation is such as to justify it, they

may state the conclusions of their own minds. In this category may be placed matters involving magnitude, or quantities, portions of time, space, motion, gravitation, value, and such as relate to the condition or appearance of persons and things." 22 O. J. 530.

This witness, Jack, stated fully all of the facts which he said he had observed, and it was not error to permit him, when a juror suggested to him that it might have been a pile of rags or something else, to give as the result of his observation, which required no expert knowledge, that he thought it was a man's body.

[15] The fourteenth assignment of error is based upon the fact that a witness, in testifying to the conduct of the accused on a certain occasion, said in response to a question by the court: "From his looks I considered him the guilty man." The court promptly excluded the testimony from the consideration of the jury, and for this reason this isolated occurrence does not constitute harmful error. In this case, however, when it is observed that at other times during the trial, and in disregard of repeated rulings of the trial judge, other witnesses expressed their opinions as to the guilt of the accused to the jury, it may be well doubted, when all of this illegal testimony is reviewed, whether the prisoner was not thereby seriously prejudiced.

[16] As an illustration of our meaning, we observe the following question by the commonwealth's attorney, addressed to the sheriff, who had assisted him in searching the cabin:

"As an officer of the county, isn't it a fact that that man's conduct and actions told you and me to go on ahead, and I told you that we would go in there in spite of hell? A. Yes, I stated we went there for the purpose of going into this house, and I didn't see anything in this key business, and it may have been from hearing what we had heard about it. I was not worrying about the key. I wasn't worrying about the key, and I don't recall that it was mentioned but twice."

When it is observed that this witness had failed to be as emphatic as was expected in his imputations against the accused under the leading of the commonwealth's attorney with reference to the specific actions and language of the deceased just before the cabin was searched, it is apparent that the commonwealth's attorney sought by this question to convey to the jury his own more positive impressions as a witness, and this certainly he had no right to do at this time or in this manner to the prejudice of the prisoner, while the rude language of the question was unnecessary and should not be tolerated in a court of justice.

[17,18] The attorney for the commonwealth was afterwards sworn and testified with reference to the execution of the search

warrant, and this appears as part of one of his answers:

"You can tell from the man's demeanor in court that he is not easily frightened. He got very nervous when Mr. Parrent told him when this rock was handed up, and I said, 'That beats the devil; I have got all I want,' and handed it over to Mr. Parrent, and Mohler followed him over to it and asked what it was, and Parrent told him it looked like blood, and this rock came up, and I said to Parrent, 'I am done,' and I looked at Mohler, and Mohler was spitting as fast as he could and trimming a stick and looked excited, and that is the worst excited I saw him at the time. No threats were made and there was nothing to excite him but this thing. I felt sorry for the man and turned my face this way."

While undoubtedly as a witness he could testify as to the demeanor of the accused, and as to all the facts which he observed, nevertheless his expressions to Parrent thus repeated to the jury are merely his opinions, and, fairly construed, are the expression of his opinion that the accused is guilty, and hence clearly violate the rule prohibiting opinion evidence. When one deems it to be his duty to testify in a case in which he also appears as an attorney, he is, while a witness, subject to all the limitations imposed upon other witnesses, and when the prosecuting attorney does so he is under the added sanction of his high office, which, while if convinced that the evidence justifies a conviction imposes upon him the duty to prosecute vigorously and fearlessly, also requires him to respect all of the legal rights of the prisoner.

[19, 20] The fifteenth assignment of error is not well taken. There was much in the testimony about blood, alleged to be human blood, found upon rocks under the cabin in which it was claimed the crime was committed. While the accused was under cross-examination, he was asked to say whether certain rocks came out of this cabin, and whether or not there were blood stains on them. Objection was made to any new exhibits at that stage of the trial. We find no harmful error here. Of course, it is the duty of the prosecuting attorney to introduce all of the testimony upon which he relies before the defendant is required to introduce that upon which he relies for his defense; but this is a matter which rests largely in the discretion of the trial court, and unless abused the exercise of such discretion is not ground for reversal here. *Southern Ry. Co. v. Stockdon*, 106 Va. 693, 58 S. E. 713; *Burks v. Commonwealth*, 128 Va. 769, 101 S. E. 230.

[21] The sixteenth assignment of error is based upon this question, propounded to the accused by the attorney for the commonwealth during his cross-examination:

"Do you tell this jury that a woman who has charged you with murder and gone on the stand and on five different occasions, according to their statement, made statements which if be-

lieved will put you where the lights don't burn, do you mean to tell them that you are not mad at that woman? A. I told you I am not mad."

Such a question is worthy of criticism. The attorney for the commonwealth represents the people of the state, who in their collective capacity are just as anxious that innocent men shall be acquitted as they are that guilty men shall be convicted. The prosecuting attorney is selected for the purpose of representing this sentiment. The presumption of innocence attends an accused person at every stage of the trial until his conviction, and the prosecuting attorney should respect this presumption. If after the testimony has been presented and in the performance of his public duty he concludes therefrom that he should ask for a conviction, it is not only his right but his duty to sum up the evidence and in argument to give the jury his reasons, based thereon, for his conclusion that it justifies such conviction. This question ignores these salutary doctrines. It was an argument during a period of the trial when he had no right to argue the case, but when his primary duty was that of aiding in the investigation and ascertainment of all the pertinent facts and presenting them to the jury. If this occurrence stood alone in the case, it is possible that we might not consider it ground for reversal; but, when considered along with all the other contemporaneous facts and circumstances, it creates the conviction that the prisoner was not tried in that calm environment which should attend a judicial investigation. Whether guilty or innocent, he is entitled to a trial during which his rights are at all times respected. When the attorney for the accused promptly objected to this question, instead of withdrawing it, another argument (characterized by the trial judge as "heated") followed, and, when the attorney for the accused said that such a question might gravely prejudice his client's interests, the court replied, "There is a possibility in its resulting that way." It seems to us that, instead of being followed by such a heated argument, the commonwealth's attorney should have immediately withdrawn the question and refrained from anticipating his argument to the jury at such an improper time, and that, upon his failure to do this and to make a frank acknowledgment of his inadvertence, the court should have promptly and explicitly told the jury that it was improper. We do not underestimate the many difficulties of conducting a trial of this character with absolute propriety from beginning to end, and the general rule is that the discretion of the trial court as to such matters will not be reviewed. In the heat of the contest it is impossible to avoid some irregularities, and in this case, notwithstanding the repeated efforts of the patient and learned trial judge, there were irregularities, no

single one of which would have justified a reversal of the case; nevertheless, when they are considered in their entirety, together with the fact that hearsay testimony was heard by the jury, though in most instances they were told by the court to disregard it, we feel that justice requires that the accused shall have a new trial in which there shall not be so many assumptions of his guilt before it has been ascertained by the jury.

This is no novel doctrine, and these general views are fully supported by the following cases: *Gale v. People* (Cooley, J.) 26 Mich. 161; *Scripps v. Reilly*, 38 Mich. 15; *People v. Wells*, 100 Cal. 462, 34 Pac. 1078; *People v. Mullings*, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223; *People v. Ah Len*, 92 Cal. 282, 28 Pac. 286, 27 Am. St. Rep. 103; *Wyatt v. State*, 58 Tex. Cr. R. 115, 124 S. W. 930, 137 Am. St. Rep. 926 (construing a local statute); *People v. Fleming*, 166 Cal. 357, 136 Pac. 300, Ann. Cas. 1915B, 881; *Cleveland, etc., R. Co. v. Pritschau*, 69 Ohio St. 438, 69 N. E. 663, 100 Am. St. Rep. 682; *People v. Teiper*, 186 App. Div. 830, 175 N. Y. Supp. 206; *People v. Fielding*, 158 N. Y. 547, 53 N. E. 498, 46 L. R. A. 641 (note), 70 Am. St. Rep. 495.

The following recent cases in this state, though not precisely applicable, are instructive: *Jessie v. Commonwealth*, 112 Va. 887, 71 S. E. 612; *Mullins v. Commonwealth*, 113 Va. 787, 75 S. E. 193; *McCoy v. Commonwealth*, 125 Va. 773, 99 S. E. 644; 3 *Wigmore on Ev.* § 1808.

No. 17 is in substance the same as No. 15, and we find no error in the ruling.

[22] No. 18 refers to a statement made by the deceased, Tyree, to the witnesses Muterspaugh and Wilhelm. This statement was, in effect, that he was going up to Mohler's (the accused); that he had invited him up there and that his girl was to be there. The accused himself had testified that the deceased on that day, at about 3 or 4 o'clock in the afternoon, had asked him twice where he would be that night; that on the first occasion he had told him he would be at home, and on the second occasion, when sitting in a buggy with Jessie Chaplin, he had again asked him where he would be, and that he told him that he would be where he had already told him, and she testified as to this interview in her presence that the deceased replied:

"I don't know whether I can get there by that time or not, but I will do the best I can."

The statements of these two witnesses, Muterspaugh and Wilhelm, occurred at a place upon the road less than a mile from the scene of the alleged murder, and while the deceased was going along the road in that direction, about 7 o'clock of the same evening, and upon the last occasion on which any witness positively identified the deceased alive. There is one witness, however, who testified

that he saw a man that same evening shortly thereafter and still closer to the scene of the alleged murder, going along the road with a flashlight in that direction.

In *Dock's Case*, 21 Grat. (62 Va.) 913, a question precisely similar to that here involved was decided against the contention of the accused. Testimony showing the expressed purpose of the deceased as to where he was going and his reason for doing so, and contemporaneous action in execution of such purpose, was there admitted as clearly part of the *res gestae*. The case of *Karnes v. Commonwealth*, 125 Va. 764, 99 S. E. 562, 4 A. L. R. 1509, does not present a question precisely similar, but what is said there as to this class of testimony and its admissibility represents the view of this court. *McBride's Case*, 95 Va. 818, 30 S. E. 454, and *Mullins v. Commonwealth*, 113 Va. 787, 75 S. E. 193, which are relied on here, can easily be distinguished from the case in judgment, for the declarations which were excluded in those cases were not only made in the absence of the prisoner, but there was no evidence that he knew anything about such declarations, and they were not so connected therewith in time or place as to constitute a part of the *res gestae*. The fact that the deceased in this case had a purpose to meet the accused on that night, that he expressed his intention of so doing to the accused, and promptly proceeded to execute that intention, is otherwise clearly indicated; therefore it would have been error on the part of the trial court if it had refused to admit this testimony as a part of the *res gestae*.

The nineteenth and twentieth assignments of error are based upon the action of the trial court in permitting the witness Vest to testify as to the reputation of the accused for truth and veracity as of the time of, and immediately before, the trial. This witness had been first introduced by the accused and had testified that his reputation as a peaceable, law-abiding, good, substantial citizen, as well as for truth and veracity, in the neighborhood in which he lived, was good. Being afterwards called by the Commonwealth, it appeared that before this disappearance the witness was of the opinion that the accused had a good reputation for truth and veracity, but that afterwards, in the opinion of the witness, he could not be believed on oath.

[23] Similar questions have frequently arisen, and the authorities appear to sustain the view that, when the accused person testifies in his own behalf, his credibility may be attacked just as that of any other witness may be attacked; that is, the question to be investigated is the reputation of the witness for truth and veracity as of the time at which he testifies. This may be a great hardship upon the accused, because it frequently happens that the neighborhood gossip and the suspicions of his guilt with the conse-

quent discussion of his criminality will give him a bad reputation in the community for truth and veracity, whereas theretofore it had been good. But nevertheless it seems to be the accepted rule. 28 R. O. L. 620; 82 Am. St. Rep. 34, note; 20 L. R. A. 616, note.

[24] Care should certainly be taken, however, in the admission of such testimony. In this case this witness Vest, who had testified as to the good reputation for truth and veracity of the accused previous to the date of the alleged crime, had also testified to his good reputation as a law-abiding and peaceful man at and before that time. Now as to this the rule is different, and in cases in which such evidence is admissible, one who proves his good reputation as a peaceful and law-abiding man is entitled to have that considered by the jury as it existed at the time of the alleged crime, and not as it may have been subsequently affected by the fact that he had been accused of committing it.

One of the oldest cases is *Carter v. Commonwealth*, 2 Va. Cas. (4 Va.) 169, where it is expressly held that when a prisoner introduced evidence in support of a general good character, and the commonwealth endeavors to impeach it, the witness who impeaches cannot give in evidence conversations relating thereto held with others subsequent to the commencement of the prosecution.

In *State v. Sprague*, 64 N. J. Law, 423, 45 Atl. 788, the same rule is enforced and the Virginia case cited. It is the reputation one has in the community up to the time of the commission of the offense only which is admissible. The accusation of the crime should not be allowed to affect his reputation so far as proof thereof may be admissible in his defense. *Olive v. State*, 11 Neb. 29, 7 N. W. 444. Proof of such reputation, or evidence in denial of such reputation, must be limited to the time of the discovery of the offense. *White v. Commonwealth*, 80 Ky. 483. Reputation acquired by the crime itself and after its commission is not admissible. *People v. Fong Ching*, 78 Cal. 175, 20 Pac. 396; *Skaggs v. State*, 31 Tex. Cr. R. 563, 21 S. W. 257; *State v. Johnson*, 60 N. O. 151, 162; 22 C. J. 480; 20 L. R. A. 612 note; 8 R. O. L. 209.

In this case, while the court repeatedly cautioned the attorneys for the prosecution that they could extend their inquiry only as to the reputation of the accused for truth and veracity up to the time of the trial, they repeatedly framed their questions so as not to observe the distinction which the court so clearly expressed. If the attorneys had

observed the caution of the trial judge, there would have been no error; but, inasmuch as they failed to do so, this examination discloses error which was prejudicial to the accused.

[25] The twenty-first and twenty-second assignments of error refer to testimony of the witness Hall, introduced in rebuttal by the commonwealth for the purpose of sustaining the reputation of the witness Jack for truth and veracity. The accused had introduced several witnesses who testified that Jack's reputation for truth and veracity was bad, and the commonwealth undertook to defend his reputation and to discredit this adverse testimony by this witness Hall. While he testified in the usual way, on his cross-examination, in response to the question, "Do you know his reputation for truth and veracity," he replied, "No." Thereupon there was a motion to exclude all of Hall's testimony, which was overruled. It is undoubtedly true that a witness who does not know the reputation of another witness for truth and veracity should not be permitted to testify in support of such reputation which had not been attacked; but here Hall was introduced by way of defense to repel such attack, and had testified that he possessed the information which is usual in such cases, that is, he had known Jack well for many years, had never heard his reputation for truth and veracity questioned or discussed in the neighborhood, and that he would believe him on oath; so that in our judgment this circumstance presents no ground for reversal. Two other witnesses, Engleman and Wade, were introduced for the commonwealth, and testified to the same general effect, and no exception was taken to their testimony by the accused. The modern tendency is to relax the stringency of the ancient rule and to admit such negative testimony. 20 L. R. A. (N. S.) 666 note.

We have referred to each of these assignments numerically in view of the reversible errors which the record discloses, and because the case must be remanded for a new trial. The only other error assigned is the refusal of the trial court to set aside the verdict as being contrary to the law and the evidence. For obvious reasons we deem it improper to express any opinion as to this.

The judgment is reversed because of the errors in procedure indicated, and the case is remanded for a new trial to be had according to law.

Reversed and remanded.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 746)

MYERS et al. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 16, 1922.)

1. Criminal law §1091(14)—Exceptions in general bill containing all evidence do not require review of rulings where no bill of exceptions points them out.

An assignment that the court erred in refusing to sustain objections to the admissibility of evidence as shown by the exceptions in the record will not be considered where there was no bill of exception pointing out the rulings and the assignment complained of; the only exceptions to the evidence being contained in the general bill certifying all of the evidence, and noting at intervals that objections were made to the admissibility of evidence which were overruled, and exceptions taken.

2. Indictment and Information §125(3)—Indictment in one count charging breaking and larceny is one for breaking.

Where an indictment in one count charged defendants with breaking and entering a railroad car, and therein stealing and taking away certain goods, it must be regarded as an indictment for car breaking.

3. Burglary §23—Description of property stolen from railroad car held sufficient.

In an indictment for breaking and entering a railroad car, a description of the property taken by number of articles of various kinds, with the value of each, "then being in the lawful custody and possession" of the railroad company, would be a sufficient description even to charge the larceny of the goods, and when, in addition, the name of the consignee to whom the goods were billed was given, the property was identified beyond all reasonable doubt.

4. Criminal law §1172(1)—Instruction authorizing conviction of both defendants if either broke into car held not prejudicial.

In a prosecution of two defendants for breaking and entering a railroad car, an instruction that if either broke and entered the car the jury could convict them could not have prejudicially misled the jury where the evidence showed that both the accused acted in concert, so that the jury must have understood both could be convicted for the act of one only if the other was aiding and abetting.

5. Burglary §42(1)—Requested instruction possession of stolen property was not evidence of breaking and entry is erroneous.

A requested instruction that possession of goods stolen from the car which was broken and entered could in no event be construed as evidence of breaking and entering of said car was manifestly erroneous.

6. Burglary §45—Criminal law §759(4)—Conclusion to be drawn from possession of stolen property is for the jury, and instructions must not infringe on jury's province.

The conclusion to be drawn from the circumstances of the possession of the stolen goods is one of fact which is in the province of the jury, and an instruction given thereon must not infringe upon the prerogative of the

jury as the sole judges of the weight to be given to the testimony.

7. Burglary §42(1)—Corpus delicti must be proved before guilt can be inferred from possession of fruits.

The corpus delicti of car breaking must be proved before any inference of guilt can be drawn from the possession by defendants of the fruits of the crime.

8. Burglary §38, 45—Court can exclude evidence of possession so remote as to have no probative value.

The rule that the weight to be given to possession of stolen property in a prosecution for burglary is a question solely for the jury is subject to the qualification that, if the possession is very remote, the judge, at his discretion, may exclude it from evidence as having no sufficient tendency to prove anything.

9. Burglary §42(3)—Circumstances in connection with defendant's possession of fruits of crime held evidence of breaking.

In a prosecution for breaking and entering a railroad car, evidence that defendants denied the possession of some of the property, and gave false explanations of possession of the rest of it, and, though they testified, did not claim to have acquired the property innocently, held sufficient inculpatory circumstances to sustain a conviction for breaking and entering in connection with proof of the possession of the fruits of the crime.

10. Criminal law §881(4)—General verdict under indictment containing one count for breaking and larceny thereafter is for breaking and entering.

Where the indictment charged in a single count the breaking and entering of a railroad car, and the larceny therefrom of certain property, a general verdict of guilty as charged in the indictment was a conviction of breaking and entering.

11. Burglary §38, 42(3)—Possession of stolen goods may be considered with other inculpatory circumstances to establish breaking.

Where goods were obtained by means of breaking and entering a railroad car, the possession of the goods shortly thereafter is a material circumstance to be considered by the jury in determining the guilt of the accused of the breaking and entering, and, with other evidence of inculpatory circumstances or guilty conduct, will warrant a conviction.

12. Burglary §42(3)—False swearing as to possession, false explanation, or absence of claim of innocent possession sufficient with possession to establish breaking.

The possession of goods stolen by the breaking and entering of a railroad car, in connection with either false testimony denying the possession, a false account of the possession, or the circumstance that the accused, although taking the stand in their own behalf, did not claim to have acquired possession by means other than the breaking, is sufficient to sustain a conviction for the breaking.

13. Burglary §42(3) — Facts corroborating possession need not connect accused with breaking.

Inculpatory facts sufficient, with possession of property stolen by the breaking and entering of a railroad car, to convict accused of the breaking, need not tend to connect accused with the actual breaking.

14. Criminal law §1028—Defense not made by accused in testimony need not be considered.

Where the accused took the stand in their own behalf, and failed by their testimony to make a defense which might have been made, the court cannot consider the possibility of such defense as sufficient to defeat the conviction.

15. Burglary §23—Ownership of stolen goods may be alleged in general or special owner.

Where the goods at the time of their taking by breaking and entering were in the possession of a special owner, such as a bailee or carrier, the indictment may allege the ownership of the goods in either the general or special owner.

16. Burglary §28(7)—Indictment held to allege special ownership, so that proof of general owner was unnecessary.

An indictment for breaking and entering a railroad car, and stealing therefrom certain goods consigned to a named individual, then and there in the possession of the railroad company, charged the ownership to be in the railroad company, the special owner, so that it was unnecessary for the prosecution to prove that the general owner was deprived of his property by the taking.

17. Criminal law §763, 764(3, 4)—Instruction there was no evidence to support particular issue should not be given.

An instruction that there was no evidence to support the charge of car breaking should not be given in a criminal case, even though there is no statute expressly forbidding such instruction in a criminal case similar to Code 1919, § 6003, applying to civil cases.

Error to Corporation Court of Roanoke.

William Myers and another were convicted of breaking and entering a railroad car, and they bring error. Affirmed.

The accused were jointly indicted. The indictment contains only one count, and in that one count charges that both of the accused, at a certain time and place stated, did feloniously break and enter a certain railroad car, the number, etc., of which is stated, "then and there in the lawful custody and control" of a certain railroad company designated, "with the intent to commit larceny therein"; and further charges both of the accused with actual larceny, at the same time and place, consisting of the feloniously taking, stealing, and carrying away from said railroad car of "26 raincoats of the value of \$253.50, and 12 rain hats of the value of \$6.50, * * * billed to" certain consig-

nees named, in a certain state named, "and 48 pairs of shoes of the value of \$276 billed to" certain consignees named, at a certain place in a certain state, both named; "all of which said raincoats, rain hats, and shoes being then and there of the aggregate value of \$536, and being then and there in the lawful custody and possession of the said" railroad company, again naming it, "and in said railway car being then and there found. * * *

The accused demurred to the indictment on the ground that it "contained no specific description of the articles alleged to have been taken." The court overruled the demurrer.

Thereupon the accused were jointly arraigned and pleaded not guilty. Upon this issue there was a trial by jury, which resulted in the following verdict:

"We, the jury, find the defendants, T. J. Stewart and Wm. Myers, guilty as charged in the within indictment and fix their punishment at 3 years each in the penitentiary"

—and the judgment under review was entered accordingly.

The material facts and circumstances, as the jury were warranted in finding them from the evidence, may be summarized as follows:

The corpus delicti, both of the burglary and of the larceny charged in the indictment, were established by the proof beyond a reasonable doubt.

Upon the question of the identity of the thief or thieves, the jury were warranted by the evidence in finding the following facts namely:

That the offenses of the car breaking and the larceny charged in the indictment were committed at one and the same time by the same person or persons. The situation upon this subject, as shown by the record, is as follows: The car was inspected after it arrived in the city, at 6:54 p. m. on August 2, 1920, and found to need some small repairs. The doors of the car were at that time found to be fastened and sealed, and the car was in such condition that it could not have been entered through the doors without breaking the seals. In that condition the car was, during that night, placed on a repair track. The next morning, at about 9 o'clock, the car repairers when they came to repair the car, found the seals broken, that the doors had been opened, and that some of the raincoats, hats, and shoes which had been in the car had been stolen, some broken boxes, shoes and raincoats being still in the car, lying scattered over the car floor. In their testimony in the case neither of the accused nor any witness in their behalf claimed that the accused obtained possession of the stolen goods, subsequently found in their possession as below stated, from any other person, or

in any other way, than from the custody of the railroad company by means of the breaking and entering of the said car. The sole claim made by the testimony of and for the accused on this subject was that neither of them ever had any of the stolen goods in their possession.

Three days after the car breaking and larceny aforesaid several boxes of the stolen shoes, with the name of the consignees stated in the indictment appearing on the boxes, were seen by a witness for the commonwealth in the same city in which the car breaking and larceny were committed in a garage in which the accused Stewart kept his automobile. The garage was kept locked by Stewart at the time. This witness, in Stewart's absence, looked through a crack in the side boarding of the building, and saw the boxes of shoes aforesaid. The witness was the owner of the garage, and rented it to Stewart about three months before he discovered the stolen goods as just stated. At the time Stewart rented the garage, Myers, the other accused, accompanied Stewart, and from time to time thereafter Myers and Stewart were seen together at the garage. Subsequently to the aforesaid discovery of the stolen shoes, and during the same month of such discovery, the wife of the owner of the garage, also a witness for the commonwealth, saw Myers come from the direction of the garage with several pairs of shoes, which, from the description given by the witness, the jury were warranted in finding were some of the stolen shoes, and carry them upstairs to a room rented by his sister, in which Myers sometimes stayed about this time. Myers took the stand as a witness in behalf of himself and of Stewart, and upon cross-examination admitted that he was familiar with the garage aforesaid; had been in there several times. He gave a false account, however, of how he came by the shoes which the witness for the commonwealth last mentioned saw him carrying from the garage, if the testimony of that witness is to be believed. On this subject Myers testified that he "might have carried some old shoes that (he) had left up in the garage there somewhere" from the garage to his sister's apartments, but denied that he so carried any shoes of the description of the stolen shoes from the garage, or ever saw any such shoes in the garage or any shoe boxes therein.

During the same month that the shoes were discovered in the garage as aforesaid Stewart sold two pairs of the stolen shoes to one Philpots, Stewart stating at the time of the sale as the reason for his selling the shoes that they were too small for him. Stewart also testified as a witness in behalf of himself and Myers, and admitted selling two pairs of shoes to Philpots at the time aforesaid, but gave a false account of how he came by them, claiming that he bought

them while on a trip in West Virginia. These two pairs of shoes were identified by the testimony for the commonwealth as having come from the lot of shoes described in the indictment, by proof which amounted to practically absolute certainty. It was proved before the jury that the lot of shoes described in the indictment had certain numbers stamped by the manufacturers at the time they were made on the lining on the inside of the shoes and on the soles of the shoes, underneath the heels. The numbers on the two pairs of shoes just mentioned, on the lining on the inside of the shoes, had been inked out when they were sold to Philpots, and so appeared at the trial; but at the trial, when the heels were removed, the numbers found there were the numbers put thereon by the manufacturers on certain of the shoes described in the indictment, and so identified these shoes as having come from that lot of shoes almost beyond all possibility of doubt.

As to the raincoats and hats: The car breaking and larceny aforesaid was in the nighttime or early morning. The day following, or upon the next day, according to the testimony for the commonwealth, Stewart and Myers were, in the same city aforesaid, seen in the manual possession of seven of the raincoats and eight of the rain hats which were stolen as aforesaid. They drove up to the store of an Assyrian named Assaid, in said city, in an automobile, accompanied by two other men. One of the men stayed in the automobile. Stewart and Myers, accompanied by the other man, came into Assaid's store. Stewart and Myers brought in with them the raincoats and hats just mentioned, and asked if Assaid would buy them or handle them. Assaid was not himself present, his wife and son being in the store in charge of it. The wife and son first declined to buy or handle the goods, stating to Stewart and Myers that Assaid was about to sell his stock of goods in bulk, and expected to inventory the stock that week. Whereupon Stewart and Myers said:

"You can inventory them [the raincoats and hats they had brought in the store as aforesaid] with the stock, and whatever you get for them you can pay us, and we won't fall out over the price"

—and left the goods there with that understanding. Neither of the accused ever came back to the store or asked for any settlement for the goods. These goods were found in the store by an officer some 20 days after they were left there as aforesaid by Stewart and Myers. The manufacturer's labels on them had been removed, but when the bunch of coats were taken up one of the labels was found lying "sort of on the sleeve" of one of the coats, which was a label of the manufacturer of the raincoats and hats which were stolen as aforesaid. In their testimony in the case both Stewart and Myers denied

all knowledge of the raincoats or hats just mentioned, denied that they ever had any of them in their possession, said that it was not true that they carried them into the As-said store or ever were in that store.

At the trial the court gave the following instructions, (Nos. 2, 3, 4, and 5 being given at the request of the accused):

"Instruction No. X. You are instructed that the burden is upon the commonwealth to prove the guilt of the defendants beyond a reasonable doubt. If you believe from the evidence beyond a reasonable doubt, first, that the defendants, or *either of them*, broke and entered the railroad car with intent to commit larceny therein, you should find *them* guilty as charged in the indictment; or, second, if you believe that they stole the goods out of the car without breaking and entering beyond a reasonable doubt, you should find them guilty of grand larceny, without convicting them of breaking and entering. If you have a reasonable doubt of any of those things, you should find them not guilty. (*Italics supplied.*)

"(2) The court instructs the jury that every person charged with crime is presumed in law to be innocent, and the burden is upon the commonwealth to prove every essential element of the offense with which he is charged, before you can convict, beyond every reasonable doubt, and unless you so believe from the evidence in this case that the commonwealth has proven the guilt of the defendants beyond every reasonable doubt, then it is your duty to find the prisoners not guilty.

"(3) The court further instructs the jury that, if you have a reasonable doubt in your minds as to the guilt or innocence of the prisoners at the bar, then it is your duty to give them the benefit of the doubt and acquit them.

"(4) The court further instructs the jury that a reasonable doubt in every criminal case is not a mere form to be disregarded by the jury, but a substantial part of the law of this land, and before you can convict the accused in this case you must have an abiding conviction in your minds, based upon the evidence in this case, that he is guilty beyond every reasonable doubt.

"(5) The court instructs the jury that circumstances of suspicion alone, however grave and serious, can never warrant a jury in returning a verdict of guilty, and you are therefore instructed that, if the evidence in this case arouses in your minds a question of suspicion alone, it would be your duty to acquit."

The court refused to give the following instructions asked for by the accused:

"A. The court instructs the jury that this is an indictment against William Myers and Tom Stewart for breaking and entering a car in the possession and control of the Norfolk & Western Railway, and for stealing and carrying away raincoats, rain hats, and shoes from said car; and you are further instructed that, even if you believe from the evidence that the defendants, or either of them, afterwards acquired or were found in possession of any goods stolen from said car, that such possession in no event can be construed as evidence of the breaking and entering of said car.

"B. The court instructs the jury that this is

a charge of car robbery and larceny of goods in transit, and the burden is upon the commonwealth to show by affirmative proof that the owner of said goods was deprived of such ownership.

"C. The court instructs the jury that there is no evidence in this case to support the charge of car breaking."

A. B. Hunt and Lawson Worrel, both of Roanoke, for plaintiffs in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

[1] One of the assignments of error in the petition is as follows:

"The court erred in failing and refusing to sustain objections to the admissibility of the evidence as shown by the exceptions in the record noted."

There is no bill of exceptions or certificate of the judge in the record pointing out the rulings complained of in the assignment of error just referred to. The exceptions mentioned in this assignment of error are contained in the general bill of exceptions certifying all of the evidence, and noting at intervals that objections were made to the admissibility of evidence, that the objections were overruled by the court, and exceptions taken. It is well settled that this is not sufficient to bring up such rulings, or any of them, for review on appeal. *Norfolk & Western R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811, and cases therein cited, and *Kibler's Case*, 94 Va. 804, 813, 26 S. E. 858.

Therefore the assignment of error just mentioned will not be considered.

The questions raised by the other assignments of error will be disposed of in their order as stated below.

1. Is the indictment sufficiently specific in its description of the property alleged to have been stolen?

This question must be answered in the affirmative.

[2] The indictment, since it contains only one count, must be regarded as an indictment for car breaking. *Speer's Case*, 17 Grat. (58 Va.) 574; *Vaughan's Case*, 17 Grat. (58 Va.) 576; *Butler's Case*, 81 Va. 159. Concerning the sufficiency of the description, in such an indictment, of the property alleged to have been stolen, this is said in *Vaughan's Case*, just cited:

"* * * Allegation of an actual larceny is only in aid of the allegation of intent. If that allegation were struck out altogether, enough would remain to describe the offense of which the prisoner has been convicted. Such being the object for which the charge of an actual larceny is introduced in cases of this

character, it need not be laid with the same formality as in an indictment for the larceny itself. [Citing cases.] It is always better, however, to lay the charge of larceny in proper form, to avoid objection in case the prisoner should, as he may, on such a count as this, be found not guilty of the breaking and entering, but guilty of the larceny."

See, to same effect, *Wright's Case*, 82 Va. 183.

[3] The indictment in the case in judgment is sufficiently specific in its description of the property stolen to have sustained a conviction of larceny thereunder, even if it had contained no other description of the property stolen than the species or names of the articles, their number, and the name of the special owner thereof, (this being a case of special ownership or bailment, the goods having been stolen from a common carrier, a special owner), all as set forth in the indictment. 2 Bish. New Cr. Proc. (4th Ed.) §§ 699, 700, 702, 710. The indictment, however, also names the consignees to whom the property was shipped. This furnished further means of identifying the property beyond all reasonable doubt. Therefore, in any aspect of the case, the indictment was sufficient in its description of the property.

[4] 2. Did the court err in giving instruction X copied in the statement preceding this opinion?

This question must be answered in the negative.

The only portion of this instruction which is claimed to have been erroneous is italicized in the copy of it appearing above. The material portion of the instruction reads as follows:

"If you believe from the evidence beyond a reasonable doubt * * * that the defendants, or either of them, broke and entered the railroad car with intent to commit larceny therein, you should find them guilty as charged in the indictment. * * *"

It is obvious that, if this language were to be understood as meaning literally and in the abstract, what it says, the instruction would be erroneous. But every instruction must be construed in the light of the evidence which has been introduced before the jury. In the case in judgment the circumstance that both of the accused were seen together, and were shown by the evidence to have acted in concert in the occurrences which most incriminated them, prominently appears from the record. And it is so obvious, when the instruction is read in the light of the evidence, that the jury were intended to be instructed that they could find both of the accused guilty of the car breaking if they believed that only one of them did the breaking only in the event that the jury believed from the evidence that the other, in such case, was aiding and abet-

ting the commission of the offense, and, indeed, a different understanding of the instruction would have been so plain a direction to the jury to find a verdict that would shock the sense of justice of every one, that we are satisfied the jury were not misled by the instructions to the prejudice of either of the accused.

[5] 3. Did the court err in refusing to give instruction A asked for by the accused?

This question must be answered in the negative.

It will be observed that it was not asked that the jury be told by this instruction that the mere evidence of the possession referred to was not of itself sufficient to establish the guilt of the accused of the crime of the car breaking. The instruction as asked would have told the jury, in substance, that the possession referred to was not a circumstance which they could consider at all as evidence of the guilt of the accused of the crime of the car breaking. Such an instruction, according to all of the authorities, would have been erroneous. 2 Bish. Cr. Proc. (4th Ed.) §§ 152, 739-747, and the authorities cited in the notes to these sections; *Henderson's Case*, 98 Va. 800, 34 S. E. 881; *Gravely's Case*, 86 Va. 396, 10 S. E. 431; *Hall's Case*, 3 Grat. (44 Va.) 593; *Wright's Case*, 82 Va. 183; *Branch's Case*, 100 Va. 837, 41 S. E. 862; *Tyler's Case*, 120 Va. 868, 91 S. E. 171; *Stallard's Case*, 130 Va. —, 107 S. E. 722; *Elmoe's Case*, 131 Va. —, 110 S. E. 257; *State v. Brady*, 121 Iowa, 561, 97 N. W. 62, 12 L. R. A. (N. S.) 199, and note thereto, and authorities therein cited.

As said in 2 Bish. New Cr. Proc. § 152, *supra*:

"The Goods Stolen.—In a burglary, as connecting the defendant with the corpus delicti, his recent possession of them, whether charged in the indictment to have been stolen or not, the circumstances of the possession, and how far he accounted therefor, may be shown. We shall see (post, sections 739-746) that in cases of pure larceny opinions are not quite uniform upon the effect of this evidence; it is the same in burglary. The question is much influenced by the facts special to the particular case. In reason, the jury, not the court, should determine what this evidence proves * * *" (citing numerous authorities and among them *Gravely's Case*, *supra*, 86 Va. 396, 10 S. E. 431.

As said in *Gravely's Case*:

"* * * Where goods have been obtained by means of a burglary or housebreaking, the fact of such possession is a most material circumstance to be considered by the jury, and where, in addition to such possession, other inculpatory circumstances are proved, such, for example, as the refusal of the accused to give any account, or his giving a false account, of how he came by the goods, such proof will warrant a conviction. In other words, to use the language of the books, there should be some evidence of guilty conduct, besides the bare

possession of the stolen property, before the presumption of burglary or housebreaking is superadded to that of the larceny. * * *

[8-9] As held by all the modern cases, including all of the cases in Virginia on the subject, the conclusion to be drawn from the circumstances of the possession of the stolen goods, in cases of the character of that in judgment, is one of fact, and not of law, and is one which is peculiarly and solely in the province of the jury. And it is a subject more than ordinarily beset with difficulties, and on which any instruction which may be given by the court must be phrased with very great care indeed, so as not to infringe upon the prerogative of the jury as sole judges of the credibility and weight to be given to the testimony. The issues of fact involved in such case are frequently numerous, and, under our practice, the evidence bearing upon such issues needs to be weighed and considered by the jury, where there is a trial by jury, uninfluenced by the opinion of the trial judge. There is the corpus delicti to be proved before any inference of guilt can arise from the possession of the fruits of the crime. 2 Bish. New Cr. Proc. §§ 152 and 739(2). Then there are the special facts of the particular case concerning the circumstances of the possession, in connection with the other evidence. The significance of the possession will vary with the special facts and the other evidence in each case, among which are the nearness or remoteness of the proven possession to the crime charged, the nature of the thing possessed, as passing readily from hand to hand or not, or as likely or not likely to have been put by another in the possession of the accused without his knowledge at the time, whether any explanation is given by the accused of the possession, whether, if the accused is silent on the subject, his silence, under the circumstances, is consistent with his innocence of the crime imputed to him, what explanation is given of the possession, where the accused undertakes to give one, together with such other circumstances as ought reasonably to influence a juror's opinion. 2 Id. § 740; Kibler's Case, 94 Va. 804, 814, 815, 26 S. E. 858. What is said above is subject to this qualification: As said in 2 Bish. New Cr. Proc. § 742:

"The just doctrine would seem to be that, if the possession is very remote, yet how remote must depend on the special facts of the case, the judge at his discretion will exclude it as having no sufficient tendency to prove anything. * * *

It is not claimed, however, in the case in judgment, that the possession was so remote as to come within this qualification.

[8] The record in the case before us shows that there were "other inculpatory circumstances proved," and "some evidence of guilty conduct" of both of the accused, "besides the bare possession of the stolen prop-

erty." Hence we have no hesitancy in holding that the trial court committed no error in refusing to give the instruction under consideration, which, in substance, would have made the court say to the jury, as a conclusion of law, that they could not consider the evidence as to the possession of the stolen goods, even though they might believe from the evidence that there were other inculpatory circumstances proved, and other evidence of guilty conduct of both of the accused, besides the bare possession of the stolen property.

[10] 4. Did the court err in refusing to set aside the verdict?

The indictment containing but one count, and the verdict, being a general one, was a verdict finding the accused guilty of the major offense of car breaking charged in the indictment. *Speer's Case*, supra, 17 Grat. (58 Va.) 574; *Butler's Case*, supra, 81 Va. 162.

The position is taken for the accused that, even if the evidence with respect to the possession of the stolen goods could have been properly considered by the jury—

"there is not a syllable of evidence in the record to connect [the accused] with the robbery of [the] car, * * * and, while the possession of recently stolen articles raises the presumption of a larceny of the articles, it has never been held that the possession of the stolen property, unaccompanied with any guilty conduct, could raise the presumption of housebreaking"—citing *Henderson's Case*, *Gravelly's Case*, and *Branch's Case*, supra.

[11] It is unnecessary for us to consider here whether there is, accurately speaking, any difference between the rule prevailing in modern times in almost, if not quite, all of the jurisdictions, including Virginia, upon the subject of the inference of guilt of the accused which the jury may be warranted in drawing from the circumstance of the possession of stolen property, in larceny, as distinguished from burglary or housebreaking. cases, further than to say this: There are statements in the opinions in a number of the cases in Virginia to the effect that "the general rule of the common law" on the subject in cases of larceny has never been held in Virginia to apply to the same effect in cases of burglary or housebreaking. But the fact remains that the rule which the Virginia cases lay down as applicable to cases of burglary and housebreaking is, in truth, precisely the same as "the general rule of the common law" on the subject as applied to larceny cases, according to Mr. Bishop and the great weight of authority.

In *Wright's Case*, supra, 82 Va. at page 188, indeed, this is said:

"Though the mere possession of the stolen property might not be prima facie evidence of the burglary or housebreaking charged, yet, in connection with other evidence of such burglary or housebreaking, evidence of such possession of stolen goods is admissible; and upon

proof of a larceny having been committed, and of the goods stolen having been found, shortly afterward, in possession of the prisoner, the general rule will attach that * * * it is incumbent upon the prisoner to prove how he came by the property, otherwise the presumption is that he obtained it feloniously.' Section 2, Russell on Crimes (Ed. 1887) p. 123; Davis' Crim. Law, p. 193; 3 Greenleaf, Ev. § 31; 3 Rob. Prac., old, p. 224."

This is a statement of the rule under consideration, as applicable to burglary and cases of that character, almost, if not precisely, in the very form in which the oldest authorities lay it down as applicable to cases of larceny. In Branch's Case, supra, 100 Va. 839, 840, 41 S. E. 862, the modern doctrine on the subject, applicable alike to the former class of cases just mentioned and to larceny cases, is approved as in force in Virginia by citing the same sections of 2 Bish. New Cr. Proc. as those we have above cited. In the opinion of the court in Branch's Case, 100 Va. at pages 839, 840, 41 S. E. 862, 863, this is said:

"* * * Recent and unexplained possession of stolen goods, is a pregnant circumstance, and, accompanied by other incriminating facts, may be conclusive of guilt of the * * * crime of breaking the house from which it is shown that the goods were stolen; and if the recent possession by the accused of articles stolen from the house broken into is proved, and it appears that he could only have gotten the articles by taking them from the house feloniously entered, this would seem to be sufficient to convict him of housebreaking. Whart. Cr. L. § 1605; Bish. Cr. Proc., §§ 152, 739, and 747; Walker's Case, 28 Gratt. 969."

And Gravely's Case, is also cited, and the doctrine of that case is restated.

And in Stallard's Case, supra, this is said:

"The jury might have convicted * * * of larceny only, upon the evidence of recent unexplained and exclusive possession of stolen goods, but when to the evidence of such possession, was added the evidence that the goods were initially acquired by entry of Sivert's barn in the nighttime, and a false account of how defendant came by the goods, the jury were justified in convicting the prisoner of the higher offense."

There can, indeed, be little doubt but that, in the particular under consideration, as in others, there has been a development and improvement in the condition of the law in modern times. Not that the law itself has changed, but the statement of it has changed. As said in 2 Bish. New Cr. Proc. § 740 (3):

"* * * The doctrine in some of our states is not now the same as in earlier years. [Referring to numerous cases in thirty of the American States and in England.] It will be comforting to the well-wishers of our jurisprudence, who examine these cases, and who remember the condition of the law on this subject fifty years ago, to note that very little now remains in our reports of unfortunate old doc-

trines which have melted before inflowing light."

It would take us too far afield to here pursue the inquiry as to what is the precise rule, stated as aforesaid as applicable in larceny cases, to which reference is made in some of the cases of burglary and house-breaking in Virginia. It is sufficient here to say that the rule, as stated in the last-named cases as applicable to burglary and the like character of cases, is, in substance, the same as laid down in the quotation we have made above from Gravely's Case.

The precise question we have presented for our decision, therefore, is this:

[12] 5. Does proof that the initial wrongful possession of the goods in question was obtained by means of the felonious breaking and entering, coupled with the further proof (a) of actual false swearing by the accused on the subject of the possession of the stolen goods (such as, for example, on voluntarily taking the stand as a witness his testifying that he never had any possession of any of the stolen goods, when there is ample evidence for the commonwealth to the contrary), or (b) of his giving a false account of the possession of the stolen goods, or (c) that the offenses of the breaking and entering and of the larceny were committed at the same time, and by the same person or persons, and the circumstance that the accused, although testifying as a witness in the case, does not claim that he obtained the possession of the goods from any one or in any other way than by means of the felonious breaking and entering, furnish sufficient evidence of the "other inculpatory circumstances," or other "guilty conduct, besides the bare possession of the stolen property," which, according to the authorities, will support a verdict of the jury finding the accused guilty of the crime of the breaking and entering with the intent to commit larceny?

We are of opinion that, in any one of the three situations stated, there would be sufficient evidence of the superadded facts mentioned to support such a verdict. And, as appears from the statement preceding this opinion, all three of these situations appear from the record in the case before us, as the jury were warranted by the evidence in finding, and involve both of the accused, with respect certainly to some of the raincoats, and some of the shoes also, which constituted portions of the stolen property according to the evidence for the Commonwealth.

[13] It should be said that in all of the Virginia cases which have been referred to in argument, and which have been cited above, in which convictions of burglary or housebreaking have been sustained, there were some circumstances in evidence, such as tracks supposed to be those of the accused, or possession of tools supposed to have been used in the breaking, or other like cir-

cumstances, to connect the accused with the breaking and entering; and in none of these cases did the conviction rest upon such situations as (a), (b), or (c), aforesaid, alone; but the court did not base its decisions in these cases upon the existence of such special circumstances, and, in reason and upon just principles, which are elaborated in the authorities above cited, and need not be further set forth here, in such situations the possession of the stolen property cannot be said to be unaccompanied by evidence of guilty conduct, and the guilty conduct, which the evidence tends to prove, is, in such situations, so inextricably linked up and connected with the felonious breaking and entering that it has convincing probative value as tending to establish the guilt of the accused of that offense, and, where a verdict of guilt of such offense is returned by the jury, must be considered as evidence supporting the verdict in its finding connecting the accused with such offense.

[14] As said in *Elmoe's Case*, supra:

"It is unnecessary for us to say anything as to the right of the accused to remain silent as to how he obtained the goods, as he did not remain silent."

Both of the accused in the case in judgment voluntarily took the stand as witnesses, and a defense which they did not make for themselves in their testimony, such as that they obtained the possession of the stolen property from some one else, who may have committed the offense of car breaking, cannot be regarded by us as entitled to sufficient weight to disturb the verdict of the jury in view of all the evidence in the case; and the guilty conduct of both of the accused in false swearing cannot be said by us not to have been evidence tending to show their guilt of the car breaking.

[15] 6. Did the court err in refusing to give Instruction B, asked for by the accused, to the effect that it was incumbent on the commonwealth to prove that the general owners of the goods were deprived of such ownership?

This question must be answered in the negative.

As said in 2 *Bish. New Cr. Proc.* (4th Ed.) §§ 720, 721:

"2. Where there is both a general and special owner, the rule is nearly universal that the pleader may charge the goods as belonging to either, though often the convenience of making proof will suggest practical grounds for choice. For example:

"3. Goods stolen from a common carrier may be laid as his or as the general owner's. More fully:

"Sec. 721. 1. Special Ownership.—The rule is general * * * that, where chattels are taken feloniously from any bailee or other special owner, * * * the ownership may be laid either in such possessor or the real owner, at the election of the pleader."

[16] In the case in judgment the special ownership of the common carrier was laid in the indictment by allegation of the facts constituting such ownership, and such facts, and, hence, such ownership, were proved at the trial. Such being the case, proof of the general ownership and loss by the general owner was unnecessary.

There is but one remaining question presented for our decision by the assignments of error, and that is this:

[17] 7. Did the court err in refusing to give instruction C, asked for by the accused, which was as follows:

"The court instructs the jury that there is no evidence in this case to support the charge of car breaking."

We have a statute (section 6003 of the Code) which expressly forbids such an instruction being given in civil cases. As held in *Montgomery's Case*, 88 Va. 852, 858, 37 S. E. 1, it is not the practice in the courts of this state to give such an instruction in criminal cases. And, besides, since the commonwealth has no appeal in criminal cases such as that in judgment, and hence has no means of correcting the error if such an instruction is erroneously given in such cases, it is manifest that the inauguration of the practice of giving such instructions as that in question cannot be approved by the courts, although not forbidden by statute.

The case will be
Affirmed.

This case was argued before Judge WEST took his seat on the court.

(132 Va. 648)

DRAPER v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia, March 18, 1922. Rehearing Denied April 3, 1922.)

1. Grand jury §34—Appearance of prosecuting attorney during deliberations does not require abatement of indictment unless prejudicial.

Though it was a violation of Code 1919, § 4864, for the prosecuting attorney to appear before the grand jury during their deliberations when not sworn as a witness, his appearance before them does not require an abatement of the indictment unless it prejudiced defendant.

2. Statutes §225½—Incorporation of prior Code section in later Code without change adopts prior construction.

Where the revisors and Legislature incorporated a section of the Code of 1904, without change, in the Code of 1919 as section 4864, they impliedly adopted the construction placed on the former Code section.

3. Grand jury §34—Advice to grand jury held not to have prejudiced accused.

Where the prosecuting attorney, when he appeared before the grand jury at their request without being sworn as a witness, merely advised them that they could strike from an indictment against numerous defendants as presented to them the names of two of those defendants, the attorney's appearance was not prejudicial to another defendant charged by the same indictment, and does not entitle that defendant to an abatement of the indictment.

4. Criminal law §317, 351(10), 721½(2)—Commonwealth could inquire whether defendant kept a material witness away, and inference and argument thereon proper.

In a prosecution for participation in a mob which attempted to lynch a prisoner, where a witness for the commonwealth had testified that he and a brother of accused were members of the mob, and had restrained accused from shooting at a negro on the way, the brother of accused would have been a material witness; and it was competent for the prosecution to show it had attempted to procure his presence and to inquire of both accused and his father whether they had anything to do with keeping the witness away, and the fact that the defendant made no attempt to produce the brother as a witness was a matter for fair inference and argument.

5. Criminal law §1119(4)—Argument objected to must be shown by record.

Alleged error in the argument of the prosecuting attorney cannot be reviewed, where there is nothing in the record to show, either that the argument was made, or that it was objected to, since error must be affirmatively shown by the record.

6. Criminal law §511(10)—Accomplices cannot corroborate each other.

Where two or more accomplices are produced as witnesses, they cannot corroborate

each other, but the same corroboration is required as if there were only one.

7. Criminal law §510, 829(10)—Conviction may be based upon uncorroborated accomplice testimony; refusal of requested charge accomplices could not corroborate each other held not prejudicial in view of charge given.

Where the court had charged the jury that a conviction might be based upon the testimony of an accomplice without any corroboration, which was correct, but that such testimony should be received with caution, it was not prejudicial error to refuse a requested charge that an accomplice could not be corroborated by the testimony of another accomplice.

8. Criminal law §572—Defendant need not establish alibi by preponderance of evidence.

In a prosecution for an offense which necessarily involved the presence of accused at the commission thereof, proof of his presence is an essential part of the prosecution's case, and he need not prove the defense of alibi by a preponderance of the evidence, but only by evidence sufficient to raise a reasonable doubt as to his presence.

9. Criminal law §822(13)—Instruction requiring proof of alibi by preponderance of evidence held cured.

A statement in an instruction that, where the accused relies upon an alibi, the burden of proving it rests upon accused, although indicating that alibi must be proved by preponderance of evidence, does not require a reversal, taking the instruction as a whole, where the prosecution was required to prove every element of the offense beyond a reasonable doubt, and the court gave several instructions at the request of accused to the effect that the jury must acquit if they had any reasonable doubt of the guilt of the accused, which must have existed if the jury had any doubt as to whether accused was present in the commission of the offense.

10. Criminal law §723(1)—Argument of prosecuting attorney held not appeal to passion.

In a prosecution of accused for participation in a mob which attempted to lynch a negro, where the evidence showed there was considerable shooting by the mob and damage was done to the jail, an argument by the prosecuting attorney, inquiring whether a crowd of moonshiners were to be permitted to come into the town, shoot it up, frighten the women and children, break into the jail and destroy the county's property and go unpunished, was not unsupported by the evidence, and was not an appeal to passion and prejudice, even though accused was not charged with the commission of any of those acts.

11. Criminal law §713—Considerable latitude is allowed in argument.

Very considerable latitude must be allowed to counsel in the argument of their cases.

Burks, J., dissenting.

Error to Circuit Court, Halifax County.

John H. Draper was convicted of assault, and he brings error. Affirmed.

Martin & Leigh, of South Boston, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

KELLY, P. The defendant, John H. Draper, indicted along with 14 other alleged confederates for conspiring and attempting to murder one Jim Coleman, was found guilty of an assault, and sentenced to serve a term of 12 months in jail and to pay a fine of \$500.

The following brief preliminary statement of facts will be helpful to a proper understanding and disposition of the several questions arising on this writ of error:

On Sunday, March 20, 1920, Jim Coleman, a negro, was lodged in jail charged with the murder of a white man named Rickman. That night an armed mob attacked the jail, and, having unsuccessfully attempted first to secure the keys from the jailer and then to break down the doors, fired a number of shots into the building. The evidence tended to show that the mob was seeking Jim Coleman, and that the defendant was a participant and fired a shot into the room where Coleman was confined. Some of the men in the party were drinking, and the defendant admits that he had taken three drinks in his room at the hotel that night. There was a good deal of shooting, and the community was excited and alarmed. The mob failed, however, in its apparent purpose, and nobody was hurt, but the doors and windows of the jail were damaged, and two or three distillery "worms" which had been captured and stored at the jail were missing after the crowd dispersed.

The defendant denied that he was present or in any way involved in the attack on the jail, but his counsel concedes that there was evidence before the jury sufficient to warrant the verdict. He insists, however, that sundry errors were committed by the trial court to his prejudice, for which we are asked to award him a new trial.

1. The defendant tendered a plea in abatement whereby he sought to have the indictment quashed on grounds stated in the plea as follows:

"Jas. S. Easley, the attorney for the commonwealth, after the grand jury was sworn and had retired to their room to consider and deliberate on said verdict, went before said grand jury during their deliberation and advised said grand jury to find said indictment a true bill, and said attorney for the commonwealth was not at the time he was before said grand jury and while they were deliberating on said indictment acting as a duly sworn witness. And by reason of said illegal conduct of said attorney for the commonwealth, and of the said grand jury, this defendant has been injured and prejudiced and said indictment returned."

Issue was joined on this plea, and Mr. Easley, attorney for the commonwealth, being called as a witness, testified as follows:

"I will state from my recollection that I was not sworn as a witness before the grand jury, nor did I testify before the grand jury, but I was asked to appear before them, which I did. Those are the facts as I recollect them.

"Did you advise them to find an indictment?

"I did not; no, sir. I was not asked in regard to that. I asked them to strike off two names from the indictment, they asked me if they had a right to find a true bill as to some and not as to others, and I told them they had a right to strike out those names, and they did take a pencil and strike out those two names. As I recollect, that is the question I was consulted about.

"I want to ask you, Mr. Easley, because you will recollect that I mentioned the matter to you several days ago, and my recollection is that you told me that you went before the grand jury, and, not being willing to take the responsibility, you advised them to bring in an indictment.

"No, sir; I stated this, that I had stated to the grand jury, when they were asking about the striking out of some names in the indictment, I stated that I had included in the indictment all the names of everybody about whom information had come to my office connected with this transaction, and it was probable that there was some names included in there that when tried before a petty jury they could not be convicted, but I felt it my duty to include in the indictment any names against whom I had information.

"I appeared there, but I did not hurt anybody, I struck off two names. I was inaccurate in saying it was done at my suggestion; I told them they had a right to do it. I want the record to be accurate about that."

This being the only evidence introduced for or against the plea, the court rejected the same, and refused to quash the indictment.

[1] Section 4864 of the Code contains the following provision material to the question under consideration:

"It shall, however, be unlawful for any attorney for the commonwealth to go before any grand jury during their deliberations except when duly sworn to testify as a witness, but he may advise the foreman of the grand jury or any member or members thereof in relation to the discharge of their duties."

This statute (found in section 3988 of the Code of 1904) was construed by this court in *Mullins v. Commonwealth*, 115 Va. 945, 950, 79 S. E. 324. In that case the attorney for the commonwealth was in the grand jury room several times during the deliberations of that body at the term at which the indictment then in question was found, having been called there by the grand jury, not as a witness, but for consultation. He did not advise the finding of the *Mullins* indictment, and was not present when it was under consideration. This court, in an opinion by Judge Cardwell sustaining the action of the

trial court in overruling the defendant's plea and refusing to quash the indictment, said:

"Section 3988 of the Code of 1904 does declare it unlawful for any attorney for the commonwealth to go before any grand jury during their deliberations, except when duly sworn to testify as a witness, with the qualification that 'he may advise the foreman of the grand jury or any members thereof in relation to the discharge of their duties.' It is unquestionably the policy of the statute, as has been the practice in this jurisdiction, to keep the grand jury independent of all outside interference, free and untrammelled in their deliberations, and while it is highly reprehensible for any attorney for the commonwealth to violate in any degree either the terms or the policy of the statute, it would be a strained construction of it, upon the facts in this case, to say that there has been such a disregard thereof as was or might have been injurious and prejudicial to the accused and calling for a dismissal of the indictment against him, upon the ground that it was returned by the grand jury because the attorney for the commonwealth went before the grand jury while they were in session at the July term of the court, 1912, at which term this indictment was found and returned into court."

[2] We have no disposition to overrule or modify the construction of the statute as expressed in the above quotation from the Mullins Case; and, while it would have been more prudent and appropriate for the attorney for the commonwealth in the instant case to have kept out of the room entirely during the deliberations of the grand jury, we think that the case cited furnishes authoritative support of the action of the trial court in rejecting the plea and refusing to quash the indictment. The mere presence of the attorney for the commonwealth in the grand jury room does not invalidate an indictment found at the time, if, as in this case and in the Mullins Case, it satisfactorily appears that the accused was not prejudiced thereby. The admonition by Judge Cardwell, quoted above, should be carefully observed by the attorneys for the commonwealth, and any "going before the grand jury" to advocate or influence the finding of an indictment would be a clear and substantial violation of the law. But the statute authorizes the attorney to "advise the foreman of the grand jury or any member or members thereof in relation to the discharge of their duty." This advice ought always, as a matter of prudence and propriety, to be sought and given outside the grand jury room. But we are not prepared to hold that the language of the statute as a whole, construed in the light of its evident purpose and of the decision in the Mullins Case, means that, when the attorney in response to a request by the grand jury goes to their room and gives them advice "in relation to the discharge of their duty," doing so in a proper manner and without seeking to influence their finding,

he thereby renders invalid an indictment thereafter found by them in the case about which he thus gives the advice. The revisors and the Legislature incorporated section 3988 of the Code of 1904 without change in the Code of 1919 (section 4864), thus impliedly adopting the construction placed thereon by the Mullins Case.

[3] In the case at bar Mr. Easley went before the grand jury, not voluntarily, but at their request, not to advise whether they should find an indictment, but to say whether they had a right to find a true bill as to some and not as to others whose names appeared in the draft of an indictment which had already been prepared by him. There were evidently two names included in that draft which they were disposed to omit, and upon a fair interpretation of his testimony it seems clear that all he did was to tell them that they could, if they thought proper, strike out those two names. It is true that he said in the course of his testimony that he "asked them to strike off two names," and that he "struck off two names," but the general trend of his testimony as above outlined indicates that what he actually did was merely to tell the jury, in answer to their inquiry, that they had the right to strike the two names out; and he removed any doubt about what occurred by his concluding statement, which was:

"I was inaccurate in saying that it was done at my suggestion. I told them they had a right to do it. I want the record to be accurate about that."

Under these circumstances it seems reasonably certain that no actual harm was suffered by the prisoner as the result of Mr. Easley's visit to the jury room. If he had given the same advice to the foreman, or to one or all of the members of the grand jury, outside of the room, he would have been strictly within the requirements of the law, and precisely the same indictment would have been found. It would be contrary to the Mullins Case, and likewise contrary to our own best judgment, to hold that the incident constituted vital and reversible error.

The undoubted purpose of the statute was to preserve privacy of deliberation and independence of action by the grand jurors, free from outside control or influence. These considerations have always been regarded in law as essential to a safe and proper discharge of duty by inquisitorial bodies of this character, and the statute can hardly be regarded as anything more than declaratory of the general law. It is said in 10 Enc. Pl. & Pr. p. 398:

"As heretofore stated, indictments must be found by authorized grand jurors, other persons being excluded from participation, and the action of the grand jury in finding or refusing to find indictments cannot be interfered with or influenced by any person whatsoever. Statutes

have been generally enacted for the purpose of preserving the privacy of deliberations of the grand jury. But the rule does not prohibit the presence of authorized officers, at least up to the time of the action of the grand jury in determining the result. Thus the prosecuting attorney is the legal adviser of the grand jury in respect of the manner of its proceeding, and may be present and assist it by his counsel. But he can act only as adviser, and has no right to exercise any manner of control over its actions."

The authorities generally, independent of statute, are to the above effect. We do not wish in the least degree to weaken or impair the sound policy of the law which seeks to secure free and independent action on the part of the grand jury; but the conduct of the attorney for the commonwealth, as approved by the trial court in this case, can hardly be regarded as a substantial violation of such policy, and it certainly did not result in a substantial violation of the rights of the accused.

2. The sheriff of the county was permitted to testify that he had attempted to summon Clark Draper, a brother of the prisoner, as a witness for the commonwealth, and had not been able to find him. The prisoner's father, I. J. Draper, was cross-examined as to the whereabouts of Clark Draper. The prisoner was likewise cross-examined on this point, and was also asked whether he knew that his brother, Clark, was going to be summoned as a witness for the commonwealth. During the cross-examination of I. J. Draper, the attorney for the commonwealth took occasion to say: "We tried to summons him, but he beat us to it."

All of this testimony and examination was allowed over the objection and exception of the prisoner; and it is argued that the clear purpose thereof was to create the impression upon the jury that Clark Draper would have been a material witness against the defendant, and that he was therefore responsible for his brother's nonappearance as a witness.

[4] We do not perceive that the prisoner could have been prejudiced by the testimony recited above and what occurred in connection therewith. It is said in the brief for the prisoner that there was no other evidence in the record about Clark Draper, but this is a mistake. A witness for the commonwealth had testified that he and Clark Draper had been with John Draper and the other members of the mob shortly before the assault on the jail, and had restrained him from shooting at a certain colored man on the way. If this statement was true, then Clark Draper would have been a material witness for the commonwealth, and, if it was not true, he would have been a material witness for the defendant. Under these circumstances the commonwealth had the right to show that it had attempted to procure Clark Draper as a witness, and, further, to inquire of both the

prisoner and his father whether they knew the whereabouts of Clark Draper, and whether they had anything to do with keeping him away from the trial. The fact that they did not attempt to produce Clark Draper or account for his absence, when there was evidence before the jury tending to show that he knew material facts in the case, was a matter for fair inference and argument.

[5] It is further stated in the brief for the prisoner that the attorney for the commonwealth argued to the jury that the defendant was responsible for the absence of Clark Draper as a witness. There is nothing in the record to show that such an argument was either made or objected to, and it is familiar law that this court cannot regard any alleged error which is not affirmatively shown by the record. If such an argument was made and was improper, it could only be availed of here after having been excepted to and made a part of the record at the trial.

3. Two of the witnesses introduced in behalf of the commonwealth were members of the mob that attacked the jail, and their testimony tended to implicate the prisoner. At the conclusion of all the evidence the prisoner asked for the following instruction:

"The court instructs the jury that as the evidence of an accomplice is tainted, and the danger of collusion between accomplices, and the temptation to clear themselves by fixing responsibility upon others is so strong, the jury should receive and act upon such evidence with great caution. And the court further instructs the jury that the evidence of one accomplice cannot be deemed to corroborate that of another."

The court refused to give the instruction just quoted, but gave in lieu thereof the following:

"The court instructs the jury that while they may find a verdict upon the unsupported testimony of an accomplice, such evidence is to be received with great caution, and the court in this case warns the jury of the danger of basing a verdict on the unsupported testimony of an accomplice."

[6, 7] Counsel for the prisoner admitted that the instruction given by the court was a proper substitute for the first part of the instruction as asked for by him, but insists that the court erred in refusing to tell the jury that the evidence of one accomplice cannot be deemed as corroborating the evidence of another. It would have been proper to give an instruction in terms covering the proposition expressed in the last sentence of the instruction requested by the defendant. As was said by this court in *Jones v. Commonwealth*, 111 Va. 862, 69 S. E. 953, according to the generally accepted rule, "if two or more accomplices are produced as witnesses, they are not deemed to corroborate each other, but the same rule is applied, and the same confirmation is required, as if there were but one;" and it was therein held to be error (though not the principal one upon

which the reversal was based) that the trial court refused to instruct the jury accordingly. In that case, however, it does not appear what other instructions were given, and of course the point ought to have been covered in some such way as to be entirely fair to the accused. But it is conceded that a conviction may be based upon the testimony of a single accomplice, without any corroboration; and, in view of the caution with which the jury was admonished in the instant case to regard such evidence, we are of opinion that there was no error to the prejudice of the prisoner in the instruction given upon this point, or in the refusal to give one in the exact form in which it was asked by the prisoner. The jury was not bound to find corroboration—they could convict without that—but corroboration was present, if needed, in the testimony of witnesses who were not accomplices. This assignment of error is, in our opinion, without merit.

4. The next assignment calls in question the correctness of the following instruction given by the court at the instance of the commonwealth, and over the objection of the defendant:

"The court instructs the jury that the burden rests upon the commonwealth to make out its case against the accused to the exclusion of a reasonable doubt; but, where the accused relies upon or attempts to prove an alibi in his defense, the burden of proving the alibi rests upon him."

The proposition contained in the concluding part of the foregoing instruction gives rise to the question here under consideration. That proposition, standing alone, would indicate that there must be a preponderance of evidence for the alibi, and would constitute reversible error, were it not rendered harmless by the context and by the language of other instructions in the case.

[8] The commonwealth was trying the accused upon the theory that he was present and actively participating in the unlawful acts of the mob at the jail. There was certainly no burden of any sort on the defendant to show that he was not there until the commonwealth had made a prima facie case against him. The burden was on the commonwealth to show his presence beyond a reasonable doubt. That fact was an essential part of its case. 12 Cyc. 384, text, and cases cited in note 18.

The case of *Lucchesi v. Commonwealth*, 122 Va. 872, 883, 94 S. E. 925, relied on by the commonwealth, is not in point. The defense there was distinctly affirmative, and the instruction on burden of proof was not questioned in that particular. The objection made to it was on another ground.

In 2 Am. & Eng. Enc. (2d Ed.), p. 53, it is said:

"Alibi is regarded by some courts as an affirmative defense, but the better doctrine seems

to be that it is not a defense in the accurate meaning of the term, but a mere fact shown in rebuttal of the state's evidence; and, consequently, the evidence introduced to support it should be left to the jury uninfluenced by any charge from the court tending to place it upon a different footing from other evidence in the case, or calculated to disparage and excite prejudice against it."

See, also, *State v. Kelly*, 16 Mo. App. 213; *Albritton v. State*, 94 Ala. 76, 10 South. 426; *State v. Reed*, 62 Iowa, 40, 17 N. W. 150; *State v. Rockett*, 87 Mo. 666; 1 Bishop Crim. Proc. 1066.

In *State v. MacQueen*, 69 N. J. Law, 530, 55 Atl. 1009 (citing *Sherlock v. State*, infra), the Supreme Court of New Jersey dealt with the question here under consideration as follows:

"Another assignment, however, deals with the refusal of the judge to charge as requested upon the question of alibi. He was asked to charge that if, upon the whole case, the testimony raised a reasonable doubt that the defendants were present when the alleged crimes took place, they should be acquitted. Another instruction requested was: 'That the defendant is not bound to prove an alibi beyond a reasonable doubt; if, upon the whole case, the testimony raises a reasonable doubt that the defendant was present when the crime was committed, he should be acquitted.'

"As MacQueen admitted his presence, these requests were pertinent only to the case of Grossmann. Both requests were refused, with comments that gave the jury to understand that while a defendant asserting an alibi was not bound to prove it beyond a reasonable doubt, he must establish it by a clear preponderance of evidence. The impression left upon the jury must have been that the evidence tending to show the absence of Grossmann was to be disregarded, unless it outweighed that which tended to prove his presence at the scene of the riot. But whatever goes towards proving an alibi (although it falls short of establishing it), at the same time tends to throw doubt upon the commission of the crime, where the presence of the defendant is essential to guilt. And if a reasonable doubt of guilt is raised, even by inconclusive evidence of an alibi, the defendant is entitled to the benefit of that doubt."

The opinion in the MacQueen Case shows that the comments of the trial judge in charging the jury in that case upon the subject of alibi were such as to lead them to think that the defendant must prove his alibi by a preponderance of evidence, and this was held to be error.

In *Sherlock v. State*, 60 N. J. Law, 31, 37 Atl. 435, the Supreme Court of New Jersey held that it was error to instruct the jury in a criminal case that a defendant relying upon an alibi must prove it by a preponderance of evidence, this ruling being based upon the ground that such an instruction may have deprived the defendant of the benefit of a reasonable doubt in the mind of the jury as to whether he was present when

proof of his presence was essential to his conviction.

In Beale's Crim. Pl. & Pr. § 289, it is said:

"Thus where the evidence offered by the defendant is of an alibi—that is, that he was at another place at the time the crime was committed, and therefore could not have committed it—he is obviously merely disproving the truth of the prosecution's evidence or inference from evidence; he is making an absolutely negative defence. It is not for him to establish an alibi, but simply to throw doubt on the case of the prosecution. Clearly, therefore, when he produces evidence tending to prove an alibi, no burden is on him; if he raises a reasonable doubt of the charge he is to be acquitted."

See, also, 4 Wigmore on Evidence, p. 3561, § 2512, paragraph (a) and cases cited in note 3.

We approve the following statement from the text in 2 Am. & Eng. Enc. (2d Ed.) p. 56:

"The true doctrine seems to be that where the state has established a prima facie case and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the accused."

See, also, State v. Lowry, 42 W. Va. 205, 212, 24 S. E. 561; 12 Cyc. 384, text, and cases cited in note 18; 8 Ruling Case Law, p. 224, § 220, and cases in note 12.

[8] That portion of commonwealth's instruction No. 1 here complained of would, as we have already indicated, probably have led the jury to think that the alibi must be established by a preponderance of evidence, and thus have been in conflict with the better doctrine and with the weight of authority, but for the fact that the instruction as a whole, taken with the other instructions, could not have been so construed. The jury must have understood that such burden as rested on the defendant required no more than that he should by his proof raise a reasonable doubt as to his presence and participation in the mob. In 2 Am. & Eng. Enc. (2d Ed.) the text, as we have seen, goes very far in holding that the accused in a criminal case never has to do more with his proof of an alibi than to raise a reasonable doubt of his presence at the time and place of the crime, but says, nevertheless, on page 55:

"Where, on a question of alibi, the charge of the court contains an objectionable statement of law, this is no ground for a reversal if the remainder of the charge, or the charge taken as a whole, contains a full and fair exposition of the law"—citing numerous cases.

The learned judge of the trial court in the instant case evidently acted upon the authority of Thompson v. Commonwealth, 88 Va. 45, 47, 13 S. E. 304, in which it was held that an instruction for the commonwealth,

containing the identical language objected to in this case, was not erroneous, because the instruction containing that language, and also an instruction given in the case for the defendant, made it clear that the burden was on the commonwealth to prove beyond a reasonable doubt everything essential to the establishment of the charge in the indictment. Exactly the same thing is true in this case as in the Thompson Case. The instruction complained of starts out with the proposition "that the burden rests upon the commonwealth to make out its case against the accused to the exclusion of a reasonable doubt." Instruction B, given at the instance of the defendant, told the jury, among other things, that "the burden of proof is upon the commonwealth to prove beyond a reasonable doubt all the material facts alleged in the indictment, or the prisoner must be acquitted;" and instruction E, given at his request, was as follows:

"The court instructs the jury that the law presumes every person charged with crime to be innocent until the commonwealth has established his guilt by evidence so strong, so clear, and so conclusive, that there is left in the minds of the jury no reasonable doubt as to his guilt. This presumption is an abiding presumption, and goes with the accused through the entire case, and applies at every stage thereof until repelled by proof.

"And in this connection the jury is instructed that it is never sufficient that the accused, upon speculative theory or conjecture, may be guilty, or that by the preponderance of the testimony his guilt is more probable than his innocence; for until his guilt has been proved beyond all reasonable doubt in the precise and narrow terms as charged in the indictment, the presumption of innocence still applies, and they must acquit him."

We feel entirely safe in deciding that the commonwealth's instruction No. 1, here complained of, could not have prejudiced the defendant. If the evidence in respect to the alibi left any doubt in the minds of the jury as to his presence and participation in the crime, it necessarily left a doubt in their minds as to his guilt, and in that event they were bound to acquit him under the unmistakable directions of the court.

[16] 5. The attorney for the commonwealth, in closing the argument of the case before the jury, said:

"Are we to permit a crowd of moonshiners to come into our town, shoot it up, frighten the women and children, break into our jail, and destroy the county's property, and go unpunished?"

The use of this language by the attorney for the commonwealth was objected to by defendant's counsel on the ground that there was no evidence to support it, that it was an appeal to the prejudice and passion of the jury, and that the defendant was not being tried for any of the acts therein men-

tioned. This objection was overruled, and the defendant excepted.

Assuming that the term "moonshiners," as used by the attorney for the commonwealth and as understood by the jury was meant to describe persons engaged in the illicit manufacture and sale of ardent spirits, there was no evidence in the record to show that the members of the mob belonged to that particular class of lawbreakers, unless the fact that they seem to have stolen two or three "worms" from the jail, and were themselves under the influence of whisky, tended to prove that fact. The proof that they did "shoot up the town," in the common acceptance of that expression, frighten women and children, break into the jail, and destroy, or certainly injure, the county's property, was altogether sufficient to justify what the commonwealth's attorney said in that respect, if he had any right to refer to the general conduct of the mob in connection with the principal charge against this defendant.

It is true that Draper was not being tried for any of the things to which the above-quoted language of the attorney for the commonwealth referred, and, strictly speaking, the attorney might more appropriately have invoked the necessity of enforcing the law, and thus preserving the peace and good order of the community, by a criticism of what was the ultimate purpose of the mob, but the essence of the appeal which the commonwealth's attorney made to the jury was right and proper. Men who come by night, intoxicated and armed, to take the law in their own hands, and interfere by force and violence with a due and orderly administration of justice, and with the proper discharge of duty by duly constituted officers, are no less violators of the law than those who by night make and sell whisky; and, though the accused was not charged with frightening women and children and damaging or destroying the county's property, those things were the necessary consequences of what the mob was deliberately and unlawfully doing, and added to the enormity of their crime. The fact that the pointing out of these aggravating circumstances was likely to arouse the indignation of the jury, does not justify the charge that the attorney for the commonwealth was making an appeal to the passion and prejudice of the jury. Persons charged with a violation of the law have the right to a trial free from the influence of passion and prejudice, but

they do not constitute such a favored class as that they may demand immunity from all feeling of disapproval or indignation on the part of those who try them when there is satisfactory evidence that they are guilty.

[11] In both civil and criminal cases very considerable latitude is and must be allowed counsel in the argument of their cases, and we do not perceive that the attorney for the commonwealth in this case went at all beyond the reasonable limits of a fair argument, nor that the court was in the least degree wrong in refusing to exclude his remarks.

There are other errors assigned in the petition upon which this writ was granted, but they were expressly waived at the oral argument.

For the reasons stated, the judgment complained of is affirmed.

Affirmed.

This case was argued before Judge WEST took his seat on the court.

BURKS, J. (dissenting). Section 4864 of Code quoted in the opinion of the court, belongs to the class of statutes known as criminal statutes, and should be strictly construed against the commonwealth. The object of it was to exclude attorneys for the commonwealth from the grand jury room during the deliberations of the grand jury in all cases, except the single case mentioned in the statute, "when duly sworn to testify as a witness." If he goes there under any other conditions, his act is declared to be unlawful. In this case, he went while the grand jury were deliberating on this indictment. His act was in direct contravention of the statute. This being true, I do not think that any testimony should be received in explanation of what he did or said while there. His advice to the foreman or any member of the grand jury should be given elsewhere, and the grand jury left untrammelled during its deliberations.

I also think that the instruction on the subject of alibi is contradictory and misleading. The latter part of it is plainly wrong, as pointed out in the opinion. When the instruction is read as a whole, it apparently says that, as a general rule, the commonwealth must make out its case against the accused to the exclusion of a reasonable doubt, but that the defense of alibi is an exception to this rule, and if the accused relies upon it "the burden of proving the alibi rests upon him."

(90 W. Va. 136)

HILL et al. v. VENCILL et al. (No. 4247.)

(Supreme Court of Appeals of West Virginia.
Jan. 31, 1922. Rehearing Denied
April 4, 1922.)

(Syllabus by the Court.)

1. Logs and logging §3(11)—If timber deed does not prescribe time for removal, it must be removed within reasonable time.

Ordinarily if a deed for timber does not prescribe the time within which it is to be manufactured into lumber, and the lumber removed from the land, the grantee must remove it within a reasonable time, or lose the benefit of his purchase.

2. Logs and logging §3(11)—Timber deed vests title in grantee only if he removes timber within reasonable time.

Although such a deed vests title to the timber in the grantee, it does so only upon the condition that he remove it within a reasonable time.

3. Logs and logging §3(11)—Reasonable time for removal of timber under deed depends upon facts of each case.

What is a reasonable time depends upon the facts and circumstances of each case requiring its application.

4. Logs and logging §3(11)—Reasonable time for removal of timber held to run from date of partition.

Where the owner of land deeded all of the timber thereon, together with an undivided interest in the land, amounting to about one-third of the acreage, if partitioned, and without limiting the time in which the timber is to be removed by the grantee, the "reasonable time" in which the timber must be cut and removed begins to run from the date of partition.

5. Logs and logging §3(11)—Removal of all timber deeded not presumed after 14 years from ceasing operations.

Where such land and timber is so granted, and the grantee a short time thereafter cuts and manufactures into lumber all kinds of timber on the land which could then be sold at a profit, on account of its remote situation from transportation and because of the condition of the lumber market, and then removes his mills and equipment and ceases the operation, but leaves approximately 50 per cent. of the timber uncut, causes the remaining timber to be assessed for taxation in his name, and pays the taxes thereon, within nine years after ceasing operations procures a mill site near the land for the manufacture of the timber remaining and secures a contract for transportation of the lumber to be cut from said land over a lumber railroad near by, but for 14 years after ceasing operations does not resume such operations, it will not be presumed that he has cut and removed all the timber deeded to him contemplated by the parties to the deed in a suit by his grantor for partition of the land.

6. Logs and logging §3(11, 15)—Assessment and payment of taxes on uncut timber deeded does not continue the right, but admissible as evidence of grantees' intention and claim of right.

Assessment and payment of taxes on the timber under such circumstances is not alone sufficient to continue the right to cut and remove, but will be considered as evidence of grantees' intention and claim of right to cut and remove.

Appeal from Circuit Court, Nicholas County.

Suit by Henry Hill and others against H. G. Vencill and others. From the decree, plaintiffs appeal. Modified and affirmed.

McWhorter & Carney, of Charleston, and Horan & Horan, of Summersville, for appellants.

G. G. Duff, of Summersville, for appellees.

LIVELY, J. The decree brought here by plaintiffs below responded to the prayer of the bill for the partition of 408 acres of land in Nicholas county, allotted to them and defendants their respective portions, and appointed commissioners to execute it. The only cause for complaint by appellants is the adjudication as to the timber of the tract, the decree awarding all of the timber to defendants Guinn and Vencill.

Whatever interest the parties may have in the timber on the land depends upon the significance of the terms used in the conveyance of July 12, 1902, by which Henry Hill and Kate Hill, his wife, for a valuable cash consideration, granted to Guinn and Vencill "all of the timber entire tract and one hundred forty-two acres (142 acres) of land in fee, being seventy-one two hundred and fourths ($\frac{71}{204}$) undivided of the following real estate, * * * containing 408 acres." As to the 142 acres there is and can be no controversy. While somewhat imperfectly drawn, the instrument contains all the elements of a deed. It purports to vest and does vest in the defendants title to the 142 acres, not by metes and bounds, but as an integral part of the entire boundary. It created a tenancy in common in the 408-acre tract between the parties. The residue, consisting of 266 acres, remained the property of Hill until April 25, 1908, when he and his wife conveyed $177\frac{1}{2}$ acres to the plaintiff Abraham Frank, Hill still retaining title to 88 $\frac{1}{2}$ acres. Such was the status of the title until September 25, 1917, when Hill and Frank joined in a conveyance of "one-fourth ($\frac{1}{4}$) of all their right, title, and interest in the timber now growing on the tract" to L. E. McWhorter and H. L. Carney.

Shortly after their purchase Guinn and Vencill erected or caused to be erected a sawmill on an adjoining farm owed by H. G.

Summers, and constructed or caused to be constructed roads and ways on the 408 acres to transport the logs to the mill and the lumber from the mill to market, and in 1903 and 1904 cut, sawed, and marketed a large amount of timber, by Vencill stated to be something less than 1,300,000 feet, approximately one-half of the timber. About the year 1905, however, they dismantled and moved the mill from its location and discontinued the lumber operations and have not since resumed them. Guinn and Vencill assert title to all the timber on the entire tract, the 408 acres, and plaintiffs controvert their right to it, except as to the timber on the 142 acres when allotted to them in this suit. Thus the issue appears to be defined with particularity, and its solution depends upon the question whether or not defendants can in 1919 successfully claim title to timber on any part of the 408 acres not within the boundary to be allotted to them in this proceeding.

[1] As the deed of the Hills to Guinn and Vencill on its face imposes no restriction upon the exercise of the right of removal of the timber conveyed, it is an unconditional sale thereof, according to their contention, and, if so, they can cut and remove it as and when their convenience or market conditions may at any time require, without regard to the interest and convenience of the plaintiffs, or any injury they may experience as a result of such removal. While our decisions have in some instances touched upon the question so raised, as will hereinafter appear, it was not presented as it now is. Other courts have, but their decisions are not harmonious, as we shall see. Of course, the principle which protects freedom of contracts and *jus disponendi* is not to be ignored, but recognized, unless its application produces unreasonable, unnatural, and intolerable results, such as would necessarily flow from the exercise of a perpetual claim of right to enter upon the land of another, sever and manufacture into lumber the timber thereon, and market the product. Indeed, such contracts are so far in general disfavor that, even though no time be specified in which the timber shall be removed, "it is very uniformly held that there is an obligation to remove the timber within a reasonable time after the making of the contract." *Williams v. McCarty*, 82 W. Va. 153, 166, 95 S. E. 633, 100 S. E. 565. Authority supporting the principle announced in the *Williams* Case abounds. *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; *Smith v. Dierks Lumber & Coal Co.*, 130 Ark. 9, 196 S. W. 481; *Beatty v. Mathewson*, 40 Can. Sup. Ct. 557, 12 Ann. Cas. 913, 3 British Rul. Cas. 859; *Eastern Kentucky Mineral Co. v. Swann-Day Lumber Co.*, 143 Ky. 82, 146 S. W. 438, 46 L. R. A. (N. S.) 672; *Ferguson v. Arthur*, 128 Mich. 297, 87 N. W. 259; *Patterson v. Graham*, 164 Pa. 234, 30 Atl. 247; *Johnson*

v. Powhatan Mining Co., 127 Va. 352, 103 S. E. 703; *Kidder v. Flanders*, 73 N. H. 345, 61 Atl. 675.

"Reasonable time" for removal depends upon the facts in each particular case. No hard and fast rule can be promulgated. All of the cases we have examined which announce this doctrine of reasonable time for removal from date of contract, deal with contracts or deeds where the ownership of the land is wholly in the party complaining, and the title to the timber wholly in another. Here that element does not exist. Vencill and Guinn own the timber on the entire tract, also a one-third undivided interest in every acre on which their timber is standing. There is no claim that they have been ousted of possession and lost title; on the contrary, their title and common possession is admitted; the suit is for partition. Where the title to the land and timber is wholly separate, perhaps the best view is that taken in *Beatty v. Mathewson*, 40 Can. Sup. Ct. 557, and cases therein cited, holding the grant to the timber to be a defeasible fee which may be lost upon failure to perform the implied condition to remove the timber "within a reasonable time." But would it not be anomalous to require the owner of the land to remove his own timber therefrom or else forfeit his timber title? Plaintiffs and defendants Vencill and Guinn are tenants in common in the ownership of the land. They hold by several and distinct titles emanating from the same source and have unity of possession; neither one knows his own severalty; they occupy promiscuously. Their possession is *per mi et per tout*; that is, each of them has the entire possession as well of every part as of the whole. They are "common tenants." It would serve no purpose to dwell upon their rights and reciprocal duties as such. They are well known to the legal profession. One reason for defeasance of the title to the timber if not removed within a "reasonable time" is that it becomes a burden upon the land, and violates the implied condition that this burden shall be removed. But the facts here answer that reason in that the burden, if any, is upon defendants' own land.

[5] Defendants own approximately one-third of the entire tract, practically one-third of every square foot and inch. Suppose it is their purpose not to cut the timber from that portion which will be eventually set off to them? A requirement to cut and remove prior to partition, under pain of forfeiture or defeasance, would defeat this purpose. Can we thus control their discretion in the use of their property? But it is insisted that plaintiffs' interest in the land has been unduly burdened by failure to cut and remove, and that their free use of the land has been prevented for many years. It is also argued that it was not the intention of the par-

ties for the timber to remain uncut beyond a reasonable time. Plaintiffs always had the remedy of partition, after which the "reasonable time" to remove would be computed. It was always within their power and discretion to compel division and then demand removal of the timber from their specific portions. Their failure to sue for division is indicative of their satisfaction with the status quo. It was not incumbent upon defendants to ask for partition. Moreover, Henry Hill seemed to have been satisfied with the common ownership, for he it was who created it by his deed. The record discloses no reason why the acreage sold to defendants could not have been described by metes and bounds at the time of the sale to them. Has the interest of plaintiffs in the land been unduly burdened? Have they been prejudiced or inconvenienced? The facts answer in the negative. The land appears not to be wanted for farming or grazing purposes; it is principally valuable for its coal and timber. No unreasonable or intolerable conditions have resulted from the presence of the timber. None of the litigants lived on the land. It is what is known as "wild land." Plaintiff Hill says he requested Vencill to remove the timber in the year 1917, being then of the opinion that defendants owned the timber and had the right to cut it, but afterwards, upon advice of counsel, came to the conclusion that what timber remained belonged to himself and coplaintiff. This action then followed, in which the bill asserts that all the timber was cut and removed in 1903-04 by defendants. We conclude from his testimony and actions that he did not consider defendants had forfeited their right by cutting a part of the timber, or were precluded from further cutting by abandonment, or had removed all the timber contemplated in the deed. His construction of the contract in 1917 is strongly indicative of his intention and understanding when he made it. All this time plaintiffs were not paying taxes on the timber, and their undivided interest in the land was assessed at \$5 per acre less because of the assessment of the timber to defendants. They made no claim of any character and did no act which would indicate a claim.

[6] Between 1905 and 1909 the timber was not assessed to defendants, an omission explained by Vencill, who attempted to have it assessed to himself for these years, but failed because of the dereliction of the county clerk or the assessing officer. Assessment and payment of taxes is indicative of an assertion of ownership. Later, in the year 1914, he secured and recorded a contract with Flynn for a mill site near the land for the purpose of sawing the timber, for a right of way over Flynn's land for a tramway over which to remove the timber, and for transportation of the lumber over Flynn's private

railway to a common carrier. These facts strongly indicate his construction of his rights under the deed and militate against the claim of abandonment. The subsequent acts of both parties to the deed evidence a mutual and similar construction of its meaning and intent.

Defendants have never abandoned their land nor their timber. They were always in possession. There had been no ouster. None of the common owners was in actual possession. It will be further observed that the deed does not convey merchantable timber; on the contrary, it grants all of the timber.

It may be well to further consider the doctrine of title and "reasonable time for removal." Judge Brannon said in *Keystone Co. v. Brooks*, 85 W. Va. 512, 84 S. E. 614:

"In case of a deed conveying legal title to timber, though the deed contemplates removal of the timber, there being no limit of time for removal and no clause of forfeiture for failure to remove, title to the timber is not lost to the purchaser."

However, later on in the opinion he says:

"I apprehend that the right to keep the timber standing does not endure forever, and thus incumber the land and prevent its cultivation, but must be removed in a reasonable time."

As pointed out by Judge Ritz in *Williams v. McCarty*, 82 W. Va. 158, 95 S. E. 638, 100 S. E. 565, there can be no divestiture of the purchaser's title until after the expiration of a reasonable time sufficient for removal. The cases which deal with a grant of timber for a specified time have little application to the questions involved here. The doctrine intimated in some cases that such grant is in effect a license or lease has slight weight where the conveyance grants the fee in the timber with no time limit for removal.

"Standing timber is land. * * * The deed granting them the timber amounted to more than a mere license." *Hardman v. Brown*, 77 W. Va. 484, 88 S. E. 1019.

See, also, *Keystone Co. v. Brooks*, supra, and *Wilson v. Collieries Co.*, 79 W. Va. 279, 91 S. E. 449.

It is clear upon reason and authority that Vencill and Guinn have title in fee to the timber. The deed cannot be construed otherwise.

While the decisions are uniform as to the right of removal of timber purchased within a reasonable time, the same decisions are in apparently hopeless confusion as to the state of the title in the timber remaining upon the land after the expiration of a period of time deemed reasonable for its removal. As analyzed by Judge Ritz in *Williams v. McCarty*, cited, there are four distinct lines of authority: (1) The purchaser of standing timber is granted a mere license to remove it within

a reasonable time; (2) a grant of standing timber is a lease of the land for the purpose of timber operations, in which the period of removal is limited to a reasonable time; (3) a deed of timber is a conveyance of real estate, and as such vests in the grantee absolute title to the trees as a part of the estate; (4) a grant of timber is a defeasible fee, and, unless the grantee removes the timber within a reasonable time after the title vests in him, his title is defeated by the implied condition that the timber will be removed within a reasonable time. In support of this view see *McRae v. Stillwell* and *Beatty v. Mathewson*, cited, and *Hudnell v. East Carolina Lumber Co.*, 180 N. C. 48, 103 S. E. 893.

[2] As above intimated, we think the fourth class of cases as analyzed by Judge Ritz announces the better doctrine. See, also, *King v. Merriman*, 88 Minn. 47, 35 N. W. 570; *Lockeshan v. Miller*, 16 Ky. Law Rep. 55; *Macomber v. Detroit L. & N. Co.*, 108 Mich. 491, 66 N. W. 378, 32 L. R. A. 102, 62 Am. St. Rep. 713; *Johnson v. Powhatan Mining Co.*, supra.

[3] Applying this doctrine, *Vencill and Guinn* are vested with defeasible title to the timber on that portion of the 408-acre tract which may be set off and partitioned to plaintiffs, conditioned upon its removal within a reasonable time after that date. A reasonable time for removal of timber conveyed by deed with no time designated for removal depends upon the facts and circumstances of each case requiring its application. It is a mixed question of law and fact. *Florence P. & G. Co. v. Newsome* (Ga. App.) 106 S. E. 619; *Patterson v. Graham*, 164 Pa. 234, 30 Atl. 247; *Western L. & C. Co. v. Copper River Land Co.*, 138 Wis. 404, 120 N. W. 277; *Beattie v. Smith*, 146 Ark. 532, 226 S. W. 168.

[4] If defendants did not own an undivided one-third interest in the land, we would hold that their reasonable time had expired. But, considering that they are tenants in common with plaintiffs, with all the rights and powers incident to that relation, we hold that their title to the timber has not been lost under the circumstances detailed. The reasonable time does not begin to run until after a division of the land. Forfeitures are not favored by equity. They are heavy and harsh and will not be declared or enforced unless justice clearly demands it. *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762; *Newton v. Kemper*, 66 W. Va. 130, 66 S. E. 102.

Upon what theory the decree declared the contract between *Hill and Abraham Frank*, of the one part, and *McWhorter and Carney*, of the other part, as fraudulent, we fail to perceive. There is not one particle of fraud in its procurement. It is a cloud upon the title of *Vencill and Guinn* to the timber and

should be annulled only in so far as it is a cloud thereon.

We affirm the decree, but modify it by striking out that portion which declares the contract between *Henry Hill and Abraham Frank* with *L. E. McWhorter and H. L. Carney* as fraudulent and void.

Modified and affirmed.

(90 W. Va. 530)

TAYLOR et al. v. STURM LUMBER CO.
(No. 4348.)

(Supreme Court of Appeals of West Virginia.
March 14, 1922.)

(Syllabus by the Court.)

1. Damages \S 189—In action for damages caused by delay, proof of loss per day and number of days lost held ample data.

In an action for damages for breach by the contractee of a logging contract to be executed with men and teams, causing the contractor delay and consequent injury, for which he claims damages by way of gains prevented as well as loss of time, proof of the number of days lost in fractional parts or otherwise, and the rate of alleged loss per day, affords ample data for assessment of the damages.

2. Damages \S 122—Damages for breach of contract by delay are measured by what men and teams would have earned in ordinary service.

If, in such case, the contract has been fully performed and the compensation paid, the damages arise out of mere loss of time, not loss of anticipated profits, and are measured by what the teams and men used in the work would have earned in other ordinary service, at the prevailing rate for such service, in the community in which the contract was performed, not by what they would have earned in the contract work, in the absence of delay.

3. Damages \S 122—Verdict based on contract right, and not on what men and teams would have earned in ordinary service, held excessive.

A verdict allowing damages on the basis of the contract rate, in such case, without proof of any special or peculiar circumstances calling for variation of qualification of the general rule, is excessive.

4. Damages \S 62(4)—Failure to mitigate damages caused by breach cannot limit recovery where plaintiff relied on defaulting party's promise to make good.

Though the law imposes duty upon one party to a contract to mitigate the damages caused him by a breach thereof by the other, if he can do so without unreasonable effort or expense, his recovery cannot be limited by his failure to do so, if he omitted such duty in reliance upon promises of the defaulting party to make good his delinquencies and relieve from their consequences.

5. Damages \S 208(7)—Proof of plaintiff's ability to mitigate damages for breach does not entitle defendant to peremptory instruction.

Proof of ability on the part of a plaintiff, in an action for damages arising out of a breach of a contract, to mitigate the damages, within the meaning of the law, does not entitle the defendant to a peremptory instruction to find for him, nor make it the duty of the court to set aside a verdict for the plaintiff, in the absence of other ground for the motion for a new trial.

6. Trial \S 256(13)—Instructions hypothetically submitting right to recover such damages as plaintiff was entitled to, if finding for him, held not erroneous.

Instructions hypothetically submitting to the jury the question of plaintiff's right of recovery, and telling them to allow such damages as the plaintiff is entitled to, in the event of a finding in his favor, are not erroneous for failure to define the measure of damages, nor for failure to give the jury conditional directions as to a claim of mitigation of damages in favor of the defendant.

7. Appeal and error \S 1176(1)—Where trial court failed to require plaintiff to file remittitur or have verdict set aside, judgment will be reversed and cause remanded without disturbing verdict.

If a jury, in assessing damages, allows too much by a sum definitely ascertainable as to amount, from the evidence, by reason of the adoption of a legally erroneous basis of estimate and allowance, it is the duty of the trial court, on the motion for a new trial, to put the plaintiff to his election as to whether he will remit the excessive sum included in the verdict or suffer the verdict to be set aside; and, if this duty is omitted by such court and judgment rendered on the verdict, the appellate court will reverse the judgment, without disturbance of the verdict, and remand the case for proper action by the trial court on the verdict.

Error to Circuit Court, Randolph County.

Action by C. J. Taylor and others as partners against the Sturm Lumber Company. Judgment for the plaintiffs, and the defendant brings error. Reversed and remanded for proper action on the verdict by the trial court.

H. G. Kump, of Elkins, for plaintiff in error.

Talbott & Hoover and R. H. Allen, all of Elkins, for defendants in error.

POFFENBARGER, P. The principal contention against the validity of the judgment in favor of the plaintiffs, for damages for breach of a logging contract, brought up by this writ of error, is that the evidence is not sufficient to sustain the verdict, its sufficiency having been challenged by a motion to exclude it, a request for a peremptory instruction to find for the defendant, and a

motion to set aside the verdict. Rulings respecting the admission and rejection of evidence, and the giving of instructions at the instance of the plaintiffs are also made subjects of assignments of error.

The written contract between the parties, dated May 24, 1919, bound the plaintiffs to skid something less than 500,000 feet of logs, at the rate of 6,000 feet per day, and at the price of \$4 per thousand feet, payable monthly according to scale, and an additional 25 cents per thousand on the completion of the work. The work to be done consisted of the hauling of logs from the stumps and placing them on skidways, to be constructed by the plaintiffs, at a tramroad, from which they were loaded on a truck and conveyed to the sawmill. Construction of the tramroad, operation of the truck, and cutting of the timber were devolved upon the defendant, and it agreed to take the logs from the skidways fast enough to permit 6,000 feet per day to be put on them.

At the date of the contract the plaintiffs had only one team, but they purchased another, with harness, etc., from the defendant, on credit, the purchase money to be charged against the compensation for their work. Feed for their teams was to be furnished by the defendant at cost, and they and their employees were to be boarded by it at \$1 per day for each person. Lumber and nails for construction of a stable or barn on the premises were also to be provided by the defendant.

On or about May 28, 1919, the plaintiffs were on the ground with their teams and ready for work, but the tramroad and truck to be provided by the defendant had not been made ready for operation, and the skidways could not be constructed, for they had to conform in location with the tramroad and in height with the truck. Pending construction or repair of the tramroad and provision of the truck, the plaintiffs hauled and dumped into a hollow, within convenient reach of the tramroad location, logs estimated to contain 40,000 feet, which had to be hauled a second time later on. On this account, loss of time and earnings is claimed. After the tramroad, truck, and skidways had been provided there was further loss of time, according to the claim of the plaintiffs, due to the failure of the defendant to cut logs for hauling and take them from the skidways, after hauling, fast enough to permit the skidding of 6,000 feet per day. They claimed right under the contract to earn an income of \$24 per day, and swear to their ability to do so with the equipment they had. According to their testimony, they skidded, on one occasion, more than 6,000 feet of logs hauled from the most distant points on the job, in a day. They profess to have kept an accurate account, from which they swear

they are able to compute their loss of time, and claim to have lost about 59 days on account of the failure of the defendant to keep them in logs at one end of the job, and space for logs at the other. The jury allowed them 56 days, making the damages \$1,344, from which there was deducted \$269.04, the amount of their indebtedness to the defendant.

[1] At the rate of 6,000 feet per day, it should have required about 75 days for the skidding of the logs, scaling in all 446,673 feet. The plaintiffs were on the job about 180 working days. Testifying from his memoranda, one of them shows work for the defendant, by the day, at work not within the skidding contract, for 34 days and 2 hours paid for by credit on the account. For part of that time one or both teams were idle. They were absent and unable to work for about 12 days. Allowing 75 days as being necessary to the skidding, 34 days at noncontract work, and 12 days of absence and inability to work, they account for 121 days, leaving 59 days of the 180-day period consumed in the delays alleged to have been occasioned by failure of the defendant to cut and remove logs, as required by its contract. In this evidence there is ample foundation for an assessment of damages, if the theory of the plaintiffs as to right of recovery is sound. There must be data in the evidence for the assessment, of course, but in the figures submitted there is no lack thereof. Loss of time, with the extent thereof, is definitely shown, and, at the rate claimed, the result in money is obvious and certain.

[2-4] A claim of excessiveness in the award is based upon the rate adopted. All of the timber contemplated by the contract was skidded, and credit therefor has been allowed by the defendant at the contract price, \$4.25 per thousand feet. But the delays occasioned by the defendant prolonged the time of performance. It is insisted that the rate of \$4 or \$4.25 per thousand is not the correct basis on which to calculate the damages for the time unnecessarily bestowed upon the work, and that the calculation should be made upon the basis of the value of the services of the men and teams for the 56 days, measured not by the contract price, but by what such services were worth in the market, the daily wages of teams with men—\$8 each per day or \$16 per day for the two—as indicated by the compensation paid for the day work done. Nothing of either compensation or profit in the contract price for the skidding was lost or prevented. The work was all done and has been paid for. The loss was in time only, which would have been devoted to some other work. There is no proof that plaintiffs had any other contract awaiting them, in the performance of which an equal profit

could have been made. Allowance of the profit of \$8 per day, which has been paid, by way of damages, in this action, would be a duplication of that profit, unless it can be assumed that an equal profit could have been made on the teams in other work. As there is no evidence of such ability, the allowance would stand upon a bare assumption only. The law does not permit an allowance of more than the reasonable value of the service would have been if the men and teams had been employed in ordinary work, or, in other words, the reasonable value of such services. *Rogers v. Beard*, 38 Barb. (N. Y.) 31; *Maryland Ice Co. v. Arctic Ice Machine Co.*, 79 Md. 103; 29 Atl. 69; *City of Chickasha v. Hollinsworth*, 56 Okl. 341, 155 Pac. 859; *Michael Seretto v. Rockland, etc., Ry. Co.*, 101 Me. 140, 6 Atl. 651; *Hardaway-Wright Co. v. Bradley Bros.*, 163 Ala. 506, 51 South. 21; *Strobel Steel Construction Co. v. Sanitary District*, 160 Ill. App. 554; *Meyer v. Haven*, 70 App. Div. 529, 75 N. Y. Supp. 261; 17 C. J. 854. As to whether a different state of facts would apply a different measure of value or damages, we enter upon no inquiry. It suffices to say that upon the evidence the verdict calls for too large an amount.

Enough has been said of the character of the evidence to make it manifest that there was no error in the admission of the oral evidence of J. L. Daft, one of the plaintiffs, based upon his personal knowledge and his recollection refreshed by the memoranda to which he referred from time to time in the course of his examination as a witness, nor in the overruling of the motion to exclude all of the evidence adduced by the plaintiffs. Taylor's evidence was properly admitted. It supplemented that of Daft and was sufficiently definite.

Nor did the court err in its refusal to compel Daft to show something on his book that it admittedly did not contain, or to demonstrate to the jury, by an exhibition of his book, a lack of memoranda, which he admitted. It did not, in terms, disclose the lost time. He demonstrated it from data it did contain, in the manner hereinbefore indicated.

[6] In none of the three instructions given upon the request of the plaintiffs, nor in the declaration to which one of them refers is any measure of damages prescribed. Each of said instructions hypothetically submits the theory of right of recovery upon breaches of the contract by the defendant, resulting in damages to the plaintiffs. In this respect they are correct as far as they go, but they are incomplete. If the defendant desired completion thereof by prescription of the measure of damages, it should have asked for an instruction upon that subject. Plaintiffs' instruction No. 2 may be technically erroneous, on account of its failure to refer

to the evidence, but the error, if any, is harmless. In two of the instructions given upon request of the plaintiffs and six given at the instance of the defendant, necessity of limitation of the verdict to the evidence was brought to the attention of the jury.

[5] In view of the evidence adduced by the defendant, tending to prove the damages claimed by the plaintiffs could have been mitigated or largely avoided by enlargement of the skidways, it is contended that the instructions given at the instance of the plaintiffs, all of which were binding in effect, as to right of recovery, should have included a conditional direction to the jury to exclude from their assessment such damages as could reasonably have been prevented by the plaintiff, by such enlargement or addition, on the principle or theory of duty on their part, to mitigate the damages. The measure of damages was not dealt with specifically in any of the instructions. It was stated, if at all, in very general terms, in connection with the submission of the question of right of recovery. In each instance the instruction merely told the jury, in the event of a finding of right of recovery, to award the plaintiffs such damages as they had sustained. In this no specific rule as to the measure of damages, nor any direction to find in accordance with any rule as to the amount, is perceived. As to that matter, the instructions are virtually silent and clearly not binding. Indeed, they are all complained of in the brief, on the ground of lack of prescription of the measure of damages. The argument condemns them for omission of the measure of damages, and then condemns them again for inclusion thereof. The first assumption is correct but innocuous.

As to right of recovery, there is considerable conflict in the evidence. By their own testimony and that of several other witnesses, the plaintiffs prove failure both to cut and to remove logs in accordance with the contract. This is opposed by evidence adduced by the defendant, but the opposing evidence is slighter in quantity and less positive and definite in character than that of the plaintiffs. It was the clear province of the jury to determine the questions of preponderance of evidence on this point and the credibility of the witnesses. The court was under no duty, therefore, to give the peremptory instruction requested by the defendant, nor to set aside the verdict on the theory of insufficient evidence to sustain a finding of liability.

But it is said the evidence of ability of the plaintiffs to mitigate the damages or avoid them, by enlargement of the skidways or construction of additional skidways, precludes right in the plaintiffs to any verdict at all. This position is manifestly unten-

able. Right to nominal damages at the least is indisputable. Right to some substantial damages represented by the second handling of the 40,000 feet of timber, occasioned by delay in providing the tramroad and truck, is equally clear. The expense of enlargement of skids and building additions, if incurred, would be another incontrovertible item. It is impossible to exclude all of the damages on this theory.

Whether this evidence of power to avoid or reduce injurious consequences makes the verdict excessive is an entirely different question. It may be that sufficient skidway space could have been provided at an expense of \$25 or some other small amount. But this fact, if established, must be taken in connection with others. There is proof of repeated demands upon the defendant to perform its contract, and of promises on its part, made by its superintendent, to comply therewith. Its attention was repeatedly called to the delays and losses caused by failure to move the logs fast enough, and promises to relieve the situation were made. Ordinarily, under such circumstances, there is no duty on the part of the injured party to take further steps for his own protection. He may rely upon the notice and promises made. *Ford v. Ill. Refrigerator Co.*, 40 Ill. App. 222; *Graves v. Glass*, 86 Iowa, 261, 53 N. W. 231; *Cronan v. Stutsman*, 168 Mo. App. 46, 151 S. W. 166; *Henry Hall Sons' Co. v. Sundstrom & Stratton Co.*, 138 App. Div. 548, 123 N. Y. Supp. 390; Ill. Cent. R. Co. v. Doss, 137 Ky. 650, 126 S. W. 349; *Lillard v. Kentucky, etc., Co.*, 134 Fed. 168, 67 C. C. A. 74; *Kentucky, etc., v. Lillard*, 160 Fed. 34, 87 C. C. A. 190; *McEwan v. McLeod*, 46 U. C. Q. B. 235. Upon the evidence just referred to, the jury could find that the plaintiffs were induced by the conduct and promises of the defendant to forego resort to measures for their own protection.

[7] Seeing excessiveness in the verdict by reason of the allowance of \$24 per day for the 56 days, instead of \$16, the amount the plaintiffs charged for their day work, which is evidence of the value of such work and the actual loss of the plaintiffs, the trial court should have put them to their election to remit one-third of the amount allowed them or suffer the verdict to be set aside, the amount of the excess being clear and free from doubt. *Clark v. Lee*, 76 W. Va. 144, 85 S. E. 64; *Hall v. Philadelphia Co.*, 74 W. Va. 172, 81 S. E. 727; *Unfreid v. Railroad Co.*, 34 W. Va. 260, 12 S. E. 512. The omitted duty of the trial court can yet be performed, upon reversal of the judgment and remand of the case for the procedure just indicated. We will reverse the judgment, and remand the case for proper action on the verdict by the trial court.

(90 W. Va. 131)

ALLEN v. CITY OF CHARLESTON et al.
(No. 4369.)(Supreme Court of Appeals of West Virginia.
Jan. 31, 1922. Rehearing Denied
April 4, 1922.)*(Syllabus by the Court.)*

1. Eminent domain \S 274(5)—Permanent appropriation by city of land for public use without proper legal proceedings may be enjoined.

Injunction is the proper remedy to restrain a city from entering upon a person's land, and permanently appropriating the same for public use, without first obtaining right to do so in one of the modes provided for by law.

2. Eminent domain \S 293(1)—Bill to restrain permanent structure on plaintiff's land by city held not demurrable for want of equity.

A bill which alleges that the plaintiff has title to and possession of land adjoining a public street in a city, that the city threatens to invade the same and place thereon a permanent structure that will cause irreparable injury, avers lack of remedy at law, and prays for an injunction to restrain the threatened injury, is not demurrable for want of equity.

3. Eminent domain \S 306 — Dispute as to easement held properly determinable in suit to enjoin construction of catch-basin by city.

Plaintiff files her bill alleging ownership in fee, inclosure, and possession of a strip of land adjacent to a public street in the city of Charleston, and that the city threatens to take possession thereof, and place thereon a catch-basin for drainage purposes, which would cause irreparable injury to plaintiff's property, and obtains a temporary restraining order. The city answers the bill, admitting title in the plaintiff to the land in controversy, except that it alleges ownership of an easement for street purposes over the disputed strip, which plaintiff denies. Equity is not thereby deprived of jurisdiction because of such dispute, and the court may proceed to a final determination of the right to such easement.

Appeal from Circuit Court, Kanawha County.

Suit by Sarah J. Allen against the City of Charleston and others. Decree for plaintiff, and defendants appeal. Affirmed.

Murray Briggs, of Charleston, for appellants.

Donald O. Blagg, of Charleston, for appellee.

MEREDITH, J. In 1883 the Glen Elk Company, a corporation owning a large area of land on the northwest side of Elk river in Kanawha county, conveyed a tract of 87 acres, 1 rood, and 4 poles to Anthony Allen, being lot No. 21 of the Hill land, described upon the map thereof recorded in the clerk's office of the county court of said county, together with the use of the roads and ways

laid down on said map, and which by will passed to the daughter of the grantee, and who is the plaintiff in this case and the present owner of the property. At the time of this conveyance there was a public road, known as the Elk road, approximately 30 feet wide, running along the front of the property on the south side. Between that road and Elk river lay a considerable tract of land, which was owned by the Glen Elk Company, and which in 1887 it platted into town lots, with intervening streets and alleys, and contributed sufficient of its own lands, together with the county road above mentioned, to make this county road 60 feet wide, instead of 30 feet wide, and naming it on its plat Crescent road.

Some 10 or 12 years ago the corporate limits of the city of Charleston were extended, so as to include the southern portion of the Allen property, fronting on Crescent road, as well as Crescent road itself, and the properties lying between Crescent road and Elk river. In 1916 or 1917 the city permanently improved a portion of Crescent road, by constructing a concrete road 24 feet wide, including curbs, in front of the Allen property, the greater portion thereof being on the southern half of the 60-foot road or street, and hence nearer the property lines on the southern side than on the northern side, being approximately 25 feet distant from an old fence line formerly maintained by plaintiff on the front of her property.

For many years plaintiff and her predecessor in title kept a fence along the front of her property on the side next the road, and after the road was paved she constructed a new fence, between 20 and 25 feet south of her old line fence, and about 4 feet from the curb of the pavement. In September, 1920, the city, claiming an easement for street purposes in that portion of the land lying between the curb line and plaintiff's old fence line, engaged W. J. Weakland & Co. to construct upon said strip, at the head of a sewer extending under the road, a catch-basin about 15 feet long, 8 feet wide, and 8 feet deep, to catch the water, sand, and debris collecting there from a small drain, called Gunter hollow, so as to carry the water into said sewer and to keep the sand and debris from entering the sewer.

The work had proceeded but a short time when plaintiff filed her bill and obtained an injunction against the city, its officers, agents, employees, and said contractors, enjoining them from trespassing upon said land for any purpose. In her bill she alleges title and possession of said lands, irreparable damage, and want of legal remedy, and also that about the time the city began the permanent improvement of the road, a dispute having arisen between her and the city as to the location of her property line and the street

line, she and the city agreed that the true line between her property and the street line should be and was where her new fence was built, and which is about 4 feet from the line of the curb.

The defendants demurred to the bill and also filed an answer. In their answer they admit the plaintiff's title to her land, except they aver that the city owns an easement for street purposes over the disputed strip; that said strip had been dedicated to public use and so used for a roadway for a great many years, and defendant had for many years maintained a sewer through said strip to the line of the old fence. They also denied taking or damaging any of plaintiff's property, or that they intended doing so, and likewise denied that there was any agreement between plaintiff and the city as to the true line between her property and said road, or that the road was paved in conformity to any such agreement.

Depositions were taken and filed on behalf of plaintiff and defendants; the cause was heard upon the bill, injunction order, demurrer, answer, general replication thereto, and the depositions. The court found that the plaintiff was not entitled to the relief prayed for, dissolved the injunction, and dismissed her bill, at her costs. From this decree plaintiff appealed to this court.

[1] The first question involved is whether equity had jurisdiction. Plaintiff's title to the land in controversy, so far as the fee is concerned, is admitted; but the city claims that this fee is subject to its easement for street purposes, and to that extent, and that only, plaintiff's title is denied by the answer. If there were no dispute as to title, equity would, without question, have jurisdiction. In the case of *Pierpoint v. Town of Harrisville*, 9 W. Va. 215, and *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8, it was held that injunction will lie to restrain a town from opening streets through a person's land, without first condemning it according to law, where there has been no dedication of such streets to the public use. In each of those cases the defendants answered, admitting the title of plaintiff to the land over which the streets had been laid or constructed, but asserted a dedication thereof for street purposes, and on final hearing this court perpetuated the injunction till the town should acquire legal right to open such streets. There the right or title to the asserted easements was determined in a court of equity.

In the case of *Jarvis v. Grafton*, 44 W. Va. 453, 30 S. E. 178, the plaintiff obtained an injunction restraining the town from opening an alley through premises claimed by her, and involved a dispute as to the existence of an easement, as in this case; she alleging that the town had no easement, and it claiming it had. This court reversed the

finding of the circuit court, though there was conflicting oral testimony, found that the alley had been dedicated by a former owner of the property, and had been accepted by defendant, and dismissed plaintiff's bill.

In the case of *Wenger v. Fisher*, 55 W. Va. 13, 46 S. E. 695, the plaintiff obtained an injunction restraining the county court of Randolph county from making a change in the roads, so as to take his lands. Defendants demurred for want of equity in the bill, but the demurrer was overruled. Defendants answered that plaintiff had consented to such change in the road. Numerous depositions were taken on both sides as to whether such consent had been given, and on final hearing the circuit court dissolved the injunction; but this court upon appeal held that equity had jurisdiction, and on review of the testimony reversed the case and perpetuated the injunction.

One of the leading cases involving this question is that of *Manchester Cotton Mills v. Manchester*, 25 Gratt. (Va.) 825. In that case the authorities of the town notified the plaintiff corporation that they intended to remove three brick buildings owned by plaintiff, which the authorities of the town claimed encroached on a street of the town. The plaintiff and its predecessors asserted title and possession for more than 20 years, the town claimed that the land had been dedicated as a street by a prior owner, under whom plaintiff claimed title. This dedication was denied by plaintiff. The circuit court refused to award an injunction, on the ground that plaintiff had an adequate remedy at law, but on appeal the Virginia Supreme Court awarded an injunction, restraining the removal, until the town, by an appropriate action at law, should establish its title, on the ground that the injury threatened an appropriation of the freehold and a destruction of the substance and value of the estate.

[2, 3] The demurrer interposed in the present case should have been overruled, though so far as we know the circuit court did not act thereon. The bill makes out a good case. It alleges title and possession in the plaintiff, and the acts done and threatened to be done would undoubtedly cause irreparable injury, not only to the particular land occupied by the catch-basin, but would also injure the residue of the frontage of plaintiff's lands, and if the city has no easement for street purposes over the parcel in controversy, plaintiff is entitled to have the construction of the catch-basin perpetually enjoined. Such acts would constitute a taking of private property for public use without compensation. So we hold that equity has jurisdiction, notwithstanding the fact that the city asserts an easement for street purposes over the land in controversy.

The only important question remaining is whether, conceding that the court had jurisdic-

diction, it should have dissolved the injunction and dismissed the bill, or should have perpetuated the injunction. This depends upon the evidence. When plaintiff's father acquired title to the 87 acres, he acquired the fee to the middle of the 30-foot road along the south side of the farm, subject to the easement for the road. After a careful review of the evidence, we think that this road, as then established, included the strip of land in controversy; that this strip was actually used as a part of the traveled way. It is shown that an 8-inch gas pipe line was buried in the ground along said road, where this catch-basin was being excavated. It was doubtless laid there by authority from the public; two public sewers cross the street at this point, up to or nearly to plaintiff's old fence line, the outside boundary of the land in dispute.

There is a great deal of conflicting testimony as to the actual boundaries of the original 30-foot road, but we believe the evidence preponderates in favor of the defendants. It is clearly shown that no valid agreement was made between the plaintiff and the city of Charleston establishing the line between her property and Crescent road.

Plaintiff insists that the decree should be reversed, the injunction be reinstated, and she be given opportunity to amend her bill, showing that she intended instituting an action at law to try the title to said strip of land. She did not ask the circuit court for permission to amend her bill. The cause having been submitted on its merits, and a final adjudication against the plaintiff, we think that she should not be allowed by this court to amend her bill.

Finding no error, we affirm the decree complained of.

(90 W. Va. 486)

MYERS v. SUMMERVILLE et al.
(No. 4401.)

(Supreme Court of Appeals of West Virginia,
March 14, 1922.)

(Syllabus by the Court.)

1. Principal and agent §131 — Agent's act within apparent scope of authority binds principal.

The act of an agent within the apparent scope of his authority binds his principal.

2. Mines and minerals §105(2)—Mining company's paymaster's placing of bonds of employee in company's safe held to bind company.

Where a superintendent of a coal mine, in order to retain the services of an employee necessary to the mining operations, goes on a peace bond for him, and, as security therefor, receives from him as a pledge certain United States government bonds, which he delivers

to the company's paymaster and mine office clerk, who places them for safe-keeping in the company's safe, of which he has charge, and it appears that the company's principal office is in a distant state, such act of the paymaster, under the circumstances shown in the opinion in this case, is within the apparent scope of his authority and binds the principal.

3. Pledges §48—Pledgee is bound to return government bonds given to secure him on peace bond upon discharge of the latter bond.

If the bonds so deposited be regarded as a pledge, then upon the discharge of the peace bond the pledgee is bound to return the bonds, and, in case of his failure so to do, to respond in damages for their value.

4. Bailment §31(1)—Bailee of gratuitous bailment is bound to excuse loss where failing to deliver on demand before suit.

If they be regarded as a gratuitous bailment, then the bailee, in case demand therefor is made before suit, is bound to show some excuse for their loss.

Error to Circuit Court, Mineral County.

Action by L. W. Myers against John Summerville and others. Action dismissed as to Summerville, and judgment entered against the defendant Emmons Coal Mining Company, which brings error. Affirmed.

Wm. MacDonald, of Keyser, L. J. Foreman, of Petersburg, and Conlen, Brinton & Acker, of Philadelphia, Pa., for plaintiff in error.

R. D. Helronimus, of Davis, for defendant in error.

MEREDITH, J. Defendant Emmons Coal Mining Company complains of a judgment entered by the circuit court of Mineral county in an action of trover and conversion of two United States Liberty Bonds. Both John Summerville and the company were made defendants. The case was tried by Hon. Taylor Morrison, special judge, in lieu of a jury. After the testimony was introduced, the defendant company demurred to the evidence. The court dismissed the action as to Summerville, overruled the demurrer, and entered judgment against the company for \$104.68.

[1, 2] In July, 1918, the defendant Summerville and plaintiff, Myers, were working for the company at Bayard, W. Va., Summerville as superintendent of the company's mining operations there and Myers as blacksmith. On the 31st day of July, plaintiff was arrested, taken before a justice in Grant county, fined, and required to give a peace bond in the penalty of \$100 for the period of one year. Superintendent Summerville signed the bond as surety and Myers was released. Myers deposited two United States Liberty Bonds, of the par value of \$50 each, as indemnity, to be returned at the end of the year unless the peace bond should be forfeited. It is not clear whether the two bonds were delivered to Summerville by Myers, or

whether they were deposited by Myers with Vernon Adams, who was the paymaster and one of the company's bookkeepers in its office. It is clear, however, that the bonds were, at Summerville's direction, placed in an envelope, Myers' name was written on it, and the package was deposited in the company's safe by Adams, and that at that time Summerville told Adams why these bonds were taken, and why they were to be placed in the safe, of which Adams had charge. One I. M. Long at this time was also employed in the office as manager of the Culpepper Supply Company, and had access to the safe. Just what the business of the supply company was the record does not disclose, but it was probably the merchandise branch of the mining business. Summerville and Myers continued to hold their positions with the company until some time in November, 1918.

About the time the peace bond expired, Myers met Summerville, who asked plaintiff if he had got his bonds, and upon his stating that he had not, he was told by Summerville that he had left them with the coal company. When the time was up he obtained a release from the justice, and, presenting it at the company's office, demanded his bonds. It appears that Adams and Long were not then in charge of the office, but the superintendent in charge as well as the clerk and store manager looked through the safe and could not find any bonds belonging to plaintiff. Plaintiff wrote to Summerville about it, who, instead of replying to Myers, wrote to the company, whose main office is in Philadelphia. The secretary treasurer of the company, J. G. Emmons, answered that he had taken the matter up with his superintendent and Louis Clark (evidently another employee), and that they stated they had never seen these bonds; that when "we [meaning the two Emmonses] went through the safe just before you left, I did not see any bonds which belonged to Myers; I would suggest that you ask Vernon Adams; he may be able to give you some information." The letter written to the company by Summerville, to which the above quotation is in part a reply, does not appear in the record, though the company admits it had it when the depositions of the president, L. C. Emmons, and its secretary, J. G. Emmons, were taken. There is nothing in this reply repudiating the act of Summerville in going upon the peace bond, or in accepting the collateral security, or in depositing the bonds with the company's paymaster in its safe.

The evidence shows that Myers was a valued employee of the company, and that, at the time Summerville went on his bond, employees were hard to obtain; that Summerville had the right to hire men, and that he went on the bond, not because of any personal interest in Myers, but solely in the interest of the company. He does not attempt

to show, however, that he was authorized in that manner to bind the company on the bond or to accept collateral security and deposit it for safe-keeping with the company, and thus bind it as pledgee or to accept it as bailee. J. G. Emmons, secretary treasurer, and Louis C. Emmons, president, of the company, both testified that they were present in the company's office when Summerville was discharged, and that they went through the safe and found no bonds of any kind there; that their attention was not called to this transaction then by Summerville, who was present, nor until more than a year afterward, when he wrote the letter already mentioned.

Strange it is that neither party placed Adams or Long on the witness stand. The absence of this testimony is not accounted for. These two men had access to and charge of the safe. Summerville swears he saw Adams write Myers' name on the envelope, place the bonds in it, and deposit the package in the safe. We think this can be fairly inferred from his evidence. How or when the bonds were taken out of the safe does not appear. Summerville swears he never got them, and so does the plaintiff. True, Summerville was present when the safe was examined by the Emmonses at the time of his discharge, and he said nothing about the bonds then; but defendant's counsel cross-examined him, and did not ask him why he did not call the attention of the company's officers to the deposit of the bonds. At that time he may have forgotten to mention the matter. The company tries to place the blame on Summerville, who, as the officers of the company testify, had no authority to execute the peace bond for it nor to accept for deposit the two bonds in suit. They do not, however, deny in any way that Adams, the paymaster, who had charge of the local office, had authority to accept these bonds. Just what his duties were are not clear, but we can safely assume that they were the duties usually performed by such employees in and about mining operations, and such additional duties as might be entailed because the company's principal office was in a distant state. This fact might with reason be considered as giving him more latitude in the discharge of his duties, and as adding to his responsibilities. He had charge of the safe, and in the course of his employment could determine what should be placed in it. He was fully informed by Summerville why the bonds were being turned over to the company, and what was to be done with them. All this was done in the interest of the company. So far as the record shows, neither Summerville nor Adams had any personal interest to serve in keeping Myers out of jail. Under the circumstances, we think that Adams, in accepting the bonds and placing them in the company's safe, whether he received them direct from Myers or from Summerville, was acting within the apparent

scope of his authority, and notice to him of the receipt of the bonds was notice to his principal. Both were acting for the company. Had the chief officials of the company been fully informed of all the facts, we have no doubt they would have ratified and approved their acts. Coal mining employees were hard to obtain, and often harder to keep. There was great demand for them then, and the company doubtless got the full benefit of Summerville's act in going on the peace bond. It obtained Myers' services because of that act, and at a time when they were most needed, and it was because of that that the company obtained the bonds in suit. We admit this is a close case, but the company, having received the benefits of an act of its agent, should not be allowed to repudiate that act, without restoring what was received by it. By so holding the ends of justice will be served. The company made no effort to show how it lost the bonds, though had it called Adams as a witness it could doubtless have done so. All it did was to show that it did not have them, and said nothing as to the authority of Adams. It offered no excuse for their loss. It offered no evidence as to the degree of care that was taken, either of its own property or of the bonds in suit.

[3, 4] If the bonds be regarded as a pledge to the company, then it was bound to return them or pay for them. On the other hand, if they be regarded merely as a bailment, and the company as a gratuitous bailee, demand therefor having been made by the plaintiff before suit, we think upon the authority of *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596, 5 Am. Rul. Cas. 1057, that the defendant should have shown some excuse for its failure to produce the bonds upon demand. The court having ruled adversely to defendant upon its demurrer to the evidence, we cannot say its judgment is wrong. We therefore affirm the judgment.

(90 W. Va. 98)

LYNCH et al. v. ARMSTRONG et al.
(No. 4209.)

(Supreme Court of Appeals of West Virginia.
Jan. 24, 1922. Rehearing Denied
April 4, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 346(1)—Limitations run from date of decree setting aside prior decree entered at same term.

Where the decree appealed from sets aside a prior decree entered at the same term, the statute of limitations of one year begins to run, not from the date of the decree set aside, but from the date of the last decree, although such decree has not changed or otherwise affected the rights of the parties to the appeal.

2. Appeal and error \S 840—Appeal will not be dismissed because of failure to file petition and bond and to transmit original papers.

When a petitioner for an appeal presents with his petition a transcript of the record instead of the original papers in a cause as provided in section 5, chapter 135 of the Code, and obtains an appeal thereon, his appeal will not be dismissed on motion of the appellee because appellant did not first file his petition in the office of the clerk of the circuit court and give bond or make a deposit and have the original papers transmitted to the clerk or a judge of this court as provided therein.

3. Appeal and error \S 1039(11), 1040(2)—Equity \S 195—Refusal to permit demurrer and special reply to be filed to answer not constituting cross-bill not prejudicial; answer held not a cross-bill or cross-bill answer.

An answer to a bill which is merely defensive of the rights alleged against respondent, though it may plead matters in estoppel of rights asserted against him in the bill, is not a cross-bill or cross-bill answer, and though such answer prays that plaintiff may be decreed to be estopped by his acts and conduct pleaded, he is not prejudiced by the refusal of the court, after a cause has been submitted for decision, but before actual decision, to file his demurrer and special reply to such answer.

4. Judgment \S 255—Complaints by concession among themselves cannot obtain decree based on rights belonging to others.

Plaintiff who by contract between himself and his coplaintiffs is conceded rights not belonging to them or him, but concededly belonging to others not parties to such contract, and from whom such plaintiff produces no right or title, is not entitled to the rights and interests conceded to him by the parties to the contract, as against the rightful owners of such rights, and he is not entitled to a decree against them based solely on the concessions in such contract.

Appeal from Circuit Court, Harrison County.

Suit by William B. Lynch, executor, etc., Isaac C. Ralphsnyder and others against Dolly Catherine Armstrong and others. From the decree, plaintiff Isaac C. Ralphsnyder appeals. Affirmed.

Charles E. Hogg, of Point Pleasant, for appellant.

F. E. Parrack, of Kingwood, Osman E. Swartz, of Fairmont, and Harvey W. Harmer, of Clarksburg, for appellees.

MILLER, J. The appellant is Isaac C. Ralphsnyder, one of the plaintiffs in the bill, and the appellees are defendants W. W. Shoch, Trustee, and Mary Abigail Shoch Batten.

The object of the bill was to determine the respective rights of plaintiffs and defendants

to the estate, real and personal, of the late Adolphus Armstrong, deceased, and of his deceased sister Louisa Ann Armstrong, his sole heir, who left a will by which she undertook to dispose of the estate which came to her from her deceased brother. After his death and after her death much litigation ensued between conflicting claimants and devisees in an endeavor to determine who were the rightful heirs of said Adolphus Armstrong and who were entitled to his estate under her will, if a will, or as heirs of the said Louisa Ann Armstrong.

The bill sought to have said estate divided and distributed on the basis of three several contracts between plaintiffs, but in which appellees had not joined, dated respectively May 31, 1911, December 26, 1914, and March 27, 1915, purporting to be compromises between them of their conflicting interests. The bill contains allegations intended to deny the said W. W. Shoch, Trustee, and Mary Abigail Shoch Batten all participation in the distribution of said estate.

The answers of the appellees denied all the material allegations of the bill designed to deprive them of their rights as distributees of said estate, and pleaded certain matters of estoppel against the appellant Isaac O. Ralphsnyder, to whom by said contracts the parties thereto had undertaken to apportion their interests and the interests of their codefendants, the heirs at law of Elias Fisher, deceased, or their assigns.

After their answers were so filed with general replications thereto by the plaintiffs including the said Isaac O. Ralphsnyder, all of the said plaintiffs except the said Ralphsnyder withdrew their general replications, and a day was fixed by the court when all pleadings and proofs were to be submitted and the issues presented, and briefs were to be filed by counsel; and the case was accordingly submitted on the day so fixed. Within the times so fixed for submission Ralphsnyder interposed no demurrer or special reply to the answers of appellees, nor were his demurrer and answers tendered until after the cause had been for several months in the hands of the court for final decision.

That portion of the decree of October 17, 1919, now appealed from adjudged that appellees were, for reasons shown by the record, entitled to two and one-half per cent. of the estate of the said Adolphus Armstrong and Louisa Ann Armstrong which was conceded to them by the contract of February 28, 1917, signed by or on behalf of all the plaintiffs except the said Isaac O. Ralphsnyder, and moreover decreed that by his acts and conduct pleaded Ralphsnyder was estopped to deny the rights and interests so decreed them, notwithstanding the provision in his favor in the contract of March 27, 1915, whereby plaintiffs stipulated that said

Ralphsnyder was to take and receive the interests claimed by the heirs at law of Frank Batten, deceased, or their assigns, and the interests claimed by the heirs at law of Elias Fisher, deceased, or their assigns. How Ralphsnyder became entitled to these interests is not recited in the contracts, nor are his rights predicated upon any other agreement or title paper. It is argued that the parties to these contracts had the right to make him this concession, if they chose to do so, and that appellees have no rights dependent thereon. But why should the plaintiffs have undertaken in contracts to which appellees were not parties to concede Ralphsnyder their rights? Numerous grounds of estoppel are pleaded in their answers, among them that Ralphsnyder undertook to represent them in suits begun and prosecuted by him in Ohio and in West Virginia, and sought to buy their interests on one or more occasions for a mere pittance; bought conflicting interests while pretending to act for them without authority, and concealed from them the existence of one of the contracts pleaded, which provided that others with rights might come in and accept the benefits of the contracts and participate in the distribution of the estate according to their rights. With respondents' answer to the bill were exhibited numerous documents showing some of the matters of estoppel by deed and conduct of Ralphsnyder, which we think justified the decree appealed from, unless some right was denied him, which we are soon to consider.

[1] Before considering the case on its merits, we are first called upon to dispose of certain motions interposed by appellees. The first was to dismiss Ralphsnyder's appeal, upon the ground that it was improvidently awarded. Application was made for the appeal on October 16, 1920, and the appeal was apparently allowed on the same day, from a decree of October 17, 1919. This decree set aside one of October 7, 1919, but the relief given appellees was in all respects the same as that given by the decree set aside and counsel for appellees contend that the last decree was simply a re-entry of the prior one, an affirmance of the former, and that their rights were fixed thereby and as of the date thereof, and that as there was no appeal therefrom, appellant's appeal was barred by the statute of limitations of one year. Is this proposition well grounded in law? We do not think so. The highest judicial tribunal in the country has negatived counsels' proposition, in the case of *Memphis v. Brown*, 94 U. S. 715, 24 L. Ed. 244. We omitted to say that the decree appealed from was entered at the same term that the decree set aside was pronounced. The Supreme Court, by Mr. Chief Justice Waite, said in the case referred to, that the court had the right to set aside the judgment of March 2, during the term at which it was rendered

and to re-enter it as of the date when the motion to set it aside was made, and that the writ of error was properly sued out on the re-entered judgment. The same court applied this rule to nunc pro tunc orders and decrees, holding that the statute began to run, not from the date to which the order was made to relate, but from the date of the actual entry thereof. *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532. The rule is so stated with citation of authorities in 3 C. J. 1051 et seq., §§ 1050, 1051. See, also, 9 *Rose's Notes on United States Reports* (Rev. Ed.) p. 809, citing the cases following *Memphis v. Brown*, supra. So this motion will be overruled.

[2] The next motion is predicated on the alleged failure of appellant to comply strictly with section 5 of chapter 135 of the Code (sec. 4985), relating to the transmission of the record in appeal cases. That section does prescribe the method of procedure when an appeal is sought on the original papers in a cause. Petitioner is required to first file his petition and a copy thereof in the office of the clerk of the court where the judgment, decree or order complained of was entered, and the clerk is required, as provided thereby, to arrange the papers and transmit them to this court or a judge thereof, but not until petitioner has deposited the money for a transcript or given bond as therein provided conditioned to pay for the transcript, etc., if the petition is granted. In this case petitioner first procured a transcript of the record, which he presented with his petition for appeal, and the appeal was allowed thereon, the appeal docketed, and writs were issued out of this court thereon. The purpose of the amendment to said section 5 in 1915 (Laws 1915, c. 69 [Code Supp. 1918, § 4985]) was to provide for application for appeals and writs of error without the expense of first obtaining a transcript of the record and to insure the prompt delivery of such transcript in case appellate process should be awarded. But if the petitioner chooses to incur the expense of a transcript in advance of obtaining the writ, he thereby satisfies the requirements of the statute. The application is *ex parte*. The appellee or defendant in error is not prejudiced. The statute gives him no right. A rule of the court permits him to file an opposition brief, but he is not deprived of doing that because the petitioner applies for appellate process on the transcript instead of the original papers. Section 2 of said chapter 135 (sec. 4982) gives absolute right to a party to a controversy to present his petition to the court or a judge thereof in vacation, and if he does so on the original papers, of course he must comply with the requirements of said section 5, but if he elects to present with his petition a transcript of the record, what good reason can there be for compliance with the provi-

sions of section 5, the only purpose of which is to secure the prompt transmission of the transcript, if the prayer of the petition is granted. The Constitution, article 8, gives the court appellate jurisdiction of certain causes, upon petition assigning error, and of course the right of appeal is thereby conferred when such petition is presented with the record below showing error therein. The Constitution and statute give the right, and the statute prescribes the proceedings necessary to obtain an appeal, and being remedial, should be given a liberal construction. 2 R. C. L. page 100, § 73; *Smith v. Duff*, 39 Mont. 374, 102 Pac. 981, 133 Am. St. Rep. 582; *Price v. Western Loan & Savings Co.*, 35 Utah, 379, 100 Pac. 677, 19 Ann. Cas. 589, 590, 591; *Charmley v. Charmley*, 125 Wis. 297, 103 N. W. 1106, 110 Am. St. Rep. 827; *Columbia Ironworks v. National Lead Co.*, 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645; *Wilson v. Kryger*, 28 N. D. 77, 143 N. W. 764, 51 L. R. A. (N. S.) 760; *Douthwright v. Champlin*, 91 Conn. 524, 100 Atl. 97, Ann. Cas. 1917E, 512, 515. There having been substantial compliance with the statute in this case, the transcript obtained, appellate process issued, bond executed, the record printed and the cause matured for hearing thereon, it would amount to a denial of exact and even justice to now dismiss the appeal. The ground relied on is not one of the specified grounds for dismissal prescribed by sections 16, 17, and 18 of chapter 135 of the Code (secs. 4996-4998). We therefore overrule the motion to dismiss.

[3,4] We have left the disposition of the case on the several assignments of error. The first of these is that appellant was erroneously denied the right to file and have considered his demurrers and answers to the answers of appellees, with general replications thereto withdrawn by all the plaintiffs except the appellant. His general replications remained in the record and presented all issuable facts which he of right could interpose. His counsel concede this, unless the answers of appellees amounted to cross-bills with matter constituting claims for affirmative relief. We do not think these answers of appellees were cross-bills. While they deny the rights of *Ralph Snyder* pleaded in the bill and set up matters of estoppel against him, they were only defensive to the bill. His entire claim to the *Batten* interests to which appellees were entitled was based wholly on the contracts between coplaintiffs pleaded in the bill, and to which appellees were not parties nor represented by any one in authority. He presented no title to their interests; and it was their specific interests which the contracts pleaded undertook to concede to him. It is said these plaintiffs had the right to make this concession if they chose to do so. But how could they confer title they did not have, by such concession.

The title of appellees came by consent or devise and assignment from Adolphus Armstrong and Louisa Ann Armstrong, of interests which Ralphsnyder had concededly sought to buy from them, but had failed to obtain. Their interests were indeed larger than the two and one-half per cent. decreed them, but by the contract of February 28, 1917, pleaded by appellees in their answer, the same parties plaintiff to the bill, except Ralphsnyder, conceded two and one-half per cent. of the entire estate to them. The contracts relied on by appellant could not be construed as interpreted to take from appellees their rights and give them to Ralphsnyder, but as conceding them to him if he should thereafter produce right and title thereto, which he never did nor pretended to have done. We think appellees' answer to the bill constituted complete defenses to Ralphsnyder's claims to the Batten interests and independently of the matters of estoppel pleaded, that Ralphsnyder was without the shadow of title thereto.

We are therefore of opinion that Ralphsnyder was without right and was not prejudiced by the rejection of his demurrers and answers, and that the decree appealed from but gave appellees the interests to which they were entitled by inheritance and by contract with plaintiffs, and that it should be affirmed.

(30 W. Va. 563)

BROWNING v. HOFFMAN et al.
(No. 4418.)

(Supreme Court of Appeals of West Virginia.
March 21, 1922.)

(Syllabus by the Court.)

1. Physicians and surgeons ¶18(8)—Evidence held not to prove negligence of physicians or nurses.

In an action to recover damages for alleged malpractice by physicians and surgeons operating a private hospital, in which the plaintiff was treated for a serious wound of the leg, developing gangrene rendering amputation necessary, within 48 hours after it was properly dressed and the broken bones set, and in the temporary absence of the attending physician, but while the patient was attended by competent nurses, and in the hospital by an assistant physician and surgeon competent in all respects, whom the nurses were instructed to call, if necessary; evidence to the effect that the leg was gangrenous to the knee and discolored for a space of two or three inches above the knee at 2 or 3 o'clock p. m. of the second day, and that, in the opinion of a physician who saw it then, it could not have been in good condition at 10:30 a. m. of that day, taken in connection with proof that, in the morning, there was evidence of lack of circulation but no constriction nor gangrene, that efforts by approved methods, on the part of the nurses and

assistant physician, to restore or increase circulation, had been constantly made throughout the forenoon and development of the trouble carefully watched until 2:30 p. m., does not appreciably tend to prove negligence on the part of the attending physician, in temporarily leaving the patient, or providing for his care and emergencies in his absence, nor on the part of the nurses and assistant physician, in respect of care and treatment of the patient, and an instruction assuming the existence of evidence appreciably tending to prove liability on such grounds, under such circumstances, cannot properly be given.

2. Physicians and surgeons ¶15—Physician held not liable for mere errors in judgment.

Nor, assuming that the operating physician, before leaving late in the evening of the first day, visited the patient, or should have done so, and if he did, saw or, should have seen, the chart disclosing a slight rise in temperature, pulse, and respiration, could the court properly instruct the jury, upon that fact and the nature of the wound, that he was negligent in temporarily absenting himself on a business mission, because such facts, taken in connection with the later developments, constitute no appreciable evidence of such negligence. A physician is not liable for mere errors of judgment.

3. Physicians and surgeons ¶15—Unqualified instruction that it was hospital physician's duty to notify parents promptly of necessity of operation held error.

If, in such case, it is shown that, when the necessity of amputation became certainly known at 2:30 o'clock p. m. of the second day, efforts were made to apprise the parents of the patient, a young boy, of the situation, and obtain their consent to amputation of the leg, by the assistant physician, but that the father was absent and the mother not found for several hours thereafter, and that, when notified, she protested against operation without the assent of her husband who did not return until 9 o'clock p. m., and who, upon his return, refused to permit the assistant physician to perform the operation, it is error to instruct the jury unqualifiedly that it was the duty of the assistant physician promptly to notify the parents or grandparents of such necessity, the grandmother, who was at the hospital not being shown to have had any authority to assent to the amputation, and it not being known to the physician, that the boy resided with his grandparents.

4. Physicians and surgeons ¶15—Facts held not to show negligence on the part of nurse.

A nurse, left in charge of a patient suffering from a compound comminuted fracture of the leg, by the operating surgeon, after the bones have been set and wired, and the leg inclosed in a plaster of paris cast, with instructions to watch the patient carefully, during the temporary absence of such physician, and, in case of swelling, to cut the cast, and, if necessary, call an assistant physician on the staff of the hospital in which the patient is, both physicians being on that staff, is not negligent in awaiting the coming of the assistant

within two or three hours, on his regular tour of the hospital and visitation of patients, after having cut the cast, resorted to appropriate treatment on discovery of unfavorable symptoms, and vainly endeavored to communicate with him by telephone, it being within her province to determine the necessity of his attendance, in point of time, and the jury cannot properly be instructed, in such case, to find for the plaintiff, on the theory of negligence on the part of the nurse, in failing to call the physician at once, by messenger.

5. Physicians and surgeons ¶15—Facts held not to show negligence in failing to discover gangrene sooner.

If, on discovery of indications of lack of sufficient circulation in a leg so injured, dressed, and treated, on the morning of the second day, the cast is cut at 8 o'clock a. m., external heat applied to stimulate circulation, the bandages cut, and the leg exposed and examined by the assistant physician, at 10:30 o'clock a. m. and the treatment continued and gangrene discovered at 1 or 2 o'clock p. m., failure of said physician to completely remove the cast and bandages for the purposes of inspection, count the pulse, and note it, take the patient's temperature, make inquiry of the nurses, as to his condition during the preceding night, and read medical books, does not justify the giving of instructions submitting hypothesis of negligence in failing to discover necessity of amputation on the morning of that day, since such facts and circumstances do not constitute appreciable evidence of such negligence.

6. Trial ¶253(9)—In malpractice action for not sooner amputating a gangrenous leg, an instruction ignoring evidence of delay caused by patient's parents is erroneous.

If, in such case, there is evidence tending to prove that amputation at, or slightly above, the knee would have sufficed, if effected immediately after discovery of gangrene, and that delay necessitated amputation at the hip, instructions to find for the plaintiff, upon the theory of negligence in delay of amputation, hypothetically given, but ignoring evidence tending to prove unwillingness of the parents of the patient, a young boy, to permit amputation by the assistant physician, the only competent person then present that had right to perform the operation, under the rules of the hospital, and efforts to find the parents and apprise them of the necessity of amputation, are erroneous.

7. Physicians and surgeons ¶15—That surgeon, 24 hours after dressing wound, temporarily absented himself held not abandonment of patient or breach of contract.

Proof that a surgeon, after having properly dressed a wound and found it in apparently good condition 24 hours later, temporarily absented himself on business, leaving the patient in the care of competent nurses and a competent assistant physician and surgeon, constitutes no evidence of abandonment of his patient or breach of his contract, and does not justify an instruction based upon the theory of such abandonment or breach.

8. Trial ¶206—Instruction on weight of testimony of expert and nonexpert witnesses approved.

Although in many instances the evidence of expert witnesses is entitled to much greater weight than that of nonexperts, the jury are presumptively as thoroughly cognizant of the fact as the court, it being one of common knowledge, wherefore there is no impropriety in the giving of an instruction, in a case in which the issue is largely dependent upon expert testimony, advising the jury to consider it and all of the other evidence, and give it such weight as they think it is entitled to, and, further, that its value depends upon the circumstances of each case, to be ascertained by them.

9. New trial ¶70—Evidence held to warrant setting aside verdict for plaintiff.

Under the facts and circumstances here indicated, it is the duty of the trial court, upon request, to give an instruction directing the jury to find for the defendants, and, failing so to do, to sustain a motion to set aside a verdict found in favor of the plaintiff.

10. Trial ¶229—Court need not repeat instructions.

A trial court is under no duty to repeat its instructions to the jury.

11. Trial ¶253(6)—Refusing a binding instruction which would base verdict upon an inclusive fact is not error.

There is no error in the refusal of a binding instruction which, if given, would make the verdict turn upon an inconclusive fact, if found under submission of an issue as to it.

12. Witnesses ¶37(1)—May not testify as to matters beyond personal knowledge.

A witness is not entitled to testify as to matters of which he has no personal knowledge.

13. Appeal and error ¶882(9)—Party may not complain of answer responsive to his own question on cross-examination.

A party cannot complain of admission of an answer responsive to a question propounded to a witness, by himself, on cross-examination.

14. Physicians and surgeons ¶18(7)—On issue of delay in operation it is permissible to show that hospital's rules forbade outside physicians operating therein.

Upon an issue as to injury by delay in performance of a surgical operation in a private hospital, when a physician not connected with it might have operated promptly, it is permissible to prove that a rule of the institution forbade operation therein by surgeons not connected with it.

15. Evidence ¶577—On second trial, preserved testimony of witness at first trial is admissible on proof that he has since left the state.

In a second trial of a civil case, the preserved testimony of a witness in the first trial is admissible on proof that he has since left the state, and his attendance cannot conveniently be procured.

16. Evidence \S 570—Expert's testimony is not rendered inadmissible because of variance with his former testimony or that of other experts.

Variance of the testimony of an expert witness in a second trial from his evidence in the first and from that of other experts, if any in either respect, does not render it inadmissible.

17. Physicians and surgeons \S 18(7)—Surgeon may prove custom of having assistant called in case of necessity and assistant's competency.

On an issue as to negligence on his part, a surgeon of a hospital having an assistant, may prove his custom to have the assistant called, in case of necessity, in his temporary absence, and also facts tending to prove the competency of the assistant, by his own evidence and the hospital records, even though it is admitted in the general sense of the term "competency."

18. Witnesses \S 255(4)—A witness may refresh memory from a document made by another from data furnished by witness in course of business.

A witness may refresh his memory from a document made by another from data furnished by him, in the usual and ordinary course of business.

19. Evidence \S 528(1)—Upon issue whether gangrene was caused by constriction of bandages or by infection, expert's testimony as to the time the former would prove fatal is admissible.

Upon an issue involving an inquiry as to whether a case of gangrene was produced by constriction of bandages or by gas bacillus infection, the opinion of an expert as to the time in which gangrene of the former kind would ordinarily prove to be fatal, is admissible.

Error to Circuit Court, Mineral County.

Action by George F. Browning, infant etc., against C. S. Hoffman and others. Verdict and judgment for the plaintiff and the defendants bring error. Reversed, verdict set aside, and case remanded for new trial.

See also, 86 W. Va. 468, 103 S. E. 484.

C. O. Strieby, of Elkins, Chas. N. Finnell, of Keyser, H. P. Whitworth, of Westernport, Md., and Harry G. Fisher, of Keyser, for plaintiffs in error.

R. A. Welch and Taylor Morrison, both of Keyser, for defendant in error.

POFFENBARGER, P. By reference to 86 W. Va. 468, 103 S. E. 484, the nature of this case, the history of the transaction out of which it arose, and the general character of the evidence, will be found in the report of the disposition of a former writ of error in it. This writ has brought up for review a judgment for \$5,000, rendered upon a verdict found in a second trial in which the

evidence was substantially the same as that adduced in the first. In some relatively unimportant respects it differs, and some, if not all, of the variations therein will be incidentally noted in this opinion.

[1] Exceptions were taken to the giving of each one of the twelve instructions given to the jury at the instance of the plaintiff, and each one of these exceptions is made the subject of a special assignment of error in the brief. Having set the broken limb and properly dressed the wound, late in the evening of November 11, 1918, Dr. Hoffman, the surgeon in charge of the plaintiff left Keyser in the evening of the next day, and went to the city of Huntington, W. Va., on an important public mission. He was absent during the night of the 12th and the day of the 13th, and returned to Keyser, after midnight of the 13th, namely, at 2 o'clock a. m. of the 14th. During his absence a crisis arose. He had left the patient in the hands of admittedly competent nurses, with such instructions as he deemed necessary. The hospital in which the patient was, belonging to the defendants, Dra. Hoffman and Kalbaugh, was attended in his absence, by Dr. Maxwell, an admittedly competent physician and surgeon. At 7 o'clock, on the morning of the 13th, the head nurse discovered a coldness and whiteness of the toes and possibly some swelling, but she did not cut the plaster of paris cast until an hour later. At 10:30 o'clock, a. m. Dr. Maxwell, in making his usual tour of the hospital and visiting the patients, came into the room and was advised of the unfavorable indications. He swears that, at that time, it was impossible to tell what ultimate exigency or condition the unfavorable symptoms betokened. Before his arrival, the head nurse had adopted measures for increase or restoration of circulation, and he supplemented this work by some additional measures. The nurse had cut the plaster of paris cast, but not the bandages that held the cotton in place within the cast. He cut the bandages also and partially exposed the leg to the knee or above. As to the extent of his observation of the patient from 8 o'clock a. m. until 2:30 o'clock p. m., there is some conflict in the evidence. He and the nurses say he visited the patient between those hours, but some of the relatives of the injured boy, who claim to have been there all the time, deny that he did so. It seems not to be denied, however, that he was there at 2:30 or earlier. He and the nurses all swear that, at that time, and not earlier, the developments of the case made it certain that amputation would be necessary. What transpired after that time is substantially set forth in the former opinion.

By instruction No. 1, given at the instance of the plaintiff, the jury were told that he

was entitled to recover if they should find that Dr. Hoffman had reason to anticipate before leaving, that the boy's condition might so develop as to make amputation of the leg necessary, before his expected return; that he had not advised the patient's parents or grandparents of the gravity of his condition; that, by the exercise of reasonable diligence, those in charge of him would have known, on the morning of November 13, that amputation was immediately necessary; that one of his parents or grandparents was in the hospital, throughout practically all of November 13th; that nothing was said to any of them about the change in the patient's condition earlier than 5:30 p. m., and that, from the morning of November 13th, until 5:30 p. m. of that day, gangrene extended from below the knee to a point above the knee.

Whether this instruction erroneously assumes the existence of evidence to prove that Dr. Maxwell, the nurses, or any of them could have known on the morning of November 13, 1918, that amputation was immediately necessary, depends upon a partial analysis of the evidence. There is no proof that, at that time, there was any gangrene or any indication thereof, unless it is found in the testimony of Dr. Bell, the family physician, whom Dr. Maxwell called at about 1 o'clock p. m. of the 13th, and who says he saw the boy's leg about an hour later, at which time it was gangrenous up to the knee and discolored two or three inches above the knee. Upon his knowledge and experience with gangrene and its progress, he expressed an opinion that, if the leg had been in good condition and doing well at 10 o'clock, it could not have been in the condition in which he found it in the afternoon. He accompanied the boy from the Hoffman hospital, to a hospital at Cumberland, Md., in which the amputation took place, at 4 o'clock on the morning of November 14th, and saw the condition of the leg at that time, and expressed the further opinion that, in view of its condition then, it could not have been doing well at 10 o'clock a. m. of the 13th. In this there is no assertion either in terms or by implication, that amputation was immediately necessary in the morning of November 13th, or that anybody had reason to know it would become necessary. Dr. Maxwell and the nurses admit unsatisfactoriness of the condition of the patient at that time, but they deny the possibility of determination of the exact cause of the unfavorable symptoms. Between their evidence on this point and that of Dr. Bell, there is no conflict. The latter did not express an opinion that amputation was then necessary, nor that those in charge should have known it would become necessary. From 10:30 a. m. until 2:30 p. m. Dr. Maxwell was endeavoring to ascertain what

the outcome would be, if his statements are true, and did not become convinced until about 2:30, when he discovered crepitation signifying the presence of gas bacillus. He claims he saw the boy four or five times in the forenoon, left at 1 o'clock p. m. and, returning at 2:30, made his discovery, called Dr. Bell and ordered preparation of the operating room. His evidence cannot be interpreted as saying the appearance of the leg then disclosed gangrene to the knee or at all, but he admits he may have told Dr. Bell the patient had developed gas gangrene. Dr. Bell says he told him the leg was gangrenous and would have to come off. The head nurse denies there was any marked discoloration at 1:45 p. m., saying the only change in appearance from earlier examinations was a slight increase of the swelling. The discovery of gas bacillus infection, if made, meant inevitable gangrene, wherefore Dr. Maxwell's message to Dr. Bell may have signified no more than that gangrene was incipiently, but ineradicably, present. His evidence is irreconcilable with the theory of obvious gangrene prior to 3 o'clock. As to the obvious condition of the leg at that time, there may be conflict between the evidence of Dr. Bell, on the one hand, and Dr. Maxwell and the nurse, on the other, but this affords no evidence of necessity of amputation on the morning of November 13th nor any duty respecting it earlier than noon. Dr. Bell may not have seen the leg before 3 o'clock. As to the time, he and Dr. Maxwell are both indefinite. Considerable discoloration may have occurred in the space of three hours, or even in the one hour which he admits intervened between the call for him and his arrival. The experts all agree that gas bacillus works with unusual rapidity, and it may have existed. If it did not, there was no proof of obvious gangrene before noon. If nothing more was discovered at 10:30 o'clock than Dr. Maxwell admits, he pursued the course approved by the experts who testified in the case. He endeavored to restore circulation, and awaited such development as would enable him to determine the cause of the trouble. We are of the opinion that there is no evidence upon which the hypothesis of knowledge, actual, or constructive, of necessity of amputation in the morning of November 13th, can stand.

And there is a total lack of evidence to sustain the hypothesis that Dr. Hoffman had reason to anticipate before leaving, that any situation would arise, making amputation necessary in his absence. The only two physicians put on the witness stand by the plaintiff, were Dr. Bell, the family physician, and Dr. Johnson of Cumberland, who performed the operation. Neither of them, nor any other expert witness, expressed an opinion that the nature of the wound or cir-

cumstances of the case were such as should have generated belief in the mind of Dr. Hoffman, that amputation would become necessary before the time of his expected return. All of the physicians agreed that careful watching was necessary, under the circumstances, and that was provided for in the nurses and Dr. Maxwell. The need of that was the danger of constriction, the result of swelling of the leg. That was anticipated by Dr. Hoffman, in his direction to the nurse to cut the cast on discovery of any swelling. According to the testimony of all the expert witnesses, a sudden development of gangrene, such as took place in the case of this boy, is unusual and unexpected, in the absence of known infection. Ordinarily, a wound of this kind after having been treated as this one was, is not disturbed for several days, and there is no evidence that infection ordinarily develops and progresses so rapidly, as it is shown to have done in this instance. In this connection, the reading of the chart kept by the nurse, as to temperature, pulse, and respiration, is invoked. It is said that, if Dr. Hoffman had looked at the chart he would have discovered in it a reason for greater care and for anticipation of serious results. From midnight, Monday, until noon, Wednesday, the temperature varied considerably. Starting at 99 it rose to 101 at 8 p. m. Tuesday, and then went down to 98 Wednesday at 8 a. m., and was 99% at noon Wednesday. The pulse started at 106, rose to 118, and declined to 102, and then went to 124. Respiration started at 24 and went up to 26 and declined to 24. From noon Wednesday until 8 p. m. Wednesday, his temperature went to 103.1, pulse to 168, and respiration to 80. Of course, Dr. Hoffman could not have known to a certainty that the readings of Tuesday would go down, but the fact that they did, taken in connection with his experience as a surgeon, justified his assumption that they indicated nothing alarming or unusual. Though his testimony, and that of the head nurse, to the effect that he saw the boy Tuesday evening, before leaving, is contradicted, there is no evidence of necessity for his presence at that time, or of any condition or symptom that might have occasioned an alteration of his purpose to leave.

[2] Both of the hypotheses of this instruction, to which reference has been made, ignore the provision made for exigencies, in the presence and duties of Dr. Maxwell and the loose form of the contract. The boy was not put in the special care of Dr. Hoffman, in the first instance. He was put into the hospital, and Dr. Hoffman, informally and without any special contract, hurriedly treated him. The medical and surgical staff consisted of at least three doctors, and there was no stipulation that Dr. Hoffman

should give the patient his personal attention at all times, nor that he should not delegate his authority or substitute either of the other physicians. In his absence, the patient was under the general oversight of Dr. Maxwell, an admittedly competent physician and surgeon. To say that a surgeon, even in a critical case, after having skillfully treated a wound and done all that seemed to be necessary for the time being, may not temporarily substitute a competent associate or assistant, for purposes of oversight, and provision against merely possible emergencies, would amount to prescription of a harsh and unreasonable rule. Ordinarily, a physician is unable to devote his entire time to a single patient, or to stay within instant call. Upon him as well as other citizens, public duties are imposed, and the necessity of his professional services to others render it impossible at all times to keep in immediate touch with a single patient. Of course, he cannot abandon his patient or neglect necessary attention and treatment. But, if he temporarily provides competent attention and treatment under his personal direction, though not in his presence, there is neither abandonment nor neglect. This seems to have been the opinion of Judge Taft in *Ewing v. Goode* (C. C.) 78 Fed. 442, 449. In this case, however, it is unnecessary to go that far. Dr. Hoffman operated and treated the patient as one of the staff of the hospital to which he was sent, and Dr. Maxwell was another member of the same staff. What is assumed in this instruction is evidence of negligence, not in respect of operation or treatment, but in respect of prognosis, diagnosis, and provision for emergencies. While the implied covenant was personal and unassignable, such delegation as took place did not amount to an assignment. It was a means or method of performance, such as may reasonably be deemed to have been within the contemplation of the parties, and, therefore, within the contract of employment. In this respect the case differs from those in which there are complete substitutions by consent of the patient or employer, express or implied, the law of which is declared in *Moore v. Lee*, 109 Tex. 391, 211 S. W. 214, 4 A. L. R. 185, and note. Here there was only a qualified substitution within the provisions of the contract if any at all.

[3] The subject-matter of plaintiff's instruction No. 2 is left in so much doubt by the evidence that the instruction was clearly misleading. It deals with the duty of Dr. Maxwell, on discovery of the necessity of amputation at 2:30 p. m., to give notice thereof to the parents or grandparents of the plaintiff. At that time the father of the boy was not within reach. A conductor on the Baltimore & Ohio Railroad, he was out on his run. He had left Keyser without

having authorized his wife, the grandparents of the child, or any other person to receive and act upon such notice. When the mother was finally located, late in the evening, she protested against amputation at that time, and demanded that it be postponed until she could communicate with her husband. Failure to notify the grandmother who claims to have been in the hospital throughout the entire day, November 13th, except for one hour between 12 o'clock and 1 o'clock, is the occasion of very severe censure in the argument of the case. Not denying her presence in the hospital early in the afternoon, Dr. Maxwell excuses his failure to notify her, on the ground that she was not authorized to consent to an amputation. She and her husband had practically raised the boy and he made his home with them, but there is no proof that Dr. Maxwell had any knowledge of that situation. The mother also claims to have been at the hospital and in the boy's room, from about 2 or 3 o'clock until 5 or 5:30. During that period, Dr. Maxwell was not in the hospital, at least not about the boy's room. At about 2 or 3 o'clock, Dr. Bell, in response to the summons of Dr. Maxwell, was in the boy's room. Before going there, he had endeavored to locate his parents. Strangely enough, he did not see the mother at the hospital, though she claims to have been there at about the time of his visit. It is probable that she came just after he and Dr. Maxwell left. From this and other evidence, it is apparent that an effort to give notice of the necessity of amputation and to procure consent thereto was made. Although Dr. Bell may not be deemed to have been the agent of the parents, he accepted notice from Dr. Maxwell and endeavored to convey it to the parents. If he was acting for Dr. Maxwell, his testimony, as a witness for the plaintiff proved an effort to give the notice and to obtain the consent. The duty imposed upon the defendant by the instruction now under consideration was absolute. The jury were told it was the duty of Dr. Maxwell promptly to inform the parents and grandparents. The import of this is that he was bound to find them and advise them of the situation. The law imposed no duty other than that of reasonable and diligent effort to do so. Dr. Maxwell swears that he took a machine and went to the home of the parents and also of the grandparents, in search of somebody authorized to receive notice and give consent. Both he and Dr. Bell swear that the latter, at the instance of the former, made a similar effort. If these efforts had been successful they would have been unavailing, unless it can be assumed that the mother's position or attitude was different at 3 o'clock, from what it was 2½ hours later. It does not appear that she could have given consent or

obtained authority to do so from her husband, in advance of his return, and he did not return until late in the evening, about 9 o'clock. He had left Keyser without making provision for any exigency of any kind, with knowledge of the boy's condition, and without inquiry or direction as to his own duty in the premises. At about 11 o'clock on Tuesday morning he called at the hospital and was told by the nurse that the boy was doing well. Without having made any further inquiry, and without having received any permission or encouragement to absent himself, he resumed his work on the railroad that day and was still pursuing it throughout the next. An instruction which, in view of all these facts and circumstances, imposed absolute duty from the physician promptly to inform parents or grandparents of the necessity of amputation, is clearly misleading and prejudicial. It ignores the evidence of negligence of the parents and futility of notice to them, if it had been given. Except in very extreme cases, a surgeon has no legal right to operate upon a patient without his consent nor upon a child without the consent of its parent or guardian. *Rishworth v. Moss* (Tex. Civ. App.) 191 S. W. 843; *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462; *Rolater v. Strain*, 39 Okl. 572, 137 Pac. 96, 50 L. R. A. (N. S.) 880; 30 Cyc. 1577; 21 R. C. L. 392. The complaint in this action, however, is not made on account of operation with or without consent, but partly on account of failure to discover necessity for it and give the parents an opportunity to decline or assent. If Dr. Hoffman had been there, the father was not on the ground to give the necessary consent, between noon and 9 o'clock p. m.

[4] Instruction No. 3 given for the plaintiff propounds the hypothesis of liability on the ground of negligence on the part of the head nurse. It told the jury that, if they should find that Dr. Hoffman, knowing the injured leg was so seriously damaged that amputation might reasonably be expected to become necessary at any time after the operation, instructed the nurse, on leaving Keyser for Huntington, to cut the cast and bandages and send at once for Dr. Maxwell, on discovery of development of any unfavorable symptoms during his absence, and that the nurse failed and neglected to send for Dr. Maxwell, after having discovered interference with circulation, then she was guilty of negligence, and the plaintiff was entitled to recover for such injury as resulted. This instruction is based upon proof of failure of the head nurse, to obtain the presence of Dr. Maxwell, immediately upon discovery of the change in the foot. She applied external heat treatment to restore circulation from 7 o'clock until 8. At the latter hour, she and the day nurse cut the cast, and, about that time, she

endeavored to summon Dr. Maxwell. His house telephone was not working. She repeatedly tried to get him by means of his office telephone, but did not send a messenger for him. His residence was only about three blocks distant, and he could have been summoned by messenger. Not being able to get him by telephone, she says she awaited his coming, knowing he would be at the hospital in a short time. In this procedure she acted upon her own experience and knowledge and the instructions given her by Dr. Hoffman. A careful search of the evidence fails to reveal any instruction to her to send for Dr. Maxwell at once, or anything else tending to prove failure on her part to comply with any directions given to her, when fairly interpreted. She was instructed to cut the cast and to relieve from all constriction, if any, on discovery of any swelling of the foot. She swears there was no swelling at 7 o'clock, nor at 8 o'clock, but that she did cut the cast because of the paleness and coldness of the foot, indicating an unfavorable condition. Dr. Hoffman's instruction to her, as found in his testimony, was to send for Dr. Maxwell, if necessary. Necessity in point of time depended, under this instruction, upon her judgment and knowledge. In view of the change in condition, she desired Dr. Maxwell's immediate presence and endeavored to obtain it; but, being unable to communicate with him at 8 o'clock, and knowing he would be at the hospital in a short time thereafter, she deemed it safe to await his coming, and in the meantime to endeavor to restore or stimulate circulation. She does not admit, nor does any one else testify, that it was necessary to have him at once. Another thing to be observed is the fact that, when he arrived, he did not find it necessary to do more than continue the treatment she had applied and elevate the foot. In all this, no evidence of neglect on the part of the nurse is discovered. As she was competent and experienced, there was no negligence on the part of the defendants in relying upon her judgment, in matters properly entrusted to her, and an honest mistake on her part, if made, would not have been negligence, any more than such a mistake on the part of a physician would be. This instruction lacks foundation in the evidence in two respects: (1) Evidence of negligence on the part of the nurse; and (2) injury occasioned by it, if any.

The evidence in this record, respecting the duties and conduct of the nurses, is not materially different from that considered on the former writ of error. In holding it insufficient to justify an instruction framed upon the hypothesis of negligence on the part of the head nurse, we merely repeat a former decision in the case.

[8] Plaintiff's instructions Nos. 4, 5, 6, 11, and 12 are very similar in substance and effect. They all assume the existence of evi-

dence of negligence in attendance, observation, care, and treatment, after the wound had been properly dressed. Two of them, 4 and 6, relate to discovery of interruption of circulation, by the exercise of usual and ordinary care and skill, in time to relieve from it and prevent gangrene. Nos. 5 and 11 assume evidence of lack of diligence and care of the patient, to avoid injury. No. 12 assumes evidence of negligence and disobedience of the instructions of Dr. Hoffman. In passing upon other instructions, the contentions as to evidence of negligence on the part of the nurses and Dr. Hoffman have been disposed of. Insufficiency of the testimony of Dr. Bell, to justify an instruction on the theory of negligence in failure to discover necessity of amputation, on Wednesday morning, November 13th, has been determined. Only one item of evidence not already considered, is recalled, as having been invoked, upon the theory of lack of diligence on the part of Dr. Maxwell, in respect of detection of the cause of obstruction of circulation and treatment, in the forenoon of November 13th. That is his failure entirely to remove the cast from the leg. Fairly interpreted, the evidence of Drs. Miller, Gracie, and Harrison, expert witnesses called by the defendant, does not impose such duty under the circumstances disclosed. What they said on the subject was indefinite and constituted only a part of the narration of proper investigation of trouble disclosed by deficient circulation, evidenced by paleness and coldness. None of them were asked whether entire removal was necessary, nor did any of them suggest such necessity, or a rule requiring it. Dr. Miller said he would "cut off the cast and examine the leg." Asked whether he would entirely remove it, he said he might not. Dr. Gracie said he would "split open the cast and examine the wound and leg." Asked if he would take off the bandage to see under it, he said: "Yes, sir, expose the leg carefully so that it can be examined." Dr. Harrison said he would remove the dressings, since he could not see through them. This observation was made with reference to the wound, not the whole leg, and it is apparent from the evidence, that there are wound dressings which form no part of the cast or bandages. A window was left in the cast, through which the wound could be observed and redressed in case of necessity. No expert witness expressed the deliberate opinion that ordinarily careful inspection required complete removal of the cast and bandages. When they are cut from end to end, they can be easily opened sufficiently to allow careful inspection. This claim not only lacks evidence to sustain it, but is actually refuted, and its soundness denied by the only expert to whom it was interrogatively suggested. On this theory of lack of proper diagnosis of the complication discovered on the morning of the second day, it is charged that Dr. Maxwell

did not take the patient's temperature. It had been taken about 2½ hours before he came in, and the chart showing it was before him. He handled the leg, and held the boy's hand or arm while he felt the pulse. He could no doubt tell whether any sudden rise of temperature had probably occurred within two or three hours. Though he did not record the pulse, he took it. We know of no rule requiring a physician to resort to his medical books, while awaiting the result of treatment and progress of unknown trouble that does not yield to treatment suggested by the symptoms. The history of the case throughout the preceding night was before the doctor on the nurse's chart. Seeing that, the patient, and the unfavorable indications, he could consider them in the light of his technical learning and professional experience, and determine the extent of the data necessary to a proper diagnosis or determination of the stage of development at which a final and correct conclusion could be arrived at. It cannot be assumed that he did not inspect the wound. He opened the cast and bandages and inspected the leg, including the wound. Being unable then to determine what the occasion of the trouble was, he did just what Dr. Harrison said he would do under such circumstances. He awaited developments. Nothing more can be found in the record, for foundation for these instructions, than mere surmise or conjecture based upon the unfortunate final result of the injury.

[8] Plaintiff's instructions Nos. 7 and 10 submitted the hypothesis of negligent failure to discover infection and gangrene, until they had so far progressed as to make amputation at the hip necessary, when it should have been discovered in time to have stopped it at the knee or somewhere below the hip, by amputation. In support of these instructions, Dr. Maxwell's failure to notify the grandmother and mother is invoked. At the time of admitted discovery of necessity for amputation, 2:30 p. m. of the second day, there was no obvious gangrene above the knee, and it is possible that amputation at the knee or somewhere between it and the hip would have sufficed. But the necessary authoritative assent to amputation at the time could not be obtained. There is no proof that Dr. Hoffman himself, if present, would have been permitted to operate. Dr. Bell, the family adviser in medical matters, did not advise it, nor offer to assist in it. The father was not there to assent, and the mother, if advised at that time, would not have assented, without direction to do so from her husband, who was absent. These instructions no doubt rest in some degree upon the theory of liability on the ground of Dr. Hoffman's absence. In that they have no foundation, as has been already determined. These binding instructions should have been so qualified as to make liability depend upon a finding as to legal right

in the attending surgeon, to perform the operation. Without such qualification, they could not be properly given.

[7] Instruction No. 8 given for the plaintiff was both abstract in form and inapplicable in substance. It assumed evidence of abandonment of the patient by his physician and surgeon. That nothing of the kind was involved in the issue has already been held. Upon the conceded facts, whether an abandonment had occurred was a question for the court, not the jury, and it should not have been submitted to the jury.

[8] The probative value of expert testimony, or rather its relative importance or status, is the subject-matter of plaintiff's instruction No. 9, by which the jury were correctly told determination of the issues as to the facts upon which it is founded, is within their province. But they were further told they should consider it and all other evidence in the case, and give it such weight and credit as they should think it entitled to receive. They were also advised that the value of such evidence depends upon the circumstances of each case, and that, of the circumstances, they must be the judges. As to purely scientific questions, it is manifest that the testimony of competent experts is entitled to more weight than that of nonexpert witnesses. They are also better qualified to say what facts have material bearing upon intricate scientific inquiries or issues. As to what is or is not skillful or careful diagnosis or treatment of a wound or disease, extending to, and dealing with, the entire wound or malady, the testimony of men learned and experienced in medicine and surgery is obviously entitled to greater weight than that of men of no learning or experience in those branches of science. But these mere facts, lying within the vast domain of common knowledge, are as well known to jurors as to the courts. The law assumes honesty, integrity, and intelligence on the part of jurors, and any attempt to control or direct them as to matters of fact and the probative value thereof is ordinarily an invasion of their province. The direction to give the expert testimony such weight as the jury should think it entitled to implied no license or right to deny it superior weight in any instance in which they should accord it. On the contrary, in common sense and logic, if not in terms, they were told to give superior weight to that kind of evidence in so far as they should find justification therefor in reason. Nor is the observation that the value depends upon the circumstances to be ascertained by the jury, open to criticism. The jury are presumed to have known that, in so far as the issue depended upon scientific facts, the expert evidence was peculiarly valuable, and there is nothing in the instructions asserting or implying the contrary, or authorizing them to disregard or disparage it in such instances. The only authority invoked

against the instruction is *Ingwersen v. Carr & Brannon*, 180 Iowa, 988, 164 N. W. 217, which is not applicable. The instruction, disapproved in that case, authorized the jury to determine what facts were material as bases of the expert opinions adduced in evidence. There is no suggestion of such authority in this instruction. The value of an opinion as evidence depends upon more than relative competency of witnesses, in respect of education and experience. Integrity and fairness, or the lack thereof, indicated by the demeanor of the witnesses, while testifying, and their relative intelligence indicated by their expressed powers of observation, analysis, and reasoning are sometimes very potent in the determination of the value of their evidence. In some instances, the superiority of one witness over another of the same class is as obvious as that of one class over another; but no right in a court to base an instruction upon such manifest difference is recognized or has ever been judicially suggested so far as we are advised. The conclusion here expressed is amply sustained by very reputable authority. *Goodwin v. State*, 96 Ind. 550, 569; *Garfield v. State*, 74 Ind. 60; *Rivard v. Rivard*, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566; *Lawson, Exp. & Op. Ev.* p. 182. The instruction just mentioned was properly given.

[9] Lack of evidence justifying the giving of any of the instructions requested by the plaintiff, save No. 9, which did not hypothetically or otherwise authorize any finding made it the duty of the court to give instruction No. 12, requested by the defendants and refused, and also to set aside the verdict for insufficiency of evidence to sustain it, as well as for errors in the refusal of said instruction No. 12, and the giving of erroneous instructions at the instance of the plaintiff. That instruction, if given, would have directed a verdict for the defendants. In passing upon the instructions, all of the evidence and facts relied upon, as proof of negligence and abandonment, have been carefully examined and considered. It is unnecessary to discuss them further and repeat our conclusions, in the disposition of the assignments of error founded upon the refusal of the peremptory instruction, and the overruling of the motion for a new trial.

[10, 11] There was no error in the refusal of instruction No. 13 requested by the defendants. Its subject-matter was specifically covered by instruction No. 10, given for them. Refusal of their instruction No. 15 was justified by the giving of two or more others covering its subject-matter. Their instruction No. 16, if given, would have required a verdict for them on the sole ground of inability on the part of the jury, to determine whether the gangrene originated from constriction or gas bacillus. It would have been manifestly misleading, and, besides, the fact hypothetically assumed by it, if found, would not have pre-

cluded recovery, if negligence had been proved.

[12] Certain evidence of Mrs. Browning, admitted over objection, should have been excluded. She could not properly testify to her mere understanding from conversation with the head nurse, as to her son's condition. She should have been interrogated as to what the nurse had told her. Whether she knew Dr. Maxwell had any connection with the hospital was immaterial. Not having been at the hospital until Tuesday morning, and having had no part in the making of the arrangements for her son's entry into it, she had no personal knowledge of the contract, and, therefore, was not competent to say her son had been put under the care of Dr. Hoffman.

[13-17] There was no error of which the defendants can complain, in the overruling of an objection by the plaintiff, to a question propounded by themselves on cross-examination of the grandmother. Nor is any error perceived in the admission of evidence tending to prove a rule of the hospital, excluding operations therein by others than members of its staff. That rule is one of the relevant facts in the case, even though it may not be very material. Between the dates of the two trials, Mrs. Butler, an aunt of the plaintiff, who testified on the first trial, left the state and went to another state, so far distant as to render it very inconvenient to procure her attendance and rather difficult to obtain her deposition. Her testimony on the first trial, having been preserved, was admitted in the second, over objection. In this ruling, there was no error. 10 R. O. L. p. 966; 16 Cyc. 1006; *Wise Terminal Co. v. McCormick*, 107 Va. 376, 56 S. E. 584. As the family physician, Dr. Bell, was appealed to by the parents of the plaintiff as well as by Dr. Maxwell, when the crisis arose, it was not error to admit his advice, nor to admit his testimony as to what he did and the advice he gave. It was clearly within the discretion of the court to permit the plaintiff to recall a witness, after the defendants had closed their evidence, and propound a question that had been inadvertently omitted, and admit the answer thereto. There was no error in the admission of the expert testimony of Dr. James T. Johnson, the surgeon who amputated the leg, on subjects like, and similar to, those on which the defendants took such evidence. Mere variance between his testimony in this trial and his testimony in the other, or between it and that of other experts, if any in either respect, did not render it inadmissible. Its weight was for the jury.

[18, 19] Dr. Hoffman should have been permitted to state his custom as to the calling of Dr. Maxwell in his absence, and also to prove the experience of Dr. Maxwell as a surgeon, by his own testimony and the hospital records. All of this evidence tends to prove the de-

gree of care and prudence exercised by him, and the reason or ground of the confidence reposed in his assistant, and his reliance upon him in important matters. It was error to refuse to let one of the nurses say she had refreshed her memory as to who were in the patient's room, by reference to the bedside chart, kept by the head nurse from information furnished by the witness. *W. Va. Architects & Builders v. Stewart*, 68 W. Va. 506, 70 S. E. 113, 36 L. R. A. (N. S.) 899. Dr. Littlefield, testifying as an expert, for the defendants, should have been permitted to say that gangrene occasioned by constriction would not ordinarily kill a patient in three or four days. His statement had direct bearing upon the issue, as to whether the gangrene was occasioned by constriction or gas bacillus, gangrene from the latter cause developing and spreading much more rapidly than that produced by the other, as shown by expert evidence.

It is not our purpose to say that any or all of the errors in admission and rejection of evidence would alone constitute ground of reversal. Many of them were no doubt harmless. The assignments are disposed of for guidance in another trial, if it shall occur. For the other errors noted, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(90 W. Va. 186)

LEVINE BROS. v. MANTELL. (No. 4336.)

(Supreme Court of Appeals of West Virginia.
Jan. 31, 1922. Rehearing Denied
April 4, 1922.)

(Syllabus by the Court.)

1. Set-off and counterclaim §54 — Right to have plea of set-off excluded held waived by failure to demur and object to evidence.

Although a claim for unliquidated damages is not proper matter for a set-off, in the absence of peculiar circumstances, and a plea of set-off founded upon it must be excluded by the trial court, upon a proper and timely objection thereto interposed by the plaintiff, right to have it excluded is waived by his failure to demur to the plea, resist the filing thereof, and object to the introduction of evidence to sustain it.

2. Set-off and counterclaim §35(1)—Damages for nondelivery of goods sold unliquidated demand.

A claim for damages for nondelivery of goods sold is an unliquidated demand.

3. Trial §210(2)—Conflict in evidence insufficient to justify instruction to disregard all testimony of witness believed to have sworn falsely.

Direct and irreconcilable conflict in the testimony of the principal witnesses in a case, as to several material questions of fact involved

therein, does not justify the giving of an instruction telling the jury that, if they believe from the evidence any witness has willfully sworn falsely to any material fact in the case, they may in their discretion disregard all the testimony of such witness.

4. Witnesses §317(1)—Maxim, "Falsus in uno, falsus in omnibus," construed.

The maxim, "Falsus in uno, falsus in omnibus," is a mere rule of evidence affirming a rebuttable presumption of fact, under which the jury must consider all the evidence of the witness, other than that which is found to be false, and it is their duty to give effect to so much of it, if any, as is relieved from the presumption against it and found to be true.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, *Falsus in Uno, Falsus in Omnibus.*]

5. Appeal and error §978(1) — Order setting aside verdict for error in instruction will not be disturbed unless appellate court can say verdict was right.

An order of the court below, setting aside a verdict for the error in giving such an instruction, will not be disturbed by the appellate court, upon the theory of harmlessness of the error, unless the latter court can see that the verdict was plainly and clearly right.

6. Appeal and error §978(1) — Trial court's judgment as to sufficiency of error to justify new trial entitled to respect in appellate court.

Such error supplemented by the trial court's peculiar knowledge of the case, derived from observation of the actors therein, affords a basis for the exercise of its judicial powers, and its judgment upon the question of the sufficiency of the error to sustain a motion for a new trial is entitled to the usual degree of respect in the appellate court.

7. Evidence §213(1)—One declining overtures of compromise may not object to evidence on the ground of disclosure of admissions in an effort to compromise.

A party to a suit who has rigidly declined all overtures of compromise of the matters in difference between him and the opposite party is not in a position successfully to resist introduction of the testimony of his opponent's attorney, filing and explaining correspondence relating to the controversy, upon the ground of disclosure of admissions made in an effort to compromise.

8. Evidence §99—Rule, "Res inter alios acta," construed.

The rule, "Res inter alios acta," precludes introduction of evidence of transactions by which the proponent was in no way affected and to which he was in no sense a party.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, *Res Inter Alios Acta.*]

9. Trial §267(3)—Instruction not based on evidence properly modified before submission to jury.

An instruction containing matter having no basis in the evidence may properly be modified

by elimination of such matter, by the trial court, before allowing it to go to the jury.

10. Trial \Rightarrow 25(13)—Where set-off is only issue, defendant may open and close.

In an action involving a plea of set-off, the issue arising on which constitutes the only real controversy between the parties, liability for the plaintiff's demand being admitted in evidence but denied by a plea, the defendant has right to open and close the argument.

Error to Circuit Court, Kanawha County.

Action by Levine Bros. against R. E. Mantell. Judgment for defendant, and plaintiffs bring error. Affirmed.

E. L. Long and Henry S. Cato, both of Charleston, for plaintiffs in error.

Morton & Mohler, of Charleston, for defendant in error.

POFFENBARGER, P. Denial of error in the trial of an action of assumpsit for recovery of the price of goods sold and delivered, in which there was a claim for damages for nondelivery of other goods purchased from the plaintiffs by the defendant, sufficient to justify the setting aside of the verdict allowing plaintiffs' claim and disallowing that of the defendant, constitutes the basis of this writ of error.

As of September 23, 1919, the defendant owed the plaintiffs a balance of \$700.08, on account of merchandise sold to her, which, with interest from September 23, 1919, to May 5, 1920, the date of the filing of the declaration, amounted to \$726.08. As to this amount, there was no controversy. The balance due as of September 23, 1919, includes a charge of \$148, the price of eight suits of clothes shipped to the defendant, on account of a large order given by her to the plaintiffs, May 19, 1919. The controversy arises over the defendant's claim for damages for nondelivery of the remainder of that large order. On this account, she endeavors to offset \$2,384.75, for extinguishment of the debt due the plaintiffs and recovery of a balance due her. At the date of the acceptance of said large order, she owed the plaintiffs a balance of about \$500. After that date and before any controversy arose, the plaintiffs shipped to her goods amounting to nearly \$800, and she paid on account thereof about \$600, in cash and by return of goods. In the letter transmitting the invoice for the eight suits shipped on the order of May 19, 1919, the plaintiffs advised her of an enormous advance in the prices of the merchandise and of their unwillingness to deliver the balance of the order, in the event of further increases, and of their notification to all of their customers that they could expect delivery of their merchandise all the way up to February,

1920, on account of slowness of the mills in making deliveries. In reply to that letter, she advised them of her intention to insist upon the deliveries according to contract and to take legal action if necessary to protect her interests. Replying to this letter under date of November 6, 1919, the plaintiffs advised her that it would be necessary to charge an additional \$3 on each one of certain suits, and that then their losses would be heavy, as they had been compelled to pay as much as \$6 per garment more than they had expected to pay at the mills. Defendant's letters were written under advice of her attorneys. As correspondence between them and the plaintiffs' attorneys in Cincinnati began November 11, 1919, the latter were no doubt acting upon legal advice. At about this time, laxness of defendant in meeting her bills was drawn into the controversy and relied upon as justification of failure of the plaintiffs to make further deliveries, and this position was based upon demands for payment made by letters of August 1, and 14, and October 15, 1919. In a letter dated November 11, 1919, the plaintiffs' attorneys Bolsinger, Kuhn & Bolsinger, brought this to the attention of the defendant's attorneys, and reminded them of the invoice of June 18, \$529, for goods sold on 30 days' time. While relying upon nonpayment of the indebtedness of the defendant, as justification for refusal to make further deliveries on the order of May 19, 1919, the plaintiffs' attorneys, on their behalf, offered in this letter, on payment of the \$700.08 due, to have their client ship her 20 suits on that order at once and the balance from time to time, as fast as they could be obtained from the mills, at the prices stipulated therein. In this offer, there was but one condition, namely, payment of the \$700.08, one contingency, namely, ability of the plaintiffs to get the merchandise, and one qualification, namely, payment on receipt of goods. This proposition seems to have been declined upon the ground that the goods were ordered for delivery, October the 1st and for the fall trade, and that the terms were changed. Neither in the letter of September 24, nor the one of November 6, from the plaintiffs to the defendant, had mention been made of an alleged stipulation in the order, making delivery of the goods optional with the plaintiffs. Whether there was such a provision in the contract is one of the principal issues in the case. Printed at the top of one of the two carbon copies of the order is found a clause reading as follows:

"This order is accepted by us on the following terms and conditions only that we are not responsible for nondelivery of this order or any part thereof."

It was torn off of the original in detaching it from something to which it was pasted while in use in plaintiffs' place of business. From another copy left with the defendant, at the time the order was given, it has been cut off. The first reference to this stipulation is found in the letter from Bolsinger, Kuhn & Bolsinger to the defendant's attorneys.

Evidence bearing on the purpose of the order was introduced by both parties, the defendant insisting that the goods were ordered for use in a particular mercantile season, the fall; and the plaintiffs, that they were not bought for such purpose, but for all the year trade, as the quality of the goods indicates. Max Mantell, the defendant's husband and agent in charge of her business, testified that he had met one of the plaintiffs in Cincinnati in August, 1919, and that he had then had a conversation with him, in which Levine admitted that he had the goods and could make delivery thereof and would do so, if he would pay him \$5 additional on each suit. His statement as to this is not entirely clear, but that seems to be what he meant by what he said. Levine denies this positively and emphatically, saying he had not seen Mantell in Cincinnati at all, between the date of the order and some time in February, 1920. Some time after this conversation and prior to September 29, 1919, Mantell went to New York and purchased from the Rosenthals goods of the same quality or kind as those ordered from Levine Bros., at prices very much higher, and shipments thereof were commenced about the last of September. A circumstance relied upon as indicating that the purchase of these goods was not replacement of those ordered from the plaintiffs is the purchase of more suits in New York than had been ordered from them. The Levine Bros. order seems to have been for about 123 suits costing about \$1,850, and the purchase from the Rosenthals included about 150 costing about \$5,200. Shipments of the New York goods began September 29, 1919, and continued until March 2, 1920.

As to the clause making fulfillment of the order optional with the plaintiffs, or exonerating them from liability for nondelivery, Mantell and Levine agree that the original and copies contained it, at the beginning of their negotiations. As to everything else relating to it, they disagree; Mantell swearing he noticed it and refused to give the order with such a stipulation in it and that, upon his demand for an unconditional acceptance, Levine cut it off of his copy; and Levine swearing it was not noticed, or, if noticed, not commented upon or mentioned in any way.

[1, 2] As only \$148 of the amount for which the plaintiffs sued is indebtedness arising out of the order of May 19, 1919, and

all the balance thereof arose out of separate and distinct contracts, the damages claimed by the defendant would not constitute a right of recoupment except as to the sum of \$148. That right must arise out of the contract on which the plaintiffs' action is based. *Orrick & Son Co. v. Dawson*, 67 W. Va. 403, 68 S. E. 39. However, it is not relied upon here. The demand is asserted by way of set-off. As such, it is not good, for it is a claim for unliquidated damages. *Van Ralte Co. v. Solof Bros.*, 108 S. E. 488; *Christian v. Miller*, 3 Leigh. (Va.) 78, 23 Am. Dec. 251. In other words, if the plaintiffs had interposed an appropriate objection to entertainment thereof, the trial court would have been bound to exclude it. No objection having been interposed by demurrer to the plea, objection to the filing thereof, or otherwise, the question arises whether an appearance thereto by the plaintiffs and submission of the two cases with the implied consent of the parties on both sides bound the plaintiffs and enabled the trial court to hear and determine the cross-demand. In New York, the courts answer in the negative. Generally, however, it is held that the plaintiff by his failure to demur or object to the cross-pleading waives his right to put the defendant to an independent action. 81 Cyc. 728. Here, however, neither a demurrer to the plea, resistance to the filing thereof, nor objection to the introduction of evidence in support of it, was interposed. After all this acquiescence, it is clear that the plaintiffs would have no just right now to complain of the court's entertainment of the cause of action. *Mitchell v. Joyce*, 76 Iowa, 449, 34 N. W. 455, 41 N. W. 161; *Jacobson v. Aberdeen Packing Co.*, 26 Wash. 175, 66 Pac. 419. It is equally clear that this court ought not to eliminate the counterclaim *ex mero motu*, under the circumstances. The question relates to the rights of the parties rather than the jurisdiction of the court, and that right pertains to matter of form rather than substance. Abundant authority holds that parties may by consent waive process and submit their controversies to a court by agreement. Here, the plaintiffs have voluntarily appeared to the defendant's cross-action and made defense thereto. If a separate action had been instituted by the defendant and both actions matured and made ready for hearing, we have no doubt that the trial court, in its discretion and with their consent, could have ordered them to be heard together and tried by one jury. 4 Ency. Pl. & Pr. § 683.

[3] The ground upon which the verdict was set aside is not disclosed by the record, but, in argument, it seems to be conceded that the trial court based its action upon its overruling of an objection to instruction No. 2, given at the instance of the plaintiffs and reading as follows:

"The court instructs the jury that if they believe from the evidence that any witness in this case has willfully sworn falsely as to any material fact in this case, they may in their discretion disregard all testimony of such witness."

A similar instruction was approved in *State v. Perry*, 41 W. Va. 641, 24 S. E. 634. But later decisions have disapproved and condemned the substance of it, deeming it, when given, to be an unwarranted invasion of the province of the jury by the court. *State v. Wilson*, 74 W. Va. 772, 83 S. E. 44; *Siever v. Coffman*, 80 W. Va. 420, 92 S. E. 669; *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384.

[4] Although the jury may believe that a witness has knowingly testified falsely in respect to one fact, they have no right to disregard his testimony, in so far as they are convinced that it is true. The maxim, "*Falsus in uno, falsus in omnibus*," asserts nothing more than a presumption of fact, which, like all others, may be rebutted, and it is the duty of the jury so to apply it. They take all of the other evidence of the witness, subject to the presumption, but, in so far as they find the presumption has been rebutted, they should give effect to the truthful part of the testimony. This view accords with a decided weight of authority, as the rulings referred to in *Blashfield on Instructions*, vol. 1, §§ 380, 381, demonstrate.

[5, 6] To the argument that the error committed in the giving of this instruction was harmless and, therefore, did not justify the setting aside of the verdict, it suffices to say its sufficiency for such purpose was a question upon which the court below had to pass and render its decision. This adjudication, like all others of trial courts, must stand, unless it is found to be erroneous. As was held in *Hodge v. Charleston Interurban Railway Co.*, 79 W. Va. 174, 90 S. E. 801, there is no discretionary power in a trial court to grant a new trial, in the absence of legal ground therefor. But an error in the trial discovered by the judge or brought to his attention on a motion for a new trial constitutes a basis for the exercise of his judicial power, and there is no total absence of legal ground therefor. Having found this, he may invoke and use, in addition thereto, his general knowledge of the case, obtained by observation of the parties, witnesses and jurors and their appearances, demeanor and conduct throughout the trial. His judgment based upon the error and such knowledge is entitled to a high degree of respect, in the appellate court, and the judgment or ruling will be sustained in cases and under circumstances not justifying award of a new trial, by the appellate court whose knowledge of the case is derived from the printed record alone. Upon this ground, it is frequently held, that a stronger case must

be made out in the appellate court for a new trial than is required to sustain the action of the trial court, in awarding it. *Shipley v. Virginian Railway Co.*, 87 W. Va. 139, 144, 104 S. E. 297; *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385; *Black's Adm'r v. Thomas*, 21 W. Va. 709; *Miller v. Insurance Co.*, 12 W. Va. 116, 29 Am. Rep. 452; *Wilson v. Fleming*, 109 S. E. 810. Although this court, looking at the dry records, has never granted a new trial for the error in giving an instruction like the one now under consideration, this rule precludes reversal of the order complained of in this case; error in it not being clearly apparent.

To sustain the action of the trial court as well as to obtain rulings upon certain questions raised in the course of the trial, for guidance in the new trial contemplated, the attorneys for defendant in error have inserted several cross-assignments of error in their brief. One of them is founded upon the overruling of an objection to instruction No. 1 given for the plaintiffs. The instruction is based upon the nondelivery stipulation relied upon by the plaintiffs, and the criticism is that it assumes agreement upon it, or assent to it by the defendant. We are unable to discover such an assumption in its terms. Manifestly, it leaves it to the jury to say, from the evidence, whether there was such a stipulation in the contract. It says:

"If they (the jury) further believe from the evidence that the contract * * * contained a condition that the plaintiffs, *Levine Bros.*, were not to be responsible for the nondelivery of said order or any part thereof, and that the defendant purchased said goods on that condition," there could be no recovery of damages by the defendant.

[7] As *Mantell* promptly declined all overtures of compromise, made through *Bolsinger*, *Kuhn* & *Bolsinger* and otherwise, there is nothing in the contention that the testimony of *H. C. Bolsinger*, submitting and analyzing the correspondence conducted through his firm, with the defendant's attorneys, should have been excluded, as containing admissions made by *Mantell* in the course of an effort to compromise. *Mantell* stood firmly and unrelentingly upon her alleged contract from first to last.

[8] As the increases in prices imposed by the plaintiffs upon the firm of *Davidson & Preiser*, in their performance of a contract made with that firm, at about the date of the making of the contract with the defendant, were transactions *res inter alios acta*, the trial court properly rejected the evidence offered to prove them. *Eastburn v. N. & W. Railway Co.*, 34 W. Va. 681, 12 S. E. 819.

[9] Lack of evidence of the insolvency of the defendant justified the court in its modification of defendant's instructions No. 2

and 4, so as to eliminate assumption there-in of the existence of such evidence. A court cannot properly give an instruction having no basis at all in the evidence. *Kuykendall v. Fisher*, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94, 11 Ann. Cas. 700.

[10] Though this case does not fall strictly within the rule enunciated in *Sammons & Piercy's Ex'rs v. Hawvers*, 25 W. Va. 678, reversing a judgment and granting a new trial, for denial to the defendant of the right to open and close the argument, the plaintiff's demand not having been denied in the pleadings and the only matters in controversy being payment and usury in the debt. Here, the plaintiffs' debt was denied by a plea; nevertheless, the trial court should have observed that rule and applied it, because the debt was admitted in the evidence, and the only issue actually tried arose on the defendant's plea of set-off. It is unnecessary to say whether this error, if any, justified award of the new trial, but it is necessary to say what the procedure shall be in the new trial, and we are of the opinion that it should conform to the ruling in the case just cited. This case falls clearly within the spirit of that rule.

For the reasons stated, the order complained of will be affirmed.

(90 W. Va. 564)

MANLEY v. BROWN. (No. 4461.)

(Supreme Court of Appeals of West Virginia.
March 21, 1922.)

(Syllabus by the Court.)

1. Waters and water courses §119(2)—Owner of ditch is liable to adjoining owner for erosion and loss of subjacent support of structures.

While an owner of real estate may construct thereon a drain for the purpose of gathering and conveying thereover the surface water, he will be liable for damages sustained by an adjoining owner, from the washing away of his soil by the erosion of the water in the ditch, as well as for damages to any structures upon the land of such adjoining owner, which are injured by being deprived of their subjacent support by the erosion of the water in such drain.

2. Waters and water courses §125—Measure of owner's damages from erosion from drain held to be the cost of repairs and restoring property to former condition.

Where an injury to property is inconsiderable in extent as compared with the value of the property, and can easily be repaired and the property restored to the condition in which it was prior thereto, and the owner does so restore it, ordinarily his measure of damages is the cost of making such repairs and restoring the property to its former condition.

Error to Circuit Court, Mingo County.

Suit by Addie Manley against D. Brown, before a justice of the peace. Judgment for plaintiff, and on appeal to the circuit court, verdict and judgment for plaintiff, and the defendant brings error. Affirmed.

Thomas West, of Williamson, for plaintiff in error.

Stafford & Rhodes, of Williamson, for defendant in error.

RITZ, J. Plaintiff brought this suit before a justice of the peace to recover damages from the defendant for injury to a wall, constructed upon her lot next to the lot of the defendant. She had a judgment before the justice, and, on appeal to the circuit court of Mingo county, a trial before a jury resulted in a verdict in her favor for \$175, upon which the court rendered judgment, and it is to review this judgment that this writ of error is prosecuted.

The plaintiff and the defendant are the owners of adjoining lots fronting on Fifth avenue in the city of Williamson. The front of these lots is somewhat lower than the rear, and the defendant's lot is also lower than the plaintiff's lot, so that the surface drainage is generally toward the street and the defendant's lot. Prior to the time either of the parties to this suit acquired these properties there was built along the line of plaintiff's lot, where the same adjoins the lot of the defendant, a stone wall. The purpose of this wall was to permit the lot to be filled to some extent on that side so as to make it level. This wall was 2 feet wide at the base, and tapered to a width of 18 inches at the top. It was constructed upon the surface of the ground as it then existed, and was about 4½ to 5 feet high at the end where it intersected the street line, and, because of the elevation of the ground, the height was reduced as the wall extended toward the rear of the lot. The surface of the defendant's lot was on the same level as the base of this wall. The plaintiff's lot had been filled in behind the wall, so that the surface of it was somewhat higher than the surface of the defendant's lot.

It appears that the defendant had some trouble in protecting his basement from the surface water. The water from the alley in the rear of the lot, as well as the water collected upon his lot, drained into his basement in times of rain and freshet, and flooded the same. In order to overcome this, he dug a ditch along the side of his lot next to the plaintiff's wall some 12 to 14 inches deep, through which the surface water was conveyed to the street and cast into a sewer at that point. At the time the ditch was dug no injury was done to the plaintiff, but, fearing that the water running through the ditch

would wash away the soil and undermine her wall, and cause the same to fall, she called the defendant's attention to the danger but he declined to take any steps to overcome it. According to the evidence, this ditch was in use for the purpose of conveying the surface water off of the defendant's lot for something like a year. By this time the process of erosion had been carried on to such an extent that the soil under the plaintiff's wall had been washed away, and the wall undermined so that it fell. The plaintiff then called upon the defendant to replace the wall, and, upon his refusal to do so, she had the wall rebuilt, and brought this suit to recover the amount expended by her in restoring the same.

[1] The defendant insists that he is not liable, for the reason that the ditch was dug upon his own land, and that he was under no obligation to furnish lateral support to plaintiff's lot, burdened as it was by this stone wall, but only in its natural state, and that, inasmuch as the plaintiff knew that her lateral support was being taken away, she was under the obligation to take such steps as might be necessary to protect her wall. This contention might be correct if the basis of this suit was deprivation of lateral support. Such, however, is not the case. The evidence conclusively shows that the damage here did not come from any failure of the lateral support, but because the subjacent support had been removed. It is not at all likely that a wall such as this would have fallen had not the water washed under it and deprived it of subjacent support. It was 2 feet wide at the base, and not of sufficient height to impose such a burden upon the soil as likely to cause it to fall from failure of lateral support, and the truth is, as shown by the evidence, that it did not so fall; that it remained uninjured until the soil was washed from under it. Now there is no doubt that the defendant had a right to dig a ditch up-

on his own land for the purpose of carrying off the surface water, or for any other proper purpose, but when he does this, he must so construct his drain or ditch as that it will not encroach upon the adjoining owner and do him damage. If it does so encroach, he will be liable for the resulting injury. *Farnham on Waters and Water Rights*, § 926; *Armstrong v. Luco*, 102 Cal. 272, 36 Pac. 674; *Harrison v. Great Northern Ry. Co.*, 3 Hurlstone & Coltman, 231, 159 Eng. Reprint. 518. It follows from this that the defendant is liable to the plaintiff for the injury sustained by her.

[2] The defendant insists, however, that the plaintiff was not entitled to recover the full amount paid by her for restoring the wall and repairing the damage; that the true measure of damages is the difference between the value of the plaintiff's property before the wall fell and immediately afterward. Ordinarily it is true that the measure of damages for an injury to real estate is the difference in the value of it immediately before and immediately after the injury is inflicted. But can it be said that the recovery of damages in this case is any more than another way of applying that rule? The injury inflicted as compared with the total value of the property was inconsiderable, and in such cases it has been held that the injured party may repair the damage done him and recover the cost of making such repairs. In other words, he may restore his property to the condition in which it was before the injury was inflicted, and the cost of doing this will represent the exact difference between the value of the property before and after the injury. *Gorby v. Bridgeman*, 83 W. Va. 727-734, 99 S. E. 88; *Stillwell & Bierce Mfg. Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035.

We find no error in the judgment complained of, and the same is affirmed.

(90 W. Va. 590)

LANDSMAN-HIRSHEIMER CO. v. RADWAN. (No. 4139.)(Supreme Court of Appeals of West Virginia.
March 21, 1922.)*(Syllabus by the Court.)*

1. Judgment \Leftrightarrow 184—Prescribed affidavit must have been served on defendant to warrant judgment on open account, by motion after notice.

To be available for the purposes and functions assigned to it, by provisions of section 6, c. 121 (sec. 4726), Code, the affidavit, therein prescribed, must have been served on the defendant in the action, and service thereof in the time and manner provided must be proved by a return or otherwise.

2. Judgment \Leftrightarrow 185—In proceedings for judgment on account for merchandise, by motion after notice, affidavit's omission of reference to notice and demand held fatal.

Omission of any reference to the notice and the demand or demands therein stated, in such affidavit, is fatal and deprives it of all force and effect.

3. Judgment \Leftrightarrow 185—Affidavit must have been made before or at the time of service of copy of account for judgment by motion after notice.

To be effective, such affidavit must have been made before or at the time of service of the notice and a copy of the account to which it is annexed.

4. Judgment \Leftrightarrow 185—Judgment on open account based on fatally defective affidavit held erroneous.

A judgment taken upon an open account, the amount of which affirmatively appears by the judgment order to have been proved only by a fatally defective affidavit, on an inquiry of damages, in a proceeding for judgment by motion, under the provisions of section 6, c. 121 (sec. 4726), Code, in which the defendant appeared on execution of the writ of inquiry, and objected to the use of the affidavit, and had his exceptions to the rulings of the court preserved upon the record, is erroneous.

Error to Circuit Court, Wyoming County.

Action by the Landsman-Hirschelmer Company against J. A. Radwan. Judgment for plaintiff, and the defendant brings error. Reversed and remanded.

Grover C. Worrell, of Mullens, for plaintiff in error.

POFFENBARGER, P. The judgment on this writ of error, taken for \$1,000, on an open account for merchandise sold and delivered, under the provisions of section 6 of chapter 121 (sec. 4726) of the Code, by motion after notice, is complained of on the ground of alleged failure to comply with

essential requirements of said statute and other provisions of the law.

[1-3] Although a copy of the itemized account seems to have been "served upon the defendant" with the notice, and in sufficient time, it was not accompanied by the affidavit required by the statute, for the affidavit bears a date four days later than that of the service of the notice. There is no return of service of the affidavit. As the statute, being in derogation of the common law, falls under the rule of strict construction (*Bank v. Thomas*, 75 W. Va. 321, 83 S. E. 985), there must be an affidavit of the kind required, bearing a date not later than that of service of the notice, and also a return of service of the affidavit, as well as one of service of the notice. The affidavit is defective and would not suffice for the purposes prescribed by the statute, if it had been made and properly served in time. It makes no reference to the notice. The plaintiff is required to swear he verily believes there is due and unpaid a certain amount "upon the demand or demands stated in the notice." Omission of reference in the affidavit, to the demand or demands sued for, as shown by the declaration or notice, is fatal. *Kingman Mills v. Furner*, 109 S. E. 600, not yet officially reported. There are no doubt other defects in the affidavit, which need not be noticed.

The defendant's demurrer to the notice and motion to quash it having been overruled, he took an exception, but tendered no plea. Upon the execution of the writ of inquiry, he appeared and objected to the filing of the affidavit on the ground of insufficiency, but the court overruled his objection, accepted the affidavit, treated it as sufficient evidence to prove the amount of the plaintiff's demand, and rendered the judgment complained of. The defendant, having excepted to the overruling of his objection, moved the court to set aside the finding, and again excepted to the overruling of his motion to set aside.

[4] As an open account is not within the statute dispensing with necessity for a writ of inquiry, section 45, c. 125 (sec. 4799), Code, it was necessary for the plaintiff to prove the amount of its debt. Only such an affidavit as the statute prescribes can be substituted for evidence of the kind usually required to prove the amount of an account. Section 46, c. 125 (sec. 4800), Code, authorizes the use of no affidavit save the one prescribed by it, which is the same as the one prescribed by section 6, c. 121, Code. The affidavit used in this case does not comply with the requirements of either statute, in point of form or substance, wherefore it could not properly be used as evidence, and the error in the admission thereof as such was not waived.

Being clearly erroneous, the judgment will be reversed, and the case remanded.

(90 W. Va. 541).

NEW EAGLE GAS COAL CO. v. BURGESS.
(No. 4334.)(Supreme Court of Appeals of West Virginia.
March 21, 1922.)*(Syllabus by the Court.)*

1. Judgment \S 490(2)—May be attacked directly or collaterally where founded upon a void process.

A judgment founded upon a process void because not issued against the person intended to be sued is a nullity, and may be assailed either directly or collaterally.

2. Judicial sales \S 50(1)—Purchaser is charged with everything appearing on face of record affecting title.

A purchaser at a judicial sale is charged with everything appearing on the face of the record affecting the title acquired by him.

3. Judicial sales \S 53—In cases of default judgment the purchaser must see if the writ forms a proper foundation for the judgment.

In all cases where there is a judgment by default, the writ on which it is based is a part of the record, so a purchaser at a judicial sale under a default judgment must look, not only to the record of the judgment, but also to the writ to see whether there is a proper foundation for the judgment.

Error to Circuit Court, Nicholas County.

Action by the New Eagle Gas Coal Company against Matt Burgess in detinue for the possession of one electric generator and a steam engine. Verdict for defendant, plaintiff's motion for new trial denied, and plaintiff brings error. Reversed, and new trial awarded.

Alderson & Breckinridge, of Summerville, and Wm. T. Lively, of Charleston, for plaintiff in error.

G. G. Duff, of Summerville, and H. C. Hml, of Lockwood, for defendant in error.

MEREDITH, J. This is an action in detinue for the recovery of the possession of one electrical generator and a steam engine. The jury returned a verdict for the defendant. The court refused to set aside the verdict and grant plaintiff a new trial, and the case is here on writ of error.

The defendant claims title to the property through his purchase at a sale under an execution, and plaintiff attacks the validity of the judgment upon which the execution was issued. The Eagle Gas Coal Company, a corporation, in 1917, was the owner of a coal mining leasehold in Nicholas county, under a lease from the Federal Coal Company, and had a mine in operation. On October 6, 1917, it leased 4 houses from Benjamin Darlington, for the term of 13 months, the rent for the term to be \$240, \$120 to be paid November 1, 1917, and the balance to be paid in monthly

payments of \$10 each. The \$120 was paid, and, about December 15, 1917, Darlington conveyed these 4 houses to the Bank of Gauley, and the bank appointed him agent to collect the rents. The houses appear to have been occupied by employees of the Eagle Gas Coal Company. No further rents appear to have been paid. In August, 1918, the Eagle Gas Coal Company sold and conveyed its mining leasehold to another corporation, called New Eagle Gas Coal Company. The purchaser did not assume any of the selling company's debts, nor does it seem to have taken over all the seller's property. It took possession of the mining property and operated it till about March 1, 1919. The two corporations were not only distinct so far as their organizations were concerned, but no one interested in the one was in any wise interested in the other. There was no interlocking as to stockholders, directors, or officers.

The purchasing company in the fall of 1918 bought and had shipped for its plant the electric generator and steam engine in controversy. This property was unloaded on a private siding not owned by the company, where it remains. About March 1, 1919, when the plant shut down, the New Eagle Gas Coal Company employed J. V. Bailey to look after its mules, to collect its rents, and to make collection of some claims. About March 5, 1919, the Bank of Gauley sued out a distress warrant against the Eagle Gas Coal Company for rent. Just what this was levied on does not appear, but some sort of levy was made, and the constable, who had the warrant, demanded and obtained the keys to the houses of the company from Justice Bailey. Justice Bailey was then employed by the constable to look after the property for him, and he says that thereafter he did not represent the New Eagle Gas Coal Company, unless it would be as justice of the peace in collecting some claims due it.

The bank, probably seeing that it could not collect full payment through its distress warrant, on March 8, 1919, sued out an attachment against the Eagle Gas Coal Company before Justice J. M. Grose for \$230.62 for rent. The New Eagle Gas Coal Company had never assumed the liability of the Eagle Gas Coal Company under the Darlington lease, but it had leased some other houses from the bank; just what they were or what rent was to be paid is not clear, but the whole amount of this rent could have been very little, if anything at all. Darlington, as agent of the bank, swore out the attachment, and, as a basis of its claim, filed the original lease between him and the Eagle Gas Coal Company, covering the 4 houses he had conveyed to the bank, and his affidavit states "that the claim of the plaintiff against the Eagle Gas Coal Company, a corporation, defendant, is for money due for rental of 4 certain houses."

It appears that an account was also filed,

but, in the trial of the present case, this paper was missing and its contents were not proved. The following return was made on the summons:

"Received this writ March 8, 1919, served by delivering a copy of this writ with indorsements thereon to J. V. Bailey, agent for the within named Eagle Gas Coal Co., a corporation, in person, in said Nicholas county.

"John W. Mullins, Special Constable.

"Subscribed and sworn to before me this the 18th day of March, 1919.

"C. A. Neal, Notary Public,

"Nicholas County, W. Va.

"My commission expires March 14, 1926."

On the return day, March 22, 1919, on motion of plaintiff, the summons was amended by inserting the word "New" so as to make the "New Eagle Gas Coal Company" defendant instead of "Eagle Gas Coal Company," as originally issued. The same change was made in the order of attachment, but no change was made in the return on the summons. There is some evidence tending to show that Justice Bailey appeared for the New Eagle Gas Coal Company on the return day, and that it was he who suggested the change in the name. It is clear, however, that he was not authorized by that company to appear for it, nor did he intend to do so. He was a justice of the peace and could not legally act as agent or attorney for any party in the case without committing a crime, which, we are sure, he did not do nor intend to do. Section 22, chapter 50, Code (sec. 2576).

Justice Grose entered judgment on March 22, 1919, in favor of the Bank of Gauley, for \$236.97, and costs. No action was taken on the attachment further than to levy it on: 1 engine and dynamo; 1 lot or stock of merchandise; and store fixtures, such as scales, show cases, refrigerators; 2 mules; 1 horse; about 30 mine cars; 1 pump; 1 pair coal scales, and one set of blacksmith tools, appraised by the constable at \$5,340. Execution was issued on the judgment, erroneously stating that the judgment was rendered March 24, instead of March 22, 1919, and placed in the hands of M. L. Oruikahanks, constable, who levied on the dynamo and steam engine involved in this suit and, after advertisement, sold them at public auction for \$300, though they were worth at least \$3,000, and cost about \$4,200, and had never been used. The defendant became the purchaser and claims title through that sale. The property has never been moved, but defendant took possession of it and built a shed over it to protect it from the weather. It may not be improper to remark that, if the proceedings before the justice were in entire good faith, it is rather strange that some of the other property levied on under the attachment was not sold, as there was much more than sufficient of that to pay the judgment, and property worth at least \$3,000

would not have been sacrificed at \$300. No explanation was made, and we are left to the conclusion that some one planned to obtain valuable property for a trifle. Happily the best laid plans sometimes go awry. The New Eagle Gas Coal Company brings this action for the recovery of the possession of the property sold, and assails the title of defendant, and claims title in itself, notwithstanding the sale to Burgess. It had no actual notice of the sale; we think that is conclusively shown by the record.

[1, 2] This is a collateral attack on the judgment obtained by the Bank of Gauley against the New Eagle Gas Coal Company. If the judgment is merely erroneous it can not be attacked collaterally. *Pates v. St. Clair*, 11 Grat. (Va.) 22. But a judgment obtained without process is not a judgment, it is a nullity; and may be declared void by every court in which it is called in question, whether collaterally or directly. *Roberts v. Hickory Camp Coal & Coke Co.*, 58 W. Va. 276, 52 S. E. 182; *Headley v. Hoopengartner*, 60 W. Va. 626, 55 S. E. 744; *Board of Education v. Berry*, 62 W. Va. 433, 59 S. E. 169, 125 Am. St. Rep. 975; *Brenham v. Smith*, 120 Va. 30, 90 S. E. 657; *Freeman on Judgments*, § 117; *Black on Judgments* (2d Ed.) § 218. "The purchaser at a judicial sale is charged with notice of every fact appearing upon the face of the record affecting the title acquired by him." *Board of Education v. Berry*, supra.

[3] In all cases where there is a judgment by default, the writ on which it is based is a part of the record, so a purchaser at a judicial sale under a default judgment must not only look to the record of the judgment but also to the writ, to see whether there is a proper foundation for the judgment. *Nadenbush v. Lane*, 4 Rand. (Va.) 413; *Wainwright v. Harper*, 3 Leigh (Va.) 270; *Amiss v. McGinnis*, 12 W. Va. 371; *Netter-Oppenhimer & Co. v. Elfant*, 63 W. Va. 99, 59 S. E. 892; 4 Minor's Inst. 940.

To sustain the judgment, counsel for defendant rely upon two grounds: First, that the New Eagle Gas Coal Company appeared to the action by its agent, Justice J. V. Bailey. We think this position is wholly untenable for three reasons: (1) He was not authorized by the company to appear for it; (2) he swears he did not enter any appearance, and we think the evidence is hardly conflicting on this point; and (3) it can hardly be conceded that he committed a crime in order to accommodate the plaintiff, and to the injury of the party whom the plaintiff in the action claims employed him. Second, that the summons was amended by the justice, on motion of the bank, so as to make the action proper and regular against the New Eagle Gas Coal Company. That it was amended there is no doubt; nor is there any doubt that from there on the proceedings be-

fore the justice to judgment were regular. But was such an amendment authorized? We think not. The summons was served on Bailey as agent of the Eagle Gas Coal Company, a corporation that was then in existence, and it was so returned executed. It was then amended so as to be a summons against the New Eagle Gas Coal Company, another and an entirely separate corporation which was also in existence. These two corporations were just as distinct entities as are two individuals. It is not a question of name, it is one of substance. If a summons named John Smith as defendant and was served upon the man intended, though it turned out that his real name was John Jones, the summons could be amended so as to show the right name of the person sued. *Van Fleet, Collateral Attack*, § 367; *Stout v. B. & O. R. R. Co.*, 64 W. Va. 502, 63 S. E. 317, 131 Am. St. Rep. 940; *Black, Judgments*, § 213; section 23, chapter 50, Code 1913 (Code 1913, § 2582); but in this case the party intended to be sued was the Eagle Gas Coal Company, not the New Eagle Gas Coal Company. The former company was the lessee under Darlington, and also lessee under the bank, and, as showing that intent, the fact that the bank filed the lease with the justice as a basis for its claim is controlling.

We, therefore, hold that the justice had no right to amend the summons so as to make the New Eagle Gas Coal Company a party defendant, and in so doing he acquired no jurisdiction to render judgment against it. The justice having no jurisdiction, it follows that his judgment rendered is void, as are all the proceedings which followed thereon, including the execution and sale, and the defendant acquired no title to the property in suit.

There are many errors relied upon by plaintiff, but we deem it unnecessary to discuss them further than to say that plaintiff's instruction No. 4, directing the jury to find for the plaintiff, should have been given; to refuse it was error.

The judgment is reversed, the verdict of the jury set aside, and a new trial awarded.

(90 W. Va. 559)

STATE v. LATTIMAR. (No. 4455.)

(Supreme Court of Appeals of West Virginia.
March 21, 1922.)

(Syllabus by the Court.)

Criminal law §913(1)—Conviction set aside for failure to accord fair and impartial trial.

Where a person has been arrested for an alleged crime, committed on the day of the arrest, and on the day following is indicted, tried, convicted, sentenced to hang, and immediately taken to the penitentiary for that purpose, and it appears that he has been given

no time to prepare his defense, was assigned counsel after he announced that he was ready for trial, and pleaded not guilty, and the judge certifies that he knew that feeling was running high against the accused in and about the courthouse, and that he had some fear of mob violence being inflicted upon the accused if a speedy trial was not had, and it appears that no witnesses were summoned for the defendant, no motion made for change of venue, improper evidence admitted on the trial without objection on the prisoner's part, and a feeble and perfunctory defense interposed, the appellate court will set aside the verdict and award the prisoner a new trial, because he has not been accorded a fair and impartial trial.

Error to Circuit Court, Mingo County.

Harry Lattimar was convicted of rape, and he brings error. Reversed and new trial awarded.

Thomas West, of Williamson, for plaintiff in error.

E. T. England, Atty. Gen., and R. Dennis Steed, Asst. Atty. Gen., for the State.

LIVELY, J. About 6 o'clock p. m. of September 7, 1921, defendant, a negro man, was arrested in the city of Williamson in Mingo county, and placed in the county jail. The next morning he was taken to the courthouse, circuit court then being in session, and was informed that he had been indicted for the crime of rape alleged to have been committed upon Wanda Varney, a white girl, about 8 years old, on the day of his arrest. He immediately announced that he was ready for trial, and, upon being arraigned, pleaded not guilty. The court then asked if he had counsel, and the prisoner replied in the negative. Upon being asked if he desired counsel, he replied in the affirmative, and counsel was then assigned to defend him. The trial proceeded immediately, resulting in a verdict of guilty as charged, followed by sentence of death, to be executed on October 17, 1921. That afternoon or evening he was placed on a passenger train and conveyed to the penitentiary. The crime was alleged to have been committed on the 7th and on the 8th the indictment was returned, trial had, sentence pronounced, and the prisoner on his way to the penitentiary to be hanged. An inspection of the evidence taken discloses that much of the state's evidence was hearsay, to which no objection was interposed. Defendant had no witnesses summoned, although it appeared that the alleged crime was committed in the daytime, in a shanty, a very short distance from other inhabited houses, and that there were numerous persons in the near vicinity. Cross-examination of the witnesses was perfunctory and feeble. The prisoner was placed on the stand and asked his name, where he worked, and if he was guilty or not guilty.

He gave his name, where and for whom he worked, and answered that he was not guilty. The examination then ceased. It is unnecessary to detail the evidence of the prosecution, although it is unsatisfactory in many particulars. Possibly it is sufficient to sustain the verdict, and if it had been apparent that the verdict had been arrived at by calm and impartial deliberation, uninfluenced by the sinister circumstances dominating the whole trial, it would likely not be disturbed.

What motive induced the extraordinary speed and result of this trial? Has the prisoner had a fair trial? Has he been accorded due process of law and equal protection of the laws as guaranteed by our Constitution?

The reason of this exceedingly hurried conviction is apparent in a "Statement by the Court" which has been made a part of the record and which is in substance as follows:

"* * * that the indictment in the above styled case was duly returned into court by a regularly constituted grand jury on the morning of the 8th day of September, 1921, charging the defendant, Harry Lattimar, with rape upon one Wanda Varney, alleged to have been committed on the day before. I knew that feeling was running high against the accused in and about the courthouse and had some fear of mob violence being inflicted upon the accused if speedy justice was not meted out to him by the court, and I caused the accused, who appeared intelligent, and certainly of mature years, and competent to take care of himself upon the occasion, to be brought immediately before the court, and he announced ready for trial immediately upon inquiry, and entered his plea of not guilty.

"I then inquired if he had counsel, and being advised that he had not, and on being asked if he desired counsel and he having answered in the affirmative, * * * a young, active and reputable attorney of the Mingo county bar was appointed by the court to represent the defendant at the trial and the trial proceeded.

"On motion of the defendant by his attorney this statement is made a part of the record of this case, this the 10th day of October, 1921, and at the same term of court at which the defendant was tried."

The mob has dictated this conviction. The bloodthirsty mob spirit permeated the atmosphere of the trial, and had its effect upon court and jury. It is true that no effort was made either for continuance or change of venue. Does not this of itself impel the conclusion that fear of a lynching influenced the deliberate judgment of the court and overawed the defense? Under the stress of this situation it would not have been surprising if the prisoner had pleaded guilty, thereby hoping to escape the threatening mob, and thus prolong his life. What would have followed if the jury had found that the evidence was not conclusive of guilt beyond a reasonable doubt? There would likely have been an appeal to the more inflamed

judgment of self-constituted judges, with the usual results. The defendant may be guilty; that does not concern us. But he is entitled to a fair and impartial trial, to the calm, deliberate, and uninfluenced judgment of his peers. Orderly and constituted government demands such trial. It is a safeguard in which all members of society are interested, and which should be jealously upheld and guarded. A judicial lynching is a graver and more startling crime than a lynching by the irresponsible rabble. It undermines the foundation of orderly government, and weakens respect for law and order. Much of the success of any form of government depends upon the opinion of those governed, of its power to protect them in the administration of the laws, and in the wisdom and integrity of those who govern. When the courts do not uphold the laws, respect for law and for government ceases. There should be no compromise with the spirit of lynching for any crime. The mob in Jerusalem was clamoring to Pilate to crucify the Saviour. He "washed his hands" of guilt, and released the Christ to the "tender mercies" of his accusers, thereby perpetrating the greatest judicial crime of the ages. The representative of imperial Rome compromised with the congregated doers of evil. It is little wonder that the empire declined and fell. What we have said is entirely impersonal and is not to be considered as reflecting upon the conduct of the officials in charge of the case. The circumstances may have impelled the choice of what was then considered the lesser evil. The duty is therefore more imperative upon this court to annul the result brought about by a choice of evils, and to preserve to every member of society, however humble he may be, or however guilty he may be, the right of fair and impartial trial. The unusual hurry to remove the prisoner from the city after conviction is significant of the intensity of feeling against him, and indicative of the fear of the officers of violence.

But we are not left to circumstances alone for our conclusions. The learned judge states, "I knew that feeling was running high against the accused in and about the courthouse, and had some fear of mob violence being inflicted upon the accused." The psychological influence of public opinion upon a jury is well recognized. It reaches a jury unperceived; but when it is plainly discernible in and about the courthouse and in the presence of the jury, the presumption is almost conclusive that the jury's verdict was affected by it. In the case of *Woodfolk v. State*, 81 Ga. 558, 8 S. E. 724, while the attorney for the state was making the closing argument, the crowd in the courtroom applauded and some persons back in the audience cried, "Hang him! hang him!" The presiding judge rapped for order and gave

instruction that the disorderly persons be removed from the courtroom—an order which was not carried out. The Supreme Court said that the judge's action was not drastic enough; that they should have been severely punished, and taught that the trial of a man for his life, however heinous the crime charged against him might be, was a serious and solemn thing; and that the law would not permit a mob to interfere either by applause, or by threatening and exciting cries. Although the members of the jury made affidavit that this incident made no unfavorable impression on their minds, the Supreme Court set aside the verdict. However, other errors appeared in that trial, and the reversal was not wholly upon the incident detailed above. Where the public has been so violently excited as to appear in the courtroom and surround the courthouse during the trial of a capital offense, in such manner as to overawe the court and jury, it will afford ground for presumption that justice has not been done; that a fair trial has not been accorded, and the appellate court will not be slow to set aside the verdict. The courts in this country universally uphold the constitutional guaranty of a fair and impartial trial to the accused, and there are many cases where verdicts have

been set aside upon much less ground than appears in this case. *Doyle v. Commonwealth*, 100 Va. 808, 40 S. E. 925; *Myers v. State*, 97 Ga. 76, 25 S. E. 252; *State v. Weldon*, 91 S. C. 29, 74 S. E. 43, 39 L. R. A. (N. S.) 667, Ann. Cas. 1913E, 801; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; *People v. McMahon*, 244 Ill. 45, 91 N. E. 104; *State v. Wilcox*, 131 N. C. 707, 42 S. E. 536.

It will be observed that when the prisoner was arraigned for trial he announced himself ready, and then pleaded not guilty. He was then asked if he desired counsel, and answered in the affirmative, when counsel was assigned to defend him. While it is probable that this failure to assign counsel before plea and announcement of readiness for trial would not be error, under our decision of *State v. Yoes*, 67 W. Va. 546, 68 S. E. 181, 140 Am. St. Rep. 978, it is another circumstance to show that the prisoner was rushed into trial with undue haste, and without proper regard for his constitutional rights.

We are of the opinion that the prisoner has not had a fair trial, and that the lower court committed palpable error in not sustaining his motion for a new trial.

Reversed, verdict set aside, and new trial awarded.

(128 N. C. 313)

VAUGHN v. FALLIN. (No. 354.)

(Supreme Court of North Carolina. April 12, 1922.)

1. Venue \Leftrightarrow 5(4)—Suit to cancel contract for purchase of land involves "interest in lands."

A suit by the purchaser of lands to cancel his contract for the purchase, and notes given therefor, and to recover the sums already paid, is a suit involving a "right or interest in real property," which must be tried in the county in which the land is situated under C. S. § 463.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest (In Property).]

2. Venue \Leftrightarrow 2—Right of plaintiff to select forum yields to public policy expressed in statute.

The general rule that a party seeking the aid of a court may select the forum is subject to exception, where such selection is prohibited by public policy as expressed by statute.

Appeal from Superior Court, Rockingham County; Long, Judge.

Action by J. M. Vaughn against W. T. Fallin. From an order denying defendant's petition to remove the cause to another county, defendant appeals. Reversed, and case removed.

This is an action begun by plaintiff on the 5th day of July, 1921. The complaint was filed August 24, 1921. Plaintiff alleges that in the year 1920 the defendant owned a large tract of land in the county of Stokes; that during said year he divided up said land for sale and made blueprints thereof; that on the 29th day of May, 1920, the defendant after due advertisement held an auction sale of said property, and at that time had the blueprints aforesaid showing to prospective purchasers the boundaries, and representing to them the number of acres in the subdivision of the land; that plaintiff was at the sale, and, relying upon the statements and representations and blueprints of the defendant, bid off tracts No. 1 and No. 3, as shown on the blueprints; that at the time of the sale some question arose of a disputed boundary at the northwest corner of lot No. 1; that the defendant stated to the plaintiff that there were 4 or 5 acres in the dispute and that they would allow 10 acres off for that dispute; that the original tract No. 1 contained 75 acres; that the land in dispute was a small block in the northwest corner of lot No. 1; that the defendant represented that the line had been definitely settled and that he could convey a clear title to the same, according to the blueprints, less the 10 acres; that the plaintiff purchased tracts No. 1 and No. 3 as a whole, and would not have purchased one without the other, and would not have purchased either tract except upon the representation made by the de-

fendant; that the defendant well knew that his statements aforesaid were false and fraudulent, and were made with the purpose of deceiving the plaintiff, and did deceive the plaintiff; that immediately after the sale the plaintiff, not knowing that false representations had been made to him as to the title and number of acres contained in the land by the defendant, paid to the defendant \$2,339.75, which was one-fourth of the total purchase price of both tracts of land less the 10 acres which were agreed to be taken off to cover the disputed land; that plaintiff relied upon the statements of the defendant as being true, and did not know that the representations made to him were false until about one year thereafter, when the defendant sent to the plaintiff a deed to said lands, which deed showed that it was short 29.6 acres, whereupon plaintiff refused said deed and refused to make further payments on said land; that the plaintiff was to pay one-fourth of the purchase price in cash, which he did as hereinbefore set out, on the 29th day of May, 1920, and was to pay the remainder in one, two, and three years from the date of sale; that plaintiff is entitled to have defendant refund to him the said sum, so paid by him, together with interest, and is further entitled to have the contract declared null and void and any and all notes or obligations which he may have executed to the defendant surrendered and canceled. The prayer to plaintiff's complaint is as follows:

"Wherefore plaintiff prays judgment against the defendant for the sum of \$2,339.75, with interest on said sum at the rate of 6 per cent. from the 29th day of May, 1920, until paid, and to have said contract and any and all notes which plaintiff may have signed surrendered and declared null, void and canceled of record, and the cost of this action, and such other and further relief as the court may deem just and proper."

Defendant filed a petition for removal of the cause from Rockingham county to Stokes county, on September 1, 1921, before the time for answering expired. At the same time, defendant had notice served upon plaintiff attaching a copy of his petition notifying the plaintiff that the defendant would on the 21st day of November, 1921, at 11 o'clock a. m., before his honor, B. F. Long, judge, at the courthouse at Wentworth, N. C., ask for an order removing the cause to the superior court of Stokes county, as requested in his petition. This notice was duly served on the 6th day of September, 1921. The defendant filed his answer to plaintiff's complaint denying all of plaintiff's allegations, and asking for affirmative relief, to wit, specific performance, and also foreclosure of plaintiff's right, title, and interest in the land by reason of his contract of purchase, to the end that from the proceeds of sale

the indebtedness due by plaintiff to the defendant may be discharged, and the balance remaining paid to plaintiff. This answer was filed on September 17, 1921. The plaintiff filed his reply on November 23, 1921.

The cause came on to be heard at the November term of the superior court of Rockingham county, upon defendant's petition demanding the removal of the cause to the county of Stokes. Defendant's motion was denied, and to this ruling of the court the defendant excepted and appealed.

King, Sapp & King, of Greensboro, for appellant.

J. L. Roberts, of Madison, and McMichael, Johnson & McMichael, of Winston-Salem, for appellee.

WALKER, J. [1] It appears that the land which is the subject of this controversy is situated in the county of Stokes, and this action to cancel and set aside the notes and contract for the sale and purchase of the same was brought in the county of Rockingham. The motion is to change the venue, or place of trial, to the county of Stokes. The motion was denied, upon the ground, we presume, that the action was not for the recovery of real property or for the determination of any interest therein, or for injuries thereto (Pell's Revisal, § 419; Consol. Stat. § 463). Those sections provide that—

"Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the cases provided by law:

"(1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property

"(2) Partition of real property.

"(3) Foreclosure of a mortgage of real property

"(4) Recovery of personal property."

We cannot see why this case is not governed by the principle stated in *Council v. Bailey*, 154 N. C. 54, 69 S. E. 760. There the plaintiff sought to subject the land by sale thereof to the payment of the purchase money or to compel specific performance by the defendant of the contract to buy the land which was situated in the county of Rowan, while the action was brought in the county of Catawba. Upon a motion by defendant to change the place of trial to Rowan county, we held that the case should have been removed as prayed for by the defendant, and reversed the contrary judgment, citing *Fraley v. March*, 68 N. C. 160; *Connor v. Dillard*, 129 N. C. 50, 39 S. E. 641; *Bridgers v. Ormond*, 148 N. C. 375, 62 S. E. 422, to which we now add *Wofford v. Hampton*, 173 N. C. 686, 92 S. E. 612. This case would seem to be the converse of *Council v. Bailey*, supra. In the latter, the relief demanded was the specific enforcement of the contract by a

sale of the land, while here it is sought to cancel the notes and contract, but both involved the determination in some form of a right, or interest, in land. The plaintiff had an equitable right to a deed for the land upon paying or properly tendering the purchase money, and the cancellation of the defendant's right or interest he sought to enforce because the contract had been procured from him by fraud. Whether his right was enforced, or annulled, it necessarily determined a right or an interest in the land, and by the terms of the statute it made no difference in what form this was done. *Bridgers v. Ormond*, supra, was an action to recover the possession of a deed for land which was alleged to be held in escrow. The court said:

"The complaint discloses that the purpose of the action is to recover possession of a deed that has never been in possession of the plaintiff. The deed was deposited in escrow, to be delivered upon the performance of a contract entered into by plaintiff and defendant Beaman in respect to the building of a railroad to Hookerton and the construction of a depot. The land described in the deed is situated in the county of Greene. The plaintiff's right to call for the delivery of the deed depends upon the determination of the fact, in his favor, that he has complied with certain conditions which entitle him to demand and receive the deed. If the allegations of the complaint are denied (which they must be taken to be for the purposes of this motion), then the right of the plaintiff to recover the land, not the deed solely, depends upon his ability to establish the facts he has alleged. Thus it is plain to us that the actual title to the land will depend upon the findings of the jury, under the instructions of the court, to the issues submitted upon the pleadings. The effect of a verdict and judgment for the plaintiff would be to transfer, not simply the deed, but the actual title of the land to him. If the deed should be destroyed in the meantime, the judgment of the court could be made to operate as a deed, or the court could decree the execution of another. Our statute is plain, and provides that actions for the recovery of real property or for the determination of any interest therein or for injuries thereto must be tried in the county where the property is situated. While the plaintiff has now no such seisin as would enable him to maintain an action against a stranger for trespass upon land, he alleges an equitable title thereto, and when he establishes the allegations of his complaint, and a final decree is entered upon the findings, he will become seized, in fact and law, of the property."

Fraley v. March, supra, was an action against the defendant for specific performance of a contract to purchase land, and the court held, by Justice Reade, that—

"The law of the venue of actions, with reference to the residence of the parties, does not govern this case, but the law of the venue with reference to the 'subject of the action.' It is substantially an action 'for the foreclosure of a mortgage of real property'; and that must be

tried in the county where the land is situate.
C. C. P., 66."

[2] It is true that, as a general rule, a party seeking the aid of the court may select the forum (*Hannon v. Power Co.*, 173 N. C. 522, 92 S. E. 353), but that case also holds that he may do so, except where not prohibited by public policy, as expressed by statute. It must follow that as the question has been finally and definitely settled, by our statute and decisions, against the plaintiff's contention and the judge's ruling, the latter must be reversed and the case removed as prayed for by the defendant.

Reversed.

(183 N. C. 677)

BROOKS v. ORANGE RICE MILL CO.
(ORANGE NAT. BANK OF TEXAS,
Intervener). (No. 292.)

(Supreme Court of North Carolina. April 12,
1922.)

Appeal and error ¶1099(7)—**Judgment on verdict on issue submitted by order of Supreme Court affirmed.**

Where the trial court, pursuant to a decision on a former appeal that there was evidence requiring that an issue be submitted to the jury, submitted the cause on practically the same evidence, his judgment on the verdict will be affirmed.

Appeal from Superior Court, New Hanover County; Connor, Judge.

Action by J. W. Brooks against the Orange Rice Mill Company, in which the Orange National Bank of Texas intervened. Judgment for plaintiff, and intervener appeals. Affirmed.

See, also, 108 S. E. 725.

It appears that plaintiff, a citizen of this state, having a cause of action against the Orange Mill Rice Company, a foreign corporation, instituted this suit in the superior court of New Hanover county, and sought to establish jurisdiction by attaching the proceeds of a certain draft in the hands of the American Bank & Trust Company of Wilmington, N. C., it being alleged that said funds belonged to the defendant. Thereafter, on March 29, 1920, the Orange National Bank of Texas was allowed to intervene and set up its claim of title to the proceeds of said draft.

In a former trial, the cause was tried on an issue of ownership of the intervening bank, and, at the close of the evidence, the court charged the jury that, if they believed the evidence, they would answer the issue of ownership in favor of the intervener, and from judgment on the verdict, plaintiff appealed.

On the hearing of said appeal, this court

reversed the action of the trial court, holding that, on the evidence introduced by the intervener, there were facts requiring that the issue of ownership be submitted to the jury. This opinion having been certified down, the present trial was had, and the cause submitted to the jury, on an issue as to claim of ownership by intervener, and as to indebtedness of the nonresident defendant to plaintiff.

There was verdict against the intervener, and establishing an indebtedness of defendant to plaintiff of \$525 and interest from December 26, 1919. Judgment on the verdict, declaring said indebtedness and appropriating the funds attached to extent required to satisfy the judgment and costs. Intervener excepted and appealed.

Rountree & Davis, of Wilmington, for appellant.

Ruark & Campbell, of Wilmington, for appellee.

PER CURIAM. There is no reason shown for disturbing the results of this trial. It was earnestly urged for appellant that there was no evidence in denial of the intervener's claim of ownership, but this same position was taken on the former trial and the court then held that, on the testimony of the intervener, there were facts in evidence challenging its claim and requiring that the issue be submitted to the jury. See *Brooks v. Orange Rice Mill*, 182 N. C. p. 258, 108 S. E. 725.

On practically the same evidence, the court, in pursuance of said decision, submitted the cause to the jury, who have found as stated against the intervener's claim.

We find no error in the present trial, and the judgment on the verdict is affirmed.

No error.

(183 N. C. 264)

W. J. BRADSHAW & CO. v. BOSTON & M. R. R. et al. (No. 297.)

(Supreme Court of North Carolina. April 5,
1922.)

Carriers ¶129 — **Recovery of damages from delay in transit allowed notwithstanding refusal to pay transportation charges.**

An action for damages lies against a carrier for delay in transit with resulting injury to goods, where the shipment was not abandoned, notwithstanding plaintiff's refusal to pay the freight and other charges thereon.

Appeal from Superior Court, New Hanover County; Connor, Judge.

Action by W. J. Bradshaw & Co. against the Boston & Maine Railroad and another. From a judgment for defendants, plaintiff appeals. Remanded for new trial.

J. Felton Head, of Wilmington, for appellant.

John D. Bellamy & Sons, of Wilmington, for appellees.

STACY, J. The record in this case is not altogether clear; it is somewhat complicated and confused; but, as we understand it, on or about March 31, 1920, a carload of furniture was shipped from Joslin, N. H., to the plaintiff at Wilmington, N. C., over the lines of the Boston & Maine Railroad Company, as the initial or receiving carrier, and other connecting carriers, and finally over the road of the Seaboard Air Line Railway Company as the terminal or delivering carrier. This shipment was delayed in transit for a period of more than four months, and plaintiff alleges that same was greatly damaged by reason of the "defendants' negligent transportation and other wrongful acts in handling said shipment."

Upon the arrival of said goods in Wilmington, the plaintiff failed and refused to pay the freight, war tax, and demurrage, which the defendants charged for carrying and transporting said goods, "except on condition the defendants allow a credit of same as a part payment of plaintiff's claim" for damages alleged to have been sustained by reason of negligent delay in transportation, etc. The terminal carrier declined to deliver the goods or to surrender their possession, under the terms as stated; whereupon the plaintiff sought to obtain possession of said furniture by claim and delivery proceedings. C. S. 830 et seq.; *Walter v. Earnhardt*, 171 N. C. 731, 88 S. E. 753, L. R. A. 1916E, 536. In this action, the defendant Seaboard Air Line Railway Company executed a replevin bond and retained possession of the goods as allowed by law. C. S. 836. It does not appear that any pleadings were ever filed in this case.

The plaintiff then sued out a writ of attachment, in an action for damages, against the Boston & Maine Railroad Company, and joined the Seaboard Air Line Railway Company as a party defendant. Thereafter at the regular September term, 1921, of the superior court of New Hanover county, as appears from the record, the following proceedings were had, to wit:

"Upon the calling of both the claim and delivery suit and the attachment suit, for trial, the defendants, through their counsel, stated to the court that no jury would be necessary, because counsel for plaintiff would admit that the pleadings did not allege plaintiff had tendered the bill of lading and transportation charges on said shipment. * * *

"Upon reading the pleadings, the court inquired of counsel for plaintiff if he admitted that plaintiff had not tendered the freight and other charges for transportation, as set out in said pleadings, and, upon counsel answering that he did accordingly admit, the court decid-

ed that the plaintiff could not recover and gave judgment for the defendants as set out in the record."

The concluding paragraph of said judgment is as follows:

"It is ordered and adjudged that plaintiff take nothing by this action, that defendants go without day and recover of the plaintiff their costs, and that the ancillary proceeding in this cause be and the same is hereby dismissed."

From the foregoing, it would seem that the two suits were consolidated and considered as one. This was so stated on the argument before us, and there is only one judgment appearing on the record.

Conceding that under authority of *Lumber Co. v. Seaboard Air Line R. R.*, 179 N. C. 359, 102 S. E. 508, plaintiff was not entitled to the immediate possession of the shipment, without first having tendered the freight, war tax, and demurrage charges, yet we see no valid reason why it should not be permitted to proceed on its claim for damages, under the doctrine announced in *Whittington v. Southern R. Co.*, 172 N. C. 501, 90 S. E. 505, and cases there cited.

It will be observed that plaintiff has not abandoned the shipment and brought suit for its full value, but its second action was to recover damages for delay in transit and alleged negligent injury to the goods. *Parsons v. Express Co.*, 144 Iowa, 745, 123 N. W. 776, 25 L. R. A. (N. S.) 843, and note.

The cause will be remanded for further proceedings; and, as the record is somewhat ambiguous, it would seem that an amendment to the pleadings would not be amiss.

New trial.

(183 N. C. 315)

GOODLOE v. FIDELITY BANK. (No. 338.)

(Supreme Court of North Carolina. April 12, 1922.)

1. Banks and banking ⇐131—Agent authorized to deposit has no implied authority to withdraw.

Where plaintiff's agent deposited money to her credit, and the passbook was made out in her name, he had no authority, without her knowledge or consent, to withdraw such deposit, although the passbook was in the agent's possession, and plaintiff never notified the bank not to pay the deposit to him.

2. Banks and banking ⇐133—Bank is liable for deposits paid out without valid directions from depositor.

A bank receives a depositor's funds on the implied condition of disbursing them according to his order, and is liable for sums paid to another without valid directions from the depositor.

Appeal from Superior Court, Durham County; Kerr, Judge.

Action by Rebecca Goodloe against the Fidelity Bank. Judgment for defendant, and plaintiff appeals. Reversed.

R. O. Everett, of Durham, for appellant.
Fuller, Reade & Fuller, of Durham, for appellee.

STACY, J. This was an action commenced in the court of a justice of the peace, and tried de novo on appeal to the superior court of Durham county. In the latter court the parties waived a jury trial, and submitted the case to his honor for determination on an agreed statement of facts, the material parts of which were as follows:

[1] On August 16, 1917, Rebecca Goodloe had Eugene Weaver to deposit to her credit in the Fidelity Bank the sum of \$143. No part of said sum was ever drawn out by the plaintiff, and she at no time gave authority to any one to withdraw the same.

When Eugene Weaver deposited said money in the bank he had an agreement with the teller that he might check the deposit out by signing the checks: Rebecca Goodloe, per Eugene Weaver." The passbook was made out in the name of Rebecca Goodloe, and the account stood in her name on the books of the bank. Eugene Weaver was permitted by the defendant to draw out said account, and he had the passbook in his possession at the time of his death in 1921. The defendant permitted this to be done without authority from the plaintiff, and without her knowledge or consent.

The defendant bank had no direct dealings or communication with Rebecca Goodloe at any time prior to the death of Eugene Weaver, and the defendant was never notified by her not to pay said money to Weaver.

Upon these, the facts chiefly relevant, we think his honor should have rendered judgment in favor of the plaintiff. The actual or implied authority of Weaver to withdraw said deposit (*Heath v. Trust Co.*, 184 Mass. 481, 69 N. E. 215) is specifically negatived by the facts agreed; hence we are driven to the conclusion that the defendant has paid out the plaintiff's money wrongfully and without authority. 2 C. J. 664; 7 C. J. 641; 3 R. O. L. 546.

[2] A bank "receives the depositor's funds upon the implied condition of disbursing them according to his order, and upon an accounting is liable for all such sums deposited, as it has paid away without receiving valid directions therefor." *Crawford v. Bank*, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152. Again, in *Hall v. Fuller*, 5 B. & C. 750, Bailey, J., speaking for the court, said:

"If the banker unfortunately pay money belonging to the customer upon an order not genuine he must suffer, and to justify the payment he must show that the order was genu-

ine, not in the signature only, but in every respect."

Applying these principles to the facts in hand, we think the plaintiff is entitled to recover. This will be certified to the superior court, to the end that judgment may be entered for the plaintiff on the agreed statement of facts.

Reversed.

(183 N. C. 309)

HEDGPETH v. COLEMAN. (No. 334.)

(Supreme Court of North Carolina. April 12, 1922.)

1. Libel and slander \S 15—Charges not actionable if merely spoken without special damage may be libelous per se when written or printed, though no crime imputed.

Many charges which, if merely spoken, would not be actionable without proof of special damages, may be libelous per se when written or printed and published, though they may not impute the commission of a crime.

2. Libel and slander \S 112(1)—Evidence held sufficient to warrant finding that defendant was responsible for libelous typewritten paper.

In an action for libel, evidence held sufficient to warrant a finding that defendant was responsible for a typewritten paper of unavowed authorship, charging plaintiff with theft.

3. Libel and slander \S 24, 25—Essentials of publication stated.

To constitute publication of slander, defendant need only speak the words so that some third person hears and understands them, but to constitute publication of a libel, defendant must compose and write the libel, and deliver, or cause it to be delivered, or read it aloud to some third person, who reads or listens to and understands its contents.

4. Libel and slander \S 25—Defamatory words need only be communicated to single person other than plaintiff.

To constitute publication of libel, it is not necessary that the defamatory words be communicated to the public generally, or even to a considerable number; it being sufficient if they be communicated to only a single person other than the person defamed.

5. Libel and slander \S 25—No publication by sending to person libeled unless sender intends or has reason to suppose matter will reach third persons.

Where libelous matter is sent to the person libeled, there is no publication such as to give rise to a civil action, unless the sender intends or has reason to suppose that the matter will reach third persons, which happens, or such result naturally flows, from the sending.

6. Libel and slander \S 25—Publication by plaintiff held proximate result of sending libelous letter.

One who sent a libelous letter to a boy about 14 years old, threatening prosecution for theft, knowing the probable emotion of fear

and the recipient's desire for advice, was liable to the latter, though he alone divulged the contents of the letter to others, as the sender must have known would be the natural and probable result of his act.

7. Evidence ¶570—Expert testimony subject to tests ordinarily applied to other evidence.

Generally speaking, expert testimony is subject to the tests ordinarily applied to the evidence of other witnesses and to the court's instruction that the jury must find the facts on their own sound judgment, though the question whether it is to be received with caution may depend on the circumstances developed in the trial.

8. Trial ¶235(7)—Instruction to scan with care expert's testimony as to authorship of libelous typewritten letter held not erroneous.

In an action for libel contained in a typewritten letter to plaintiff of unavowed authorship, the court did not err in refusing an instruction that, owing to the large number of typewriters of different kinds and makes and the similarity in styles of typewriting in the various schools, the jury should scan with care the evidence of an expert witness that the letter was written by the same person as one the authenticity of which defendant did not dispute.

Appeal from Superior Court, Granville County; Devin, Judge.

Action by Leroy Hedgpeth, by his next friend, G. W. Hedgpeth, against H. G. Coleman. From a ruling denying in part defendant's motion to dismiss, defendant appeals. No error.

The defendant was a merchant, depot and express agent, and postmaster at Lyon. In February, 1918, his storehouse and safe were broken into; and soon thereafter the plaintiff, a boy then between 14 and 15 years of age, found in his individual mail box the following paper writing, sealed in an envelope addressed to him:

"Washington, D. C.

"Read All This.

"We saw you next day after it happened. You showed guilt, but we wanted more evidence. We have plenty of it now, and would come right on and get you, but on account of your age, and for the sake of your relatives, we will give you one chance to make good by taking everything you got, tie it up and throw it into cat hole of shed room door. If he finds it before next Sunday, he will let us know, but unless it is found by Sunday, we will come and get you and there will be no more chance to stop it this side of Atlanta Pen.

"If it is found, no one will know that you put it there, and you may not be suspected by everybody, but if we come back, then it matters not who knows it, for we will push it clear through and do it quickly.

"Two men, who saw you one Wednesday."

The plaintiff showed this paper to W. T. Hedgpeth, his brother, and to T. M. Parrott,

and his brother showed it to the plaintiff's father. The communication received by the plaintiff was typewritten. An expert witness compared it with a typewritten letter received from the defendant, and testified that in his opinion each paper was written on an Oliver typewriter No. 4 or 5. He said:

"The type is the same, and the general appearance is the same. The body of each letter is written in single space. It is doubled spaced between paragraphs. The marginal indentation starts immediately after the salutation in each letter, and the paragraphs down through the letter follow that beginning point; the spacing after the comma and before the next letter is the same. The letters E, A, C, D, and B, and the small letter s and the capital S and the period on each letter are out of alignment. The letter E is clogged at the top—not plain; also the letter T and W and the letter U are clogged and not plain; periods after the letter C and after the letter E in each letter. In each of these letters, the letter C is struck out of place—the same impression and the same clearness. The margins on the right-hand side are similar. The periods and the dash are struck with such force as to leave an indentation on the back of each letter, and the comma is distinct; that is, the period and the tail are distinct in each letter. The spacing after the comma is the same. These are some of the main characteristics in these two letters. That the style of the type is the same, and the space between each written line, that is, from the bottom of the first line to the top of the second line, is the same. From these similarities pointed out he formed his opinion that they were written by the same person and on the same machine."

After reading the paper received by plaintiff, W. T. Hedgpeth showed it to the defendant, who denied writing it, but said that "he was knowing to it; that efforts were being made to locate the person who had broken into the store, and that the matter was in the hands of a detective. Defendant told plaintiff's father that he would be wonderfully surprised when he found out who had broken into the store; that if the person who did so would bring back all he had and put it in the cat hole of the shedroom his name would not be exposed.

The defendant introduced no evidence. At the close of the evidence the defendant moved to dismiss as in case of nonsuit. Motion allowed as to the alleged slander and blackmail, and denied as to the alleged libel. Defendant excepted and appealed.

Royster & Royster and A. W. Graham & Son, all of Oxford, for appellant.

John W. Hester and D. G. Brummitt, both of Oxford, for appellee.

ADAMS, J. [1] In *O'Brien v. Clement*, 15 M. & W. 435, Parke, B., said:

"Everything, printed or written, which reflects on the character of another, and is

published without lawful justification or excuse, is a libel, whatever the intention may have been."

Many charges which if merely spoken of another would not be actionable without proof of special damages may be libelous per se when written or printed and published, although such charges may not impute the commission of a crime. *Simmons v. Morse*, 51 N. C. 6; *Brown v. Lumber Co.*, 167 N. C. 11, 82 S. E. 961, L. R. A. 1915E, 275, Ann. Cas. 1916E, 631; *Hall v. Hall*, 179 N. C. 571, 103 S. E. 136; *Paul v. Auction Co.*, 181 N. C. 1, 105 S. E. 881. In the case before us, however, the anonymous communication appears to charge the plaintiff with an offense punishable by confinement in a federal prison; and while the defendant does not deny that it is libelous per se, he controverts, chiefly on two grounds, the plaintiff's right to recover damages. These grounds are: (1) That the defendant did not write the paper referred to; and (2) that, even if he did, there has been no publication of it in contemplation of law.

[2] As to the first, the defendant admitted that, while he did not write the communication, "he was knowing to it"; and there was expert evidence tending to show that this paper and a letter, the authenticity of which the defendant did not dispute, were written by the same person on an Oliver typewriter. This was not mere vague, uncertain, and irrelevant matter, but it was evidence of a character sufficiently substantial to warrant the jury in finding as a fact that the defendant was responsible for this typewritten paper of unavowed authorship.

[3] As to the second ground of defense, the general rule unquestionably requires that the defamatory words be communicated to some one other than the person defamed. *Folkard's Starkie on Slan. & Lib.* 37; *Newell's Def. Lib. & Slan.* 227; *Shepard v. Lamphier*, 84 Misc. Rep. 498, 146 N. Y. Supp. 745; *Enright v. Bringgold*, 106 Wash. 233, 179 Pac. 844; *Howard v. Wilson*, 195 Mo. App. 532, 192 S. W. 474; *Traylor v. White*, 185 Mo. App. 325, 170 S. W. 412; *Walker v. White*, 192 Mo. App. 13, 178 S. W. 254.

"The publication of a slander involves only one act by the defendant; he must speak the words, so that some third person hears and understands them. But the publication of a libel is a more composite act. First, the defendant must compose and write the libel; next, he must hand what he has written, or cause it to be delivered, to some third person; then that third person must read and understand its contents; or, it may be that, after composing and writing it, the defendant reads it aloud to some third person, who listens to the words and understands them: in this case the same act may be both the uttering of a slander and the publication of a libel." *Odgers on Lib. & Slan.* 157.

[4] But it is not necessary that the defamatory words be communicated to the public generally, or even to a considerable number. It is sufficient if they be communicated only to a single person other than the person defamed. *Jozsa v. Moroney*, 125 La. 813, 51 South. 908, 27 L. R. A. (N. S.) 1041, 19 Ann. Cas. 1193; *Adams v. Lawson*, 17 Grat. (Va.) 250, 94 Am. Dec. 455. For example, it has been held that the publication was sufficient where the defendant had communicated the defamatory matter to the plaintiff's agent, or attorney; or had read it to a friend before posting it to the plaintiff; or had procured it to be copied, or sealed in the form of a letter addressed to the plaintiff and left in the house of a neighbor by whom it was read; or had caused it to be delivered to and read by a member of the plaintiff's family. The fact, therefore, that the paper under consideration may have been seen only by the plaintiff's brother and Parrott cannot exonerate the defendant on the ground that there was no communication to the public. *Tuson v. Evans*, 12 A. & E. 733; *Snyder v. Andrews*, 6 Barb. (N. Y.) 43; *Kiene v. Ruff*, 1 Iowa, 482; *Swindle v. State*, 2 Yerg. (Tenn.) 581, 24 Am. Dec. 515; *Odgers*, supra, 161; *Brown v. L. Co.*, 167 N. C. 9, 82 S. E. 961, L. R. A. 1915E, 275, Ann. Cas. 1916E, 631.

[5] But the defendant argued that, even if this be granted, still there was no publication by him, because the paper was communicated directly to the plaintiff, and the plaintiff alone divulged its contents. We have stated the general rule to be that the communication of libelous matter to the person defamed does not of itself constitute a publication. The defendant's argument involves the question whether the rule is inflexible or whether it is subject to exception or qualification. The suggestion that as a principle it is immutable cannot be adopted. The ultimate concern is the relation that existed between the writing of the paper and the disclosure of its contents by the plaintiff. For running through the entire law of tort is the principle that a causal relation must exist between the damage complained of and the act which occasions the damage. Unless such relation exists, the damage is held to be remote, and cannot be recovered; but, if such relation does exist, the wrongful act is held to be the cause of the damage. So in this case we cannot disregard the relation of cause and effect.

"There is no publication such as to give rise to a civil action where libelous matter is sent to the person libeled, unless the sender intends or has reason to suppose that the matter will reach third persons (which in fact happens) or such result naturally flows from the sending." *Street's Found. Leg. Lib.* vol. 1, 296.

[6] Under this principle the mailing of a libelous letter to a person whose clerk, in pursuance of a custom known to the sender, opens and first reads the letter constitutes a publication. *Delacroix v. Theyenot*, 2 Starke, 63; *Pullman v. Hill*, 1 Q. B., 524; *Rumney v. Worthley*, 186 Mass. 144, 71 N. E. 316, 1 Ann. Cas. 189. Whether the principle extends to a disclosure by the person libeled is to be determined by the causal relation existing between the libel and the publication. The sending of libelous matter to a person known by the sender to be blind, or having sight, to be unable to read, and therefore obliged to have it read by another, is, when read, a publication by the sender, because such exposure of the subject-matter is the proximate result of the writing and sending of the communication. *Allen v. Wortham*, 89 Ky. 485, 13 S. W. 73; *Wilcox v. Moon*, 64 Vt. 450, 24 Atl. 244, 15 L. R. A. 760, 33 Am. St. Rep. 936. These exceptions are based upon the principle that the act of disclosure arises from necessity. But necessity is not predicated exclusively on conditions which are physical. Necessity may be superinduced by a fear which is akin to duress. A threat may operate so powerfully upon the mind of an immature boy as to amount to coercion; and, when an act is done through coercion, it is not voluntary.

In the letter referred to there is a threat of prosecution and imprisonment. When it was received the plaintiff was between 14 and 15 years of age, and his youth was known to the defendant. With knowledge of the plaintiff's immaturity, of the character of the accusation and menace contained in the letter, of the probable emotion of fear, and the impelling desire for advice on the part of the plaintiff, the defendant must have foreseen the plaintiff's necessary exposure of the letter as the natural and probable result of the libel. Indeed, under the charge of his honor the jury found from the evidence that the defendant had reasonable ground to know that the letter would necessarily be seen by third persons. Obviously, then, the act of the defendant was the proximate cause of the publication. *Fonville v. McNease*, *Dudley Law* (S. C.) 303, 31 Am. Dec. 556; *Miller v. Butler*, 6 Cush. (Mass.) 71, 52 Am. Dec. 768; *Rollard v. Batchelder*, 84 Va. 664, 5 S. E. 695. This conclusion disallows all the exceptions relating to the motion for nonsuit, and to the defendant's prayer for peremptory instructions.

[7, 8] The defendant excepted to his honor's refusal to give the jury this instruction:

"That, owing to the large number of type-writers of different kinds and makes now in use, and the similarity in styles of typewriting in the various schools, the jury should scan with care the evidence of the expert before arriving at a conclusion that defendant wrote the letter complained of."

The defendant relies on *Buxly v. Buxton*, 92 N. C. 479. There the issue was whether the bond sued on had been executed by the defendant's intestate. The plaintiff introduced evidence of the intestate's admission that he had signed the note, and each party introduced expert evidence relating to the alleged signature. The trial judge instructed the jury that evidence of the intestate's admission, if accepted as true, was entitled to greater weight than the expression of opinion by expert witnesses, and that an opinion as to handwriting should be received with caution. On appeal it was held that an exception to this instruction was untenable; but it may be remarked that the learned justice who wrote the opinion was contrasting the relative value of positive with opinion evidence and pertinently said that there "could be no harm in making the observation in regard to these classes of evidence and their relation to the controversy." But he did not say that refusal to give the instruction would have constituted reversible error. We should hesitate to hold that there may not be cases in which it would be proper for the court to tell the jury that expert testimony should be received with caution; and we should be equally reluctant to pronounce such instruction an inflexible necessity. As the testimony of an expert ought neither to be blindly accepted nor arbitrarily rejected, so the question whether it is to be considered like other evidence or received with caution may depend upon the circumstances developed in the trial. But, generally speaking, expert testimony should be subject to the tests that are ordinarily applied to the evidence of other witnesses, and to the court's instruction that the jury must find the facts upon their own sound judgment. *Railroad v. Thurl*, 32 Kan. 255, 4 Pac. 352, 49 Am. Rep. 484; *Carter v. Baker*, 1 Sawy. 512, 525, Fed. Cas. No. 2472; *Eggers v. Eggers*, 57 Ind. 461; *Cuneo v. Bessoni*, 63 Ind. 524; *U. S. v. Pendergast* (C. C.) 32 Fed. 198; *Madden v. Coal Co.*, 133 Iowa, 699, 111 N. W. 57, 60; *Ryder v. State*, 100 Ga. 528, 28 S. E. 246, 33 L. R. A. 721, 62 Am. St. Rep. 334; *Burney v. Torrey*, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33. We find nothing in the record which removes the evidence referred to from the operation of the general principle, and for this reason exception 7 is overruled.

The exceptions disposed of are those which were chiefly relied on in the argument. We have not overlooked the others, but have given them due consideration; and, having regard to the evidence and the charge, we have concluded that they cannot be sustained. Upon a careful review of the entire record, we find no sufficient cause for disturbing the result of the trial.

No error.

(188 N. C. 221)

COOPER et al. v. BOARD OF COM'RS OF
FRANKLIN COUNTY. (No. 259.)(Supreme Court of North Carolina. March 29,
1922.)1. Highways \Leftrightarrow 124—Statute held not to au-
thorize levy of tax for sinking fund to pay
highway bonds.

Under Pub. Loc. Laws 1919, c. 173, creat-
ing road improvement taxing district author-
izing the commissioners to levy a tax sufficient
to pay the annual interest on the road bonds,
and providing, in section 10, for levy of tax "for
the purpose of providing for the payment of
said bonds and the interest thereon, and for the
construction, improvement, and maintenance of
the roads," without expressly authorizing the
levy of a tax for the creation of a sinking fund
with which to pay principal of bonds, the com-
missioners had no authority to levy a tax for
such a sinking fund.

2. Highways \Leftrightarrow 80—Validity of bonds not af-
fected by failure of statute to provide for
creation of sinking fund.

Failure of Pub. Loc. Laws 1919, c. 173, creat-
ing highway district, and authorizing issuance
of bonds for construction of roads, to provide
for the creation of a sinking fund, and to au-
thorize a tax levy for sinking fund purposes, did
not affect the validity of the bonds.

Hoke, J., dissenting.

Appeal from Superior Court, Franklin
County; Bond, Judge.

Action by J. J. Cooper and others against
the Board of County Commissioners of Frank-
lin County. From a portion of the judgment
rendered, the defendants appeal. Affirmed.

This was a proceeding to restrain the de-
fendants from levying a higher rate for gen-
eral county purposes, the poor fund, and pen-
sions than 15 cents. On the return day of
the restraining order the court adjudged that
the 21 cents which had been levied on the
\$100 worth of property for general county
purposes, the poor fund, and pensions be re-
duced so that the aggregate of these three
charges be reduced to 15 cents, the right be-
ing reserved to the commissioners to redis-
tribute the relative proportion of 15 cents as
in their judgment is to the best interest of
the county, and it was further adjudged that
the levy in Sandy Creek township for this
year, purporting to be 75 cents on the \$100
worth of property for road bonds, be "reduced
to such an amount as is required in good
faith to pay the interest on said bonds," and
that the poll tax levied shall also be reduced
to constitutional equation between the poll
tax on one side and property tax on the other.

The defendants appealed from so much of
the judgment as directed that the levy of 75
cents in Sandy Creek township for roads this
year should be reduced to a sum sufficient
to pay the interest on said bonds.

Wm. H. & Thos. W. Ruffin, of Louisburg,
for appellants.

W. M. Person, of Louisburg, for appellees.

CLARK, C. J. The error assigned is to the
ruling that the levy of taxes in Sandy Creek
township for payment on road bonds this
year should be limited to the levy of a sum
sufficient to pay the annual interest on the
bonds. This is levied in a special taxing dis-
trict after an election held under a special
act of the General Assembly constituting said
taxing district, and creating the township
road commission, a corporation, with special
powers and duties.

Chapter 173, Public Local Laws 1919, cre-
ated said taxing district, and the township
road commission for said township, a corpo-
ration, imposing upon it special powers and
duties. Under the power thus conferred, the
Road Commission issued and sold \$50,000 of
road bonds to run 40 years, and received and
expended the proceeds thereof in the con-
struction of roads. Upon the sale of said
bonds the duty was imposed on the township
road commission to levy a tax sufficient to
pay the annual interest, but not to provide
for a sinking fund, and the construction of
roads not to exceed the limit voted by the citi-
zens of the township, the maximum author-
ized being 75 cents on \$100 worth of prop-
erty. Section 10 of said act provides:

"For the purpose of providing for the pay-
ment of said bonds and the interest thereon, and
for the construction, improvement, and main-
tenance of the roads of said township, the board
of county commissioners of the said county,
shall, annually and at the time of levying county
taxes, levy and lay a special tax on all persons
and property subject to taxation within the
limits of said township, of not less than twenty-
five cents and not more than seventy-five cents,
on the one hundred dollars assessed valuation
of property."

[1] The question presented is whether, un-
der the authority to provide for "the pay-
ment of said bonds and the interest thereon
and for the construction, improvement and
maintenance of roads of said township," the
board of county commissioners can levy a tax
not only to provide for the construction, im-
provement, and maintenance of the roads of
said township, and for the payment of the in-
terest accruing on the bonds issued therefor,
but whether it authorized the commissioners
to levy an additional amount to accumulate
a sinking fund to pay the principal not yet
due. The act does not authorize the creation
of a sinking fund, and that proposition was
not submitted to a vote of the people of the
township.

In *Lumberton v. Nuveen*, 144 N. C. 308, 56
S. E. 940, the act provided that the commis-
sioners "shall levy a special tax sufficient to
provide for the interest and sinking fund."

The defendants rely upon *Hotel Co. v. Red*

Spring, 157 N. C. 137, 72 S. E. 837, where it was held that an act authorizing a municipality to issue bonds for water and sewerage system was not invalid because, at the present rate of taxation, there was not sufficient revenue to raise the sinking fund to retire the bonds at maturity. The court held that the Legislature could subsequently increase the tax rate for that purpose, or it might become unnecessary by reason of the growth of the town and the increase in taxable property.

In *Gastonia v. Bank*, 165 N. C. 507, 81 S. E. 755, it was held that, where the bonds were issued by a municipality under statutory authority, for necessary purposes, without provision for a special levy of taxes to pay the interest and to create a sinking fund, the city has the power to pay the interest and create a sinking fund for the bonds if the general revenue derived under the limit fixing its taxing power is sufficient, and, if not sufficient, the bonds will not be declared invalid on that account.

In these decisions it is not held that there is any authority to levy a tax sufficient to create a sinking fund when the act does not so specify but merely that the bonds are valid without it. On the contrary, it was expressly held, in *Commissioners of Pitt County v. MacDonald*, 148 N. C. 125, 61 S. E. 643:

"When bonds are issued by a county by popular vote, under legislative authority, which does not further provide for a levy to exceed the constitutional limitation for principal, interest or for a sinking fund, the commissioners are without authority to levy a tax to exceed the restriction."

This case has often been cited since with approval. See citations to that case in the *Ann. Ed.*

As suggested in *Hotel Co. v. Red Springs*, supra, the Legislature may have thought proper to leave the collection of taxes for the sinking fund to some future Legislature, and it is a very doubtful question whether the creation of a sinking fund for that purpose is sound public policy, for, as counsel for the plaintiffs observed, a "sinking fund has very often proven to be a sunken fund," and it is also doubtful whether, in the present financial condition of the country, and the pressure of high taxes, it is advisable to anticipate the payment of the principal of this indebtedness by the collection of a fund at the present day which (if not lost) shall meet the payment of the principal at some future day when the people of the township at the maturity of the bonds will be far more numerous and better able financially to meet that payment if they do not prefer to renew the bonds. It is said that no part of the bonded indebtedness of this state has ever really been paid, but has always been renewed from time to time at maturity of the indebtedness.

But, at any rate, the language of the statute (section 10) provides:

"That for the purpose of providing for the payment of said bonds and the interest thereon, and for the construction, improvement, and maintenance of the roads of said township, the board of county commissioners of the said county, shall, annually and at the time of levying county taxes, levy and lay a special tax on all persons and property subject to taxation within the limits of said township, of not less than twenty-five cents and not more than seventy-five cents."

To same purport are sections 9 and 15 of the act. The purpose for the levy of tax is specified to be the construction, improvement, and maintenance of the roads of said township. The act provides that the taxation shall be used to provide for the payment of said bonds, but this means at maturity, and is not a requirement that the taxes shall be levied now sufficient in amount to provide for the creation of an idle fund as a sinking fund in anticipation of the maturity of the bonds. The interest is to be paid each year as it falls due, nor can the principal be called for until due. Its payment is to be met when the bonds become due, and not at the present time, long years before their maturity. When the bonds fall due 40 years from date the wealth of the township may be such as to make the tax sufficient for the payment of the principal. The people of that day—40 years hence—can better take care of their own affairs than this generation. They may see fit to renew the bonds, as the state and many other municipalities have done heretofore, or they may pay them as they may see fit.

If the Legislature had intended that the levy should be sufficient not only to provide for the purposes named in the act—"the interest on the bonds and the construction, improvement and maintenance of said roads"—but there should be a levy yearly to accumulate out of this generation a fund sufficient for the payment of the principal of the bonds 40 years hence, it would doubtless have adopted a plan now recognized as far safer than a sinking fund of issuing "serial bonds," so that some of the principal shall fall due and be paid each year.

"Without legislative authority a sinking fund could not be created" (*Hightower v. Raleigh*, 150 N. C. 571, 65 S. E. 279; *Jones v. New Bern*, 152 N. C. 65, 67 S. E. 73), nor can a tax be levied even to pay interest unless so specified and authorized, though this would not make the bonds invalid (*Underwood v. Asheboro*, 152 N. C. 642, 68 S. E. 147; *Pritchard v. Com'rs*, 160 N. C. 479, 76 S. E. 488; *Jackson v. Com'rs*, 171 N. C. 382, 88 S. E. 521). In *Proctor v. Com'rs*, 182 N. C. 56, 108 S. E. 360, the creation of a sinking fund was required by the act.

[2] The Legislature has not seen fit in this act, by the device of serial bonds, to provide for the levy of taxes to pay any part of the bonds each year, and, as the creation of a sinking fund is not named as one of the pur-

poses authorized by the statute or by vote of the people, we think his honor was correct in restricting the taxes to be levied to the purposes named in the act, and held that the levy purporting to be "75 cents on the \$100 worth of property for the purpose of paying bonds should be reduced to such an amount as is required in good faith to pay the interest on said bonds." In this case neither the statute nor the popular vote authorizes a sinking fund. The bonds are valid, but no levy can be made to create a sinking fund.

Affirmed.

HOKE, J. (dissenting). I dissent from so much of the opinion as denies the power to levy a tax for a sinking fund, the amount being within the 75 cents authorized by statute and approved by the voters. I am of opinion that there is ample power conferred to levy this tax in question, and that the same is being providently exercised by the commissioners.

In the cases cited, so far as examined, no power to levy a special tax existed.

(183 N. C. 771)

STATE v. JESSUP. (No. 346.)

(Supreme Court of North Carolina. April 12, 1922.)

1. Homicide §235—Evidence of reckless driving in violation of criminal statute is sufficient to convict of manslaughter.

In a prosecution for manslaughter caused by criminal negligence in driving an automobile on the wrong side of the road without reasonable care, contrary to C. S. §§ 2617, 2618, evidence of such recklessness as is incompatible with a proper regard for human life or limb or that the injury was likely to occur under the circumstances, is sufficient for conviction, though the speed limit was not violated; the commission of a dangerous act which is in itself a violation of a statute intended to prevent injury to the person constituting manslaughter at least, when death of another ensues.

2. Criminal law §368(1)—Homicide §171 (1)—Testimony that defendant's companions had liquor on occasion of reckless driving held competent.

In a prosecution for manslaughter caused by reckless driving of an automobile, testimony that defendant's companions had liquor on such occasion and were under its influence was competent as *res gestæ* and as tending to show defendant's opportunity to obtain whisky.

3. Homicide §169(2) — Testimony that defendant tried to borrow money to enable companion to buy whisky held competent.

In a prosecution for manslaughter caused by reckless automobile driving, testimony that defendant that morning had tried to borrow money to enable a companion to buy whisky held competent as bearing directly on the fact

that he and his party intended to provide themselves therewith for the occasion.

4. Criminal law §451(3) — Testimony that defendant was under influence of liquor held competent as statement of fact.

In a prosecution for manslaughter caused by reckless driving of an automobile, testimony that defendant, a short time before, was under the influence of liquor, held competent as a statement of fact actually observed by the witness at the time as evidenced by defendant's conduct and appearance.

Appeal from Superior Court, Surry County; Long, Judge.

Charles Jessup was convicted of manslaughter caused by negligently running an automobile, and he appeals. No error.

Indictment for manslaughter caused by negligently running an automobile, thereby causing the death of one O. N. Swanson.

There was evidence on the part of the state tending to show: That the Swansons, the father, O. N. Swanson, and son, Claude Swanson, driver, on the front seat, two daughters and a younger son on a rear seat, were traveling in a Mitchell car on the improved highway going north from Pilot Mountain to Westfield about 8 o'clock p. m. on June 12, 1921.

About four miles from Pilot Mountain and on a curve in said road, a Ford, driven by the defendant and occupied by himself and other young men, had a head-on collision with the Mitchell car just at the curve, and in consequence of such collision Mr. O. N. Swanson was seriously injured and died soon afterwards. At the curve, the point of collision, the road was 22 feet wide. Immediately to its right was an embankment. The Mitchell car, going north, was running to the right of the center of the road, within 12 or 15 inches of the embankment. The Ford car, coming south, instead of taking the right at the curve, cut across the curve, and at the time of the collision was plainly on the right of way of the Mitchell car. The radiator of the Mitchell car showed that it was a head-on collision. After the collision (Record, p. 7):

"The Swanson car was something like a half foot from the bank; that is, the right front wheel. The Jessup car something like 2½ feet, probably three feet. The rear of the Swanson car was 2½ feet from the bank and the rear of the Jessup car 4 or 4½. Where the cars were standing when I saw them, they were further towards Westfield. I do not know where the cars had skidded; both cars were pointing toward the bank."

At the point of collision, the Ford car, if properly driven, would have had 15 feet of passage room to the right of the Mitchell car. There was a road called the Bryant Road which entered the improved highway about opposite the point of collision.

Cy Bryant testified (Record, p. 9):

"I live about 300 yards west of the place where the collision occurred. There is a road leading from my father's house to the main road. At the time of the collision, I was coming from my father's house and got to the cherry tree where I saw two cars coming, both on the right hugging the curve. I stopped about 30 steps from the highway. The Swanson car was going north; the Jessup car, south. The Swanson car pulled to the right, very near the bank; the Jessup car cut to the left right against Swanson. Then I heard the crash. Charlie Jessup was driving. Claude Swanson was driving Swanson's car. I stepped the distance from where I stopped to the road, and it was 30 steps."

At the curve, one could see from the south going north 127 feet. There is evidence that the defendant was drinking the day of the accident, and his reputation as a whisky drinker was bad.

There was evidence for defendant tending to show that the collision occurred at or near the center of the highway; that Charles Jessup was not drinking or under the influence of liquor on the occasion; and, at or about the time of the occurrence, the attention of the defendant was attracted by the approach of a third car, from a side road, and which was about to enter the highway at or near the point where defendant's car then was. The jury rendered a verdict of guilty of manslaughter and judgment on the verdict, and defendant excepted and appealed.

J. H. Folger, of Mt. Airy, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. Notwithstanding the earnest and forcible presentation of his case by defendant's counsel, we are constrained to hold that no reversible error has been shown in the record.

The jury, accepting the state's version of the matter, have convicted the defendant of causing the death of O. N. Swanson, as charged in the bill of indictment, by his criminal negligence in driving his car on the wrong side of the road, and in operating the same without taking reasonable and proper care, contrary to the provisions of the statute applicable. Consolidated Statutes, §§ 2617, 2618.

[1] Both of these sections were enacted as necessary to a proper protection of persons upon the highways of the state, and because, with the high-power vehicles now very generally in use, a violation of these regulations was not unlikely to result in serious and oftentimes in fatal injuries. In the recent case of *State v. Rountree*, 181 N. C. 535, 106 S. E. 669, Associate Justice Stacy in a clear and forcible opinion deals with

these statutes and the underlying reasons for their enactment, and it was there held, among other things, as pertinent to the facts of the present record:

"Where one is tried for the reckless driving of an automobile made criminal by our statute (C. S., 2618), and an unintentional killing has been established by him, evidence is sufficient for conviction of manslaughter which tends to show such recklessness or carelessness as is incompatible with a proper regard for human life or limb, or that such injury was likely to occur under the circumstances.

"The commission of a dangerous act, in itself a violation of a statute, intended to prevent injury to the person, when death to another ensues renders the actor guilty of manslaughter at least. * * *

"Where an act makes reckless driving of automobiles upon the public highways, under certain conditions, a criminal offense, and there is a proviso fixing various speed limits thereon as to different localities and conditions criminal negligence per se and indictable, the proviso as to the speed limits does not necessarily preclude conviction of the offense prescribed in the body of the act for recklessness while driving at less speed."

[2, 3] It was insisted for defendant that prejudicial error was committed in the admission of certain testimony over his objection, tending to show that others of the party had liquor on the occasion and showed evidences of being under its influence. There was direct testimony to the effect that defendant also had taken whisky at the time, and the statements objected to were not only competent as presenting the conditions existing at the time of the occurrence, a part of the *res gestæ*, but also as tending to show that defendant had every opportunity for obtaining whisky at the time. And the testimony, also objected to, that defendant on the morning of the same day had endeavored to borrow \$5 for the purpose professed by him at the time to enable his brother to buy whisky, bore directly on the fact that defendant and his party in the car had the purpose of providing themselves with whisky for the occasion.

[4] Again, it is urged that a witness was allowed to express that "defendant a short time before the occurrence was under the influence of liquor." This was given as the impression of the witness from the conduct and appearance of defendant under the witness' actual observation at the time, and where relevant is held competent as the statement of a fact. *Taylor v. Security Co.*, 145 N. C. 383, 59 S. E. 139, 15 L. R. A. (N. S.) 583, 13 Ann. Cas. 248; *Gilliland v. Board of Education*, 141 N. C. 482, 54 S. E. 413.

The case in its essential aspects is controlled by *State v. Rountree*, and, as stated, there has been no error committed in the trial of the cause.

No error.

(183 N. C. 303)

(111 S.E.)

ACME MFG. CO. v. TUCKER & NOBLES
et al. (No. 286.)

(Supreme Court of North Carolina. April 12, 1922.)

1. Carriers ⇨132—Carrier must prove delivery to consignees or loss of goods without its default on proof that goods were loaded into cars and transported over its line.

In seller's action for loss of goods shown by waybill, bill of lading, and wheel report to have been loaded into and transported over the carrier's line, it had the burden of showing that goods were delivered to consignees or that failure to deliver was not by its default.

2. Carriers ⇨85—Carrier required to notify consignees on arrival of goods and deliver to them.

Carrier, having received goods for transportation, must notify consignees on the arrival of the shipment and make delivery to them.

3. Sales ⇨351—Carrier properly made party defendant in seller's action against buyers who denied having received goods from carrier.

In seller's action against buyers for goods shipped and consigned to buyers, but which buyers denied having received from carrier, it was proper to make the carrier a party defendant.

4. Trial ⇨397(1)—Court erred in rendering judgment without finding on material issue.

In seller's action against buyers for goods shipped and consigned to buyers, in which the carrier was made a party defendant on buyers' denial of having received goods from carrier, it was error for the court, under O. S. § 602, to render a judgment adverse to seller without passing upon question of whether the carrier's failure to deliver the goods to buyers was without default on carrier's part.

Stacy, J., dissenting.

Appeal from Superior Court, New Hanover County; Kerr, Judge.

Action by the Acme Manufacturing Company against L. W. Tucker and J. E. Nobles, copartners trading and doing business as Tucker & Nobles, and others. Judgment for defendants, and plaintiff appeals. New trial.

This action was brought to recover the value of a carload of fertilizer shipped by plaintiff from Acme, N. C., on the Atlantic Coast Line Railroad to defendants Tucker & Nobles at Munford siding, a blind siding or non-agency station of the A. C. L. R. R. two miles north of Greenville, N. C., and operated under the control of the A. C. L. agency at Greenville.

There is uncontradicted evidence that this carload of fertilizer came to Greenville and was forwarded thence to Munford siding, but that it was never received by Tucker & Nobles, some one having opened the car and removed the contents, and that there has been

a trial therefor before the federal court at Wilson. On motion of the defendants Tucker & Nobles, the A. C. L. R. R. Co. and the Director General of Railroads were made party defendants, and the railroad company answered, placing responsibility, if any, upon the Director General, who through the same counsel as the railroad company admitted the receipt of Soo Line car No. 36986, in which this carload of fertilizer was transported, but denied any liability for failure to deliver the same.

The plaintiff admitted that by inadvertence they notified Tucker & Nobles that the fertilizer had been shipped in "Soo Line car No. 36986," whereas in truth it was shipped in "Soo Line car No. 36986." There was much evidence on the trial in regard to this inadvertence and mistake in the notice sent by the plaintiff to Tucker & Nobles.

The jury responded to the issues submitted that the plaintiff shipped over the A. C. L. R. R. the 30 tons of fertilizer in Soo car No. 36986 consigned to Tucker & Nobles at Munford siding, but that the defendants Tucker & Nobles never received said fertilizer, that the value of the same was \$1,707. The evidence was uncontradicted that the consignees, Tucker & Nobles, inquired of the railroad agent at Greenville frequently if a carload of fertilizer had been shipped to them at that point, and the agent replied that it had not been received there, and there was evidence that the carload was later placed at Munford siding, but that no notice was given to the consignee by the carrier or its agent at Greenville, and the agent himself so testified, although it was the habit of the carrier to give such at that siding; that the car was broken open by parties unknown, and the contents were never delivered to Tucker & Nobles. Judgment was entered against the plaintiff, who appealed.

J. G. McCormick, of Wilmington, and J. Bayard Clark, of Fayetteville, for appellant.

F. G. James & Sons, of Greenville, and Wright & Stevens, of Wilmington, for appellees Tucker & Nobles.

Rountree & Carr, of Wilmington, for appellees Atlantic Coast Line R. Co. and Director General.

CLARK, C. J. [1] It being admitted by all parties to this action that, according to the waybill, the bill of lading, and the wheel report, as well as a matter of fact, the carload of fertilizer in question was loaded into, and transported over the A. C. L. R. R. in, Soo car No. 36986, the title at once passed, when it was so loaded, to the defendants Tucker & Nobles, the consignees, and the burden then devolved upon the carrier represented by the Director General to show a delivery thereof to Tucker & Nobles or that

failure to deliver the same was not by default of the carrier. The verdict of the jury determined that the said carload which had been transported in Soo car No. 36986, consigned to Tucker & Nobles at Munford siding, was delivered by the railroad at said siding, but that said carload was never delivered to Tucker & Nobles, and that the value thereof was \$1,707.

The other finding as to the plaintiff having erroneously notified Tucker & Nobles that the shipment had been made in Soo car No. 36986 seems to have been much debated at the trial and the issue as to that matter established the fact of this inadvertency but we cannot see that it was very relevant or at all material.

In *Mitchell v. Railroad*, 110 S. E. 859, at this term, it was held by Hoke, J., that under Revisal, § 2632, as amended by chapter 461, Laws 1907, which, as amended, is now O. S. 3516, it is incumbent upon the common carrier of freight not only to ship the goods promptly, but it is negligence on the part of the carrier not to make delivery at destination within the time limited by the statute, which is not complied with "until the goods are in the company's warehouse (or at destination) and notice duly given." The railroad agent at Greenville testified that no notice of the arrival of the shipment was given to Tucker & Nobles, and the testimony that they frequently inquired for it is uncontradicted.

[2] The carrier having received this shipment, consigned to Tucker & Nobles at Munford siding, the title thereupon to the goods passed to the consignees, and the duty devolved upon the carrier to notify the consignees upon the arrival of the shipment and to make delivery. *Poythress v. Railroad*, 148 N. C. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427; *Bank v. Railroad*, 153 N. C. 351, 69 S. E. 261.

[3] It was eminently proper and indeed essential to the disposition of the questions involved that the Director General should be made a party defendant.

[4] The trial was incomplete because the issues submitted did not decide the material matters necessary for a final judgment to determine the ultimate rights of the parties in each side as between themselves. Issues 1 and 3 were as to whether the plaintiff notified the consignees correctly as to the number of car, and No. 4 whether the plaintiff corrected this error. In response to issue No. 2 the jury found that the plaintiff shipped over the A. O. L. R. R. this 30 tons of fertilizer consigned to Tucker & Nobles at Munford siding, and that it was delivered by the railroad at said siding. In response to issue 5 the jury found that the defendants Tucker & Nobles did not receive the car of fertilizer shipped by the plaintiff to them;

and in response to issue No. 6 the jury found that the value of the said carload of fertilizer was \$1,707.

The matters found on issues 2, 5, and 6 were not controverted by any evidence, and in fact were admitted by all parties. The real issue was as to whether the failure of the carrier to deliver was without default on its part. The case should go back for this additional finding of fact, and, if found against the Director General, judgment should be entered in favor of the plaintiff and against the Director General. It would be superfluous to render judgment in favor of the plaintiff against the consignees with judgment over against the Director General.

In the language of the statute (O. S. § 602) the judgment should "determine the ultimate rights of the parties on each side as between themselves"; and, as held in *Corp. Com. v. Railroad*, 137 N. C. 1, 49 S. E. 191, "Judgment should be entered on the material issues without regard to the immaterial issues."

The evidence in this case upon the record shows no default on the part of the consignees, and no excuse for the failure of the carrier to notify the consignees and to deliver the shipment to them, but they should have opportunity now to produce such evidence, and the verdict should distinctly adjust the responsibility for the failure to deliver the goods.

New trial.

STACY, J., dissents.

(183 N. C. 358)

EVANS v. JUNIOR ORDER UNITED AMERICAN MECHANICS et al.
(No. 394.)

(Supreme Court of North Carolina. April 19, 1922.)

I. Insurance — 813 — National Council held proper party defendant in action for funeral benefits.

Where the only provision in the constitution of a lodge relating to payment of funeral benefits empowered the National Council to establish and maintain a department for such purpose, and the laws of the National Council required the subordinate councils to adopt a by-law providing for funeral benefits, and to hold their property in trust for the National Council, a local council was merely the agent of the National Council in procuring applications for funeral benefits, collecting the assessments, and remitting the proceeds to the National Council, so that an action for such benefits was properly brought against the National Council, notwithstanding a provision that the officers of the subordinate council should be agents of that council, and not of the National Council.

2. Appeal and error \S 882(14)—Defendant, alleging particular disease of insured, cannot object to issues submitting only that disease.

Where an answer of a fraternal benefit society alleged that insured, when he became a member, was not in sound health, but was afflicted with a specified disease, the defendant cannot object that the court submitted an issue in the language of the answer as to whether insured had that disease, instead of submitting an issue as to whether he was in sound bodily health when taken into the order.

3. Evidence \S 252—Declarations of member in fraternal benefit society not admissible against beneficiary.

The rule applicable to ordinary life insurance that declarations of an insured which are not part of the res gestae of making the contract, and are not admissible to show knowledge of the falsity of representations, are not admissible against the beneficiary in an action on the policy, applies also to fraternal benefit insurance.

Appeal from Superior Court, Guilford County; Long, Judge.

Action by Daisy Evans against the Junior Order United American Mechanics and others. Judgment for plaintiff, and defendants appeal. No error.

This is an action by the beneficiary to recover upon an insurance, funeral, or death benefit policy in the funeral benefit department of the defendant, the National Council of Junior Order U. A. M. The defendant is a corporation, with its principal place of business at Pittsburgh, Pa., and maintains and conducts a funeral benefit department for the purpose of paying funeral benefits to its members. Buffalo Council No. 202 is a subordinate council of the defendant, and is, and has been continuously, enrolled in the funeral benefit department thereof since before the plaintiff's intestate, H. Norwood Evans, became a member of said local council. He became a member of said subordinate council several months before his death, which occurred about February 23, 1920. His dues and assessments for funeral benefits were paid up until the time of his death. He was enrolled in the funeral benefit department of the defendant, and Daisy Evans, the plaintiff in this case, is his widow, and also his dependent, and therefore his beneficiary. From the verdict and judgment in favor of the plaintiff, the defendants appealed.

Douglass & Douglass and Murray Allen, all of Raleigh, for appellants.

R. C. Strudwick and N. L. Eure, both of Greensboro, for appellee.

CLARK, C. J. [1] Article VII, § 15, of the constitution of the defendant enumerates the powers reserved to the National Council, and subchapter 26 thereof reads as follows:

"To establish, maintain, control and regulate a department for the payment of funeral benefits to the members of the order."

This is the only section in the Constitution of the defendant referring to a funeral benefit department, and is the only section granting to the defendant the right to establish such department. It appears, therefore, that this department was established for the purpose of paying funeral benefits to members of the order, and not for the purpose of reinsuring the subordinate councils. Any by-law attempting to make the defendant a reinsurer only is contrary to this provision of the constitution, and can have no force or effect as against the plaintiff.

Since the funeral benefit department is formed for the express purpose of paying funeral benefits to the members of the order, and as the defendant chooses to do the funeral benefit business through the local councils, it thereby makes the local or subordinate council its agent for the purpose.

In *Bragaw v. Supreme Lodge*, 128 N. C. 360, 38 S. E. 907, 54 L. R. A. 602, the court cited with approval the case of *Schunck v. The Gegenseitiger Wittwen und Waisen Fond*, 44 Wis. 375, as follows:

"The subordinate lodge acts for and represents the defendant in making the contract with the member, unless we adopt as correct the idea that the member, by some one-sided arrangement, makes a contract with himself through his agent."

Whenever a subordinate council makes application for enrollment in the funeral benefit department, it is required under division VIII, § 6, par. 3, of the laws of the defendant, to make a pledge as follows:

"We have adopted, or hereby agree to adopt upon enrollment of this council in the funeral benefit department, a by-law providing for the payment to the legal dependent of a deceased brother, irrespective of the time of membership of the said brother in this council, the full amount received by his council from the funeral benefit department, less the cost of preparing the claim, and all other charges legally due the council at the time of death."

The foregoing law of the defendant requires the local council to pledge itself that it will act as the agent of the defendant to distribute funeral benefits to members of the order.

Under division VIII, § 12, of the laws of the defendant, it is attempted to make enrollment of councils in the funeral benefit department optional, but, instead of being optional, it is made obligatory upon every council within the state of North Carolina to become enrolled in said department or not to be enrolled in any funeral benefit association at all. The section reads as follows:

"It shall be optional with any council of the Junior Order United American Mechanics to

be enrolled in the funeral benefit department as provided herein, but no council of the order shall hereafter be permitted to become members of or connected with any so-called funeral benefit association or organization whose business may be to pay funeral or death benefits, and which is not connected with and controlled by the National Council Jr. O. U. A. M. of the United States of North America.

"Provided that the foregoing shall in no wise affect any state death benefit association now in existence whose activities and jurisdiction is now and shall continue to be exclusively confined to such states and limited in its membership to members of the Jr. O. U. A. M."

To show further that the subordinate council is a part and parcel of the National Council, and that its acts are the acts of the National Council, even the property of the local council is held in trust for the National Council as appears from division V, c. 13, § 6, of the laws of the defendant, which reads as follows:

"All funds, moneys and property of whatsoever kind or description accumulated or held by any council of the order, state or subordinate, shall be accumulated and held solely in trust for and as provided by the National Council, and upon the severance of either of said councils from its relations with the National Council by disbanding, withdrawal, expulsion, dissolution, or revocation of its charter, or by its ceasing to exist as a council of the order in any manner, all of said funds, moneys and property shall immediately thereafter revert to the National or state council as the case may be, to be held by it for the uses and purposes of the order."

The foregoing shows that the local council has absolutely no independence of its own, and must act, if at all, as agent for the National Council, the defendant in this action.

In division VIII, § 13, of the laws of the National Council, the recording secretary of the local council is expressly made the agent of the defendant for the purpose of sending in the names of members of the local council to be enrolled in the funeral benefit department, and also for the purpose of sending in assessments for funeral benefits to said department. The section reads as follows:

"Immediately after the initiation, reinstatement or admission by card of a member in any council that has already been admitted to the funeral benefit department, if such member possesses the qualifications prescribed in section 8 of these laws, the recording secretary of such council shall forward to the secretary, on blanks provided for that purpose, the name of such member in full, his number upon the roll, his age at last birthday and his occupation and address and the recording secretary shall certify that such member is in sound bodily health and free from any disease, together with 35¢ if in class A or 70¢ if in class B, which shall be for the enrollment fee and the assessment of such member for the month in which his name is enrolled in the funeral benefit department, and the secretary shall immediately upon receipt

thereof, enroll the name of such member on the roll of his council in the funeral benefit department and beginning with the date of such enrollment and thereafter his council shall be entitled to all benefits thereof."

Relative to the duty of the recording secretary of the subordinate council as to forwarding assessments for members of the funeral benefit department, division VIII, § 14, par. 1, of the laws of the defendant reads as follows:

"On or before the tenth day of each month, there shall be paid by each council for each member on its roll in the funeral benefit department on the first day of the current month, a regular monthly assessment as provided by law. It shall be the duty of the recording secretary of each council enrolled in the funeral benefit department to forward such monthly assessment to the secretary on or before the tenth day of each month, using blanks furnished by the secretary for that purpose, and should such payment not reach the office of the secretary by the last day of the month, such council shall thereby, ipso facto, be suspended and not entitled to benefits until such suspension shall have been removed."

In *Bragaw v. Supreme Lodge*, above cited, 128 N. C. at page 359, 38 S. E. 907, 54 L. R. A. 602, it is said:

"To invest the secretary with the duties of an agent, and to deny his agency, is a mere juggling of words. Defendant cannot thus play fast and loose with its own subordinates. Upon its theory the policy holders had absolutely no protection. They were bound to make their monthly payments to the secretary of the section (local lodge), who was bound to remit them to the Board of Control (Supreme Lodge), but they (the assured) could not compel him to remit, and were thus completely at his mercy."

The court, in *Bragaw v. Supreme Lodge*, cited above, 128 N. C. at top of page 360, 38 S. E. 907, 54 L. R. A. 602, cites with approval *Murphy v. Independent Order of Jacob*, 77 Miss. 830, 27 South. 624, 50 L. R. A. 111, in which it is held:

"Under a by-law of a beneficial association declaring that officers of subordinate lodges shall be agents of the body that elects them, and not of the Grand Lodge, the latter cannot escape liability on a certificate of membership by reason of the failure of the subordinate lodge to do its duty in paying assessments to the Grand Lodge."

See, also, *Carden v. Sons & Daughters of Liberty*, 179 N. C. 399, 102 S. E. 610; *Connor v. Odd Fellows*, 179 N. C. 494, 102 S. E. 881; *Hart v. Woodmen of World*, 181 N. C. 488, 106 S. E. 458.

It follows, therefore, that the objection that the defendant is not properly the party defendant cannot be sustained. The by-law that the officers of subordinate lodges shall be agents of the lodge that elects them, and not of the defendant, the National Council, cannot avail, for the latter cannot escape lia-

bility for the action of the local lodges who are their agents to make the collections and forward to the national lodge the funds out of which the payments are made on these funeral benefit policies. The National Council is the proper party to pursue in this action. *Gilbert v. Dalton Council*, 25 Ga. App. 130, 102 S. E. 831.

[2] The defendant in its answer alleged that the said H. Norwood Evans, when he became a member of Buffalo Council No. 202—

“was not in sound bodily health but was afflicted and suffering from chronic middle ear trouble and chronic mastoiditis which had demonstrated itself prior to said initiation and enrollment, and that, under the by-laws of the defendant and said subordinate councils, the defendant was not liable.”

The court submitted the following issue in the exact language of the answer:

“Was H. Norwood Evans at the time he joined Buffalo Council No. 202, Junior Order U. A. M., suffering from chronic middle ear trouble and chronic mastoiditis which had demonstrated itself prior to the initiation of his name in the funeral benefit department of the National Junior Order?”

To which the jury answered, “No.”

The defendant excepted because the issue was not submitted in these words: “Was the said H. N. Evans in sound bodily health at the time he was taken into the order,” etc.—but the answer set up specifically the particulars in which the health of the said Evans was defective, and it would have been an injustice to the plaintiff to have broadened the issue into a general inquiry as to the general bodily health of the insured. It does not appear that there had been any motion to amend the answer in this respect, and certainly there is no record that such motion was allowed. The defendant selected its battle ground, and the issue was fought out in accordance therewith.

[3] Lastly, the defendant excepted because the court excluded depositions as to statements of H. N. Evans made some time subsequent to the enrollment of his name in the funeral benefit department of the National Council, Junior Order.

In 14 R. O. L. 1438, § 601, in regard to the “Admissions and Declarations of Insured,” it is said:

“It may be laid down as a general rule established by the weight of authority that, where the defense in an action on a contract of life insurance is based on the alleged falsity of statements contained in the application, admissions or declarations of the insured, whether made before or after the policy was issued, are not admissible against the beneficiary, unless

they were made at a period not too remote in time from the making of a contract of insurance, and were of such nature as to be a real probative force in determining the truth or falsity of such statements; apparently on the ground that the contract of insurance is between the insurer and the beneficiary; that the insured is not a party to the suit; and that the beneficiary has a vested interest in the policy of which he cannot be deprived by the insured except by some act in violation of the conditions of the policy. Where, however, the declarations of the insured, are a part of the *res gestæ* they are admissible, though their purpose has been limited to showing knowledge and not as evidence of the facts stated. If the declarations relate to the cause of an accident and death and are a part of the *res gestæ* they are also admissible.”

After laying this down as a general rule, it is added that some courts have held that the admissions and declarations of the insured are admissible against his beneficiaries in the case of benefit societies because the beneficiary has no vested rights, though other courts have held that the same rule applies to such policies as in the case of an ordinary life policy.

In *Taylor v. Grand Lodge* (1907) 101 Minn. 72, 111 N. W. 919, 11 L. R. A. (N. S.) 82, 118 Am. St. Rep. 606, 11 Ann. Cas. 260, the whole subject is discussed in a very elaborate note, and, while there is some conflict on this point, evidently the weight of the reasoning and of authority is that the same rule applies as in ordinary life insurance policies, and that admissions of the insured, especially when made after the date of the policy, are not competent evidence against the beneficiaries therein. We think his honor correctly followed the better reason in excluding the testimony offered of admissions by the insured made subsequent to the issuance of the benefit policy.

In *Jones on Evidence*, § 242, it is said:

“It is generally held that there is no such privity of interest between an insured person and his beneficiary as to admit the declarations of the former in actions on life insurance policies.”

Certainly this is almost the unbroken line of decisions as to ordinary life insurance, and we think, as already stated, that, while the authorities are divided in this respect as to the admissibility of evidence of this kind in actions on benefit policies, the reason of the thing does not justify any difference as to the admissibility of evidence in the latter case.

There is no controversy as to the amount to be recovered (\$500) if the validity of the policy is sustained.

No error.

(183 N. C. 776)

STATE v. WINDER. (No. 2.)

(Supreme Court of North Carolina. April 19, 1922.)

1. Jury \Rightarrow 103(6)—Jurors who had formed an opinion held competent.

Jurors who stated on their voir dire that they had formed an opinion that defendant was guilty, but could lay it aside and render a fair and impartial verdict according to the evidence, were competent.

2. Rape \Rightarrow 48(1)—Evidence of complaint by female held admissible.

In a prosecution for rape, evidence that the prosecutrix told her mother of the alleged act, and that her mother was the only person accessible to her in whom she could confide, is admissible as corroborating her testimony.

3. Witnesses \Rightarrow 274(1)—Cross-examination to disparage testimony of character witness held proper.

Where in a prosecution for rape defendant's witness testified on direct examination that he had seen prosecutrix flirting with men and out alone at night, it was proper to cross-examine him concerning his willingness to blacken prosecutrix's character, her age at the time, and the purpose for which she went to the places mentioned.

4. Witnesses \Rightarrow 360—Re-examination to explain insinuations against witnesses held proper.

In a criminal prosecution, it is proper for the state on re-examination to explain insinuations impeaching the character of its witnesses brought out on cross-examination.

Appeal from Superior Court, Pasquotank County; Horton, Judge.

L. L. Winder was convicted of the crime of carnally knowing a female child under 14 years of age, and he appeals. No error.

Defendant's witness, J. G. Baum, testified that he had seen the prosecutrix down on the wharf alone several times, on one occasion between 9 and 10 o'clock at night and on another occasion had seen her flirting with two men in a boat. He also testified that the general reputation of the prosecutrix was bad.

Defendant's exceptions 3, 4, and 5 were as follows:

Third. In overruling the defendant's objection to the question asked the witness, J. G. Baum, "And now you have got yourself up to the point where you will come here and swear the little girl's reputation is bad?"

Fourth. In overruling the defendant's objection to the question asked the witness, J. G. Baum, "And don't you know that 12 months before that child was not more than 12 years old at that time?"

Fifth. In overruling the defendant's objection to the question asked the witness, J. G. Baum, "Don't you know the other time you saw her, outside of the occurrence you spoke of, she was

there to borrow a bicycle from Bob Black, a friend of her father?"

W. L. Cahoon, Meekins & McMullan, P. G. Sawyer and Thompson & Wilson, all of Elizabeth City, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. The defendant was convicted at the November term, 1921, of the superior court of Pasquotank county, Judge Horton presiding, of the statutory crime of carnally knowing a female child (Hattie Puckett) under 14 years of age, and from the judgment upon such conviction, appealed to this court.

The statute upon which the prosecution was based is section 4209, C. S., as follows:

"If any person shall unlawfully carnally know or abuse any female child over twelve and under fourteen years old, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the state's prison, in the discretion of the court."

The state's evidence, if accepted as true, was conclusive of defendant's guilt.

[1] Exception 1 was to the court's overruling defendant's challenge to, and refusing to stand aside, five jurors, who on their voir dire stated that they had formed an opinion that the defendant was guilty, but could lay this aside, hear the evidence, the argument of counsel and the charge of the judge, and render a fair and impartial verdict according to the evidence. These were competent jurors. This ruling of the court is fully sustained by many decisions of this court, presenting the same question. One of the more recent cases is *State v. Terry*, 173 N. C. 761, 92 S. E. 154, in which it substantially appeared that after challenge to a juror, and upon cross-examination, as well as upon examination by the court, the juror testified that he could "eliminate from his mind all that he had heard or read, and that he could go into the jury box and be governed solely by the evidence produced upon the trial and by the charge of the court, and he could give the state and the prisoner an absolutely fair trial. On examination by the judge, the juror stated again that he could render a verdict uninfluenced by any opinion he may have formed or anything that he may have heard or read. The court in its discretion found the said jurors to be impartial, and had them tendered and sworn. With reference to this ruling of the court, it was held in that case to be in "exact accord" with previous decisions of this court, and especially with the very recent case of *State v. Foster*, 172 N. C. 960, 90 S. E. 785, which cites with approval the case of *State v. Banner*, 149 N. C. 519, 63 S. E. 84, in which the same questions were asked and like answers

returned as in the case now before this court. The decision there was that a juror having been tested according to the standard used in the present case was a competent juror, and that his admission to the jury box was in the sound discretion of the judge. *State v. English*, 164 N. C. 498, 80 S. E. 72. Like ruling was made, at this term, upon practically the same state of facts. *State v. Montgomery*, 188 N. C. —, 111 S. E. 178.

[2] Exception 2 was taken to the solicitor's question, and the answer of the prosecuting witness, Hattie Puckett, as follows:

"I told my mother about this occurrence Sunday. Q. Was there any one else in your household for you to tell it to? A. No, sir. I had no sister or brother or father there to tell."

This, of course, may have had very little, if any, probative force. It did tend to show that she told it to the only person accessible to her, who would probably be in her confidence, and as such it was admissible, as corroborative of her testimony.

[3] Exceptions 3, 4, and 5 were to the admission of questions and answers put by the solicitor to adverse witnesses on the cross-examinations. These were admissible as impeaching the witnesses. It is said in *State v. Davidson*, 67 N. C. 119:

"It is now held that you may put almost any question to the witness, and that the witness is bound to answer it, unless the answer might subject him to an indictment, or to a penalty under a statute,"

—which is approved in *State v. Lawhorn*, 88 N. C. 637, and in *State v. Robertson*, 166 N. C. 356, at page 360, 81 S. E. 689. But there are some exceptions to this rule, though not presented in this case. Those cases should, however, be considered with *State v. Holly*, 155 N. C. 485, 71 S. E. 450, and what was said by Justice Allen therein as to collateral testimony upon the question of character.

[4] The argument in this court for defendant was confined mainly to the question as to the competency of the jurors to sit in the case, and, we think, properly so, but we have carefully examined all the other exceptions of the defendant, and find them to be so unimportant, if not trivial, in their nature, as not to justify a reversal of the judgment. There was certainly no more than harmless error, if any error at all, in the rulings of the judge. Several of them were merely explanatory, and admitted in reply to attacks upon the state's witnesses. The state did have, and should have, the right to explain any seemingly wrong conduct imputed to its witnesses. Having allowed the insinuation against their character to be made, or the truth of their testimony impeached, if only in an indirect manner, it was nothing but fair and just that they should be permitted to rebut any implication of wrongdoing against them, or to explain any conduct on

their part which was sought to be questioned by the other side, so that the jury might hear the whole story and be more competent to pass upon the credibility of the testimony.

Many exceptions were taken to the statement by the judge of the contentions of the state and the defendant, but the judge in respect to them made the following finding:

"No objection was made during the charge or after the same or at any time during the trial to any statement or contentions by the court, nor was any correction suggested, all exceptions to statement of contentions and charge being made for the first time in the statement of the case on appeal served January 13, 1922; the case having been tried November, 1921."

The other exceptions to the charge are clearly without merit. The instructions to the jury were full and complete, presenting the case to the jury in every phase of it, and correctly stated the law bearing upon all questions raised during the course of the trial.

No error.

(183 N. C. 300)

**BOARD OF EDUCATION OF JOHNSON
COUNTY v. BOARD OF COM'RS OF
JOHNSON COUNTY. (No. 113.)**

(Supreme Court of North Carolina. April 12, 1922.)

1. Constitutional law §193—Legislature may validate retrospectively any proceeding it might have authorized in advance.

Generally the Legislature may validate retrospectively any proceeding it might have authorized in advance.

2. Constitutional law §193—Legislature may validate proceedings under defective act.

Where the Legislature has undertaken to pass a law clearly within its power, and by reason of some defect the statute is rendered ineffectual, the Legislature, in the absence of any intervening rights could, by subsequent enactment, ratify the result of such proceedings as in good faith have been had under the prior defective act.

3. Schools and school districts §97(7)—Special act held to have properly validated authorization of bonds in excess of the amount permitted at the time they were voted.

Where the qualified electors of a school district at an election called under C. S. c. 95, art. 39, and amendatory act (Pub. Laws Ex. Sess. 1920, c. 91), voted bonds not to exceed \$75,000, as authorized by Pub. Laws Ex. Sess. 1920, c. 91, for building, rebuilding, and repairing schoolhouses (C. S. § 5676), and it is conceded that the act of 1920 was not passed in accordance with Const. art. 2, § 14, and that under C. S. § 5678, the amount of bonds that could be authorized was only \$25,000, held, that the voters' action was properly validated by act of 1921.

Appeal from Superior Court, Johnston County; Calvert, Judge.

Controversy without action, by the Board of Education of Johnston County against the Board of Commissioners of Johnston County, submitted upon an agreed statement of facts, to ascertain and determine the validity of certain school bonds, authorized by the voters of Four Oaks school district in Johnston county. From a judgment sustaining the validity of said bonds and directing that they be delivered as required by C. S. § 5681, the defendant appealed. Affirmed.

J. A. Narron, of Smithfield, for appellant.
H. B. Marrow, of Smithfield, for appellee.

STACY, J. On April 12, 1921, a majority of the qualified voters of Four Oaks school district, known as "Ingrams No. 8," situated in Johnston county, in an election duly called, under article 39, ch. 95, of the Consolidated Statutes and amendatory act thereto, chapter 91, Public Laws Extra Session 1920, authorized the board of county commissioners of said county to issue bonds not to exceed in amount the sum of \$75,000, for the purpose of building, rebuilding, and repairing the schoolhouses of said district and furnishing the same with suitable equipment. C. S. § 5676. The validity of said bonds having been called in question, this proceeding is brought to ascertain and determine their legal status.

It is conceded that chapter 91, Public Laws Extra Session 1920, was not passed in accordance with the requirements of article 2, § 14, of the Constitution, and is therefore invalid. It is further conceded that under C. S. § 5678, the amount of bonds for any township or school district, authorized by an election, such as the instant one, may not exceed the sum of \$25,000. But it is contended that the Legislature, on the 19th day of December, at its Extra Session in 1921, passed an act, conforming in all respects to the requirements of article 2, § 14, of the Constitution, specifically ratifying and confirming the results of the election in question and validating the issuance of the said bonds up to the amount of \$75,000.

The only question presented for consideration is whether the bonds, in excess of \$25,000 and up to \$75,000, could be validated by the curative act of the Special Session of 1921. It is conceded that the election in all respects was regular, and that a majority of the qualified voters cast their ballots in favor of issuing the bonds, not only for the maximum amount allowed under C. S. § 5678 (the validity of which is incontestable), but also for the full amount authorized and voted upon under color of chapter 91, Public Laws Extra Session 1920.

[1] The original power of the Legislature to pass the amendatory act of 1920 is admitted, and, as now advised, we see no valid reason why the lawmaking body could not ratify and confirm that which it had the

power to authorize in the first instance, and which power it actually did attempt to exercise. Subject to certain exceptions, the general rule is that the Legislature may validate retrospectively any proceeding which it might have authorized in advance. *Anderson v. Wilkins*, 142 N. C. p. 157, 55 S. E. 272, 9 L. R. A. (N. S.) 1145; *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379; *Cooley on Const. Lim.* (7th Ed.) p. 531; 6 A. & E. Enc. (2d Ed.) 940; *Sechrist v. Com'rs*, 181 N. C. p. 514, 107 S. E. 503.

"The Legislature may ratify and confirm any act which it might lawfully have authorized in the first instance, where the defect arises out of the neglect of some legal formality and the curative act interferes with no vested rights." *Steger v. Building Ass'n*, 208 Ill. 236, 70 N. E. 236, 100 Am. St. Rep. 225.

[2] Where the Legislature has undertaken to pass a law, clearly within its power to enact, and by reason of some defect in its passage the statute is rendered ineffectual, we see no reason why the Legislature, in the absence of any opposite intervening rights, could not, by subsequent enactment, ratify and confirm the results of such proceedings as in good faith have been taken and had under the prior defective act. This is the prevailing rule, and it seems to be in accord with the general trend of authorities on the subject. *Anderson v. Wilkins*, supra, and cases there cited. *Belo v. Com'rs*, 76 N. C. p. 497; 12 C. J. 1094; 6 R. C. L. 321.

Speaking to a similar question in *Thomson v. Lee County*, 8 Wall. 327, 18 L. Ed. 177, it was said by the Supreme Court of the United States:

"If the Legislature possessed the power to authorize the act to be done, it could, by retrospective act, cure the evils which existed, because the power thus conferred had been irregularly executed. The question with the Legislature was one of policy, and the determination made by it was conclusive."

See, also, *Erskine v. Netson County* (N. D.) 27 L. R. A. 696, and note.

[3] Again, in *Grenada County v. Brown*, 112 U. S. 261, 5 Sup. Ct. 125, 28 L. Ed. 704, it was held that a municipal subscription to the stock of a railroad company, in aid of the construction of said road, made as a result of an election, called without proper authority previously conferred, might be confirmed and legalized by subsequent legislative enactment, unless such legislation were prohibited by the Constitution of the state, and when that which was done would have been legal had it been done under legislative sanction previously given. Mr. Justice Harlan, speaking for the court, said:

"Since what was done in this case by the constitutional majority of qualified electors, and by the board of supervisors of the county, would have been legal and binding upon the county had it been done under legislative authority, previously conferred, it is not perceived

why subsequent legislative ratification is not, in the absence of constitutional restrictions upon such legislation, equivalent to original authority."

And to like effect is the decision in *Hayes v. Holly Springs*, 114 U. S. 120, 5 Sup. Ct. 785, 29 L. Ed. 81.

Under the foregoing principles, we think the judgment of his honor, sustaining the validity of the bonds in question, should be upheld.

Affirmed.

(188 N. C. 317)

CRAVER v. DURHAM HOTEL CORPORATION. (No. 339.)

(Supreme Court of North Carolina. April 12, 1922.)

Easements \Leftarrow 36(3)—Deed from defendant's predecessor in title held insufficient to establish easement.

A deed from defendant's predecessor in title held insufficient to make out a prima facie case in establishing an easement in an alley over defendant's land, where it was not sufficiently shown that the grantee in such deed ever conveyed the land, or that any one under whom plaintiff claimed derived title from him by descent or otherwise, and there was no actual possession of the strip.

Appeal from Superior Court, Durham County; Kerr, Judge.

Action by R. D. Craver against the Durham Hotel Corporation. From a judgment as of nonsuit, plaintiff appeals. Affirmed.

McLendon & Hedrick, of Durham, for appellant.

R. O. Everett and Fuller, Reade & Fuller, all of Durham, for appellee.

STACY, J. Plaintiff and defendant are adjacent landowners of several lots situate in the city of Durham, N. C., and plaintiff claims an easement, or perpetual right of user, in, to, and over an alleyway, 10 feet wide and 65 feet in length, lying along the edge of defendant's property and adjoining one of the plaintiff's lots.

There was evidence tending to show that the defendant's land, as well as that claimed by the plaintiff, was originally owned by Martha Mangum. Plaintiff then undertook to establish his title, including the alleged easement in question, by offering mesne conveyances tending to connect his claim with the original title of Martha Mangum, defendant's predecessor in title and the common grantor of both parties. Plaintiff introduced a deed from Martha Mangum and husband to Rufus Massey, but it does not sufficiently appear in the evidence that Rufus Massey ever conveyed the land to any one, or that any of the persons, under whom the plaintiff now claims, derived title from said

Rufus Massey by descent or otherwise. There has been no actual possession of the strip of land in controversy. Hence, upon the record, plaintiff has failed to make out a prima facie case. *Mobley v. Griffin*, 104 N. C. 113, 10 S. E. 142.

While this break in the plaintiff's chain of title would seem to be fatal, unless it can be cured, yet it does not appear, from the instant record, that any rights have been lost by mere nonuser, or failure to open said alleyway. 9 R. C. L. 810.

For the reason assigned, the judgment must be upheld.

Affirmed.

(188 N. C. 181)

CAPPS v. ATLANTIC COAST LINE R. CO. (No. 64.)

(Supreme Court of North Carolina. March 22, 1922.)

1. Limitation of actions \Leftarrow 180(3)—Limitation in statute giving right of action can be raised by demurrer.

Where the limitation of time within which to bring an action is contained in the statute giving the right of action, the objection that the action was not brought within the time limited can be taken by demurrer, if the facts appear on the face of the pleading.

2. Commerce \Leftarrow 8(6)—Federal Employers' Liability Act is exclusive of state statute in its field.

The federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) in its particular field is exclusive of the state statutes giving an action for wrongful death.

3. Limitation of actions \Leftarrow 127(15)—Action for death under Virginia statute cannot be set up in suit under federal act after expiration of time limited.

The right to recover for a wrongful death under Pollard's Code Va. 1904, § 2903, which requires an action thereunder to be brought within 12 months after the death, cannot be set up in an action originally based on the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) by an amendment filed more than 12 months after the death.

4. Limitation of actions \Leftarrow 2(1)—Limitation in foreign statute creating right is not governed by law of the forum.

Where an action is based on a foreign statute creating a right of action and containing therein a limitation on the time within which the action must be brought, the right of action is limited by such provision, and not by the statutes of limitation of the forum.

5. Limitation of actions \Leftarrow 127(11)—Statute runs until amendment setting up new cause of action.

Though a new cause of action may be introduced by amendment of the original pleadings, the defense of the statute of limitations to the new cause thus stated will have the same effect

as if the amendment were a new and independent suit.

6. Limitation of actions §130(1)—Under Virginia statute, full limitation does not run from abatement of first suit.

Under Pollard's Code Va. 1904, § 2903, requiring actions for death to be brought within 12 months, and providing that if an action so brought abates or is dismissed, the time it is pending shall not be counted as part of the period of 12 months, but another suit may be brought within the remaining part of said 12 months, plaintiff has only so much time for second action as had not expired at the time first action was brought.

Clark, C. J., dissenting.

Appeal from Superior Court, Wilson County; Allen, Judge.

Action by E. B. Capps, as administrator, against the Atlantic Coast Line Railroad Company, to recover damages for wrongful death. Judgment for plaintiff, and defendant appeals. Reversed and action dismissed.

See, also, 178 N. C. 558, 101 S. E. 216; 103 S. E. 300.

Civil action to recover damages for an alleged negligent injury and wrongful killing. From a verdict and judgment in favor of plaintiff, the defendant appealed.

F. S. Spruill, of Rocky Mount, and Carl H. Davis, of Wilmington, for appellant.

O. P. Dickinson, of Wilson, for appellee.

STACY, J. The following statement of the case will suffice for our present decision.

The plaintiff's intestate, I. M. Williamson, was employed as a carpenter by the Atlantic Coast Line Railroad Company, and on August 16, 1915, "while making investigation as to how to repair a section of the steps of a coal chute" at South Richmond, Va., he received injuries, from which he died 3 days thereafter, August 19th.

On May 15, 1916, plaintiff instituted suit in the superior court of Wilson county, N. C. Complaint was duly filed, specifically setting up a cause of action based on the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), and alleging that, at the time of the injury, both the plaintiff's intestate and the Atlantic Coast Line Railroad Company were engaged in interstate commerce. The defendant answered, denying liability, and further alleging that plaintiff's intestate, while in its employ, was not engaged in any work of interstate commerce. In deference to this denial and allegation, the plaintiff thereafter, on June 28, 1917, more than 22 months after the death of the decedent, upon motion and over defendant's objection, was permitted to set up, by way of amendment to the original complaint, an additional or new cause of action based on a statute of the state of Virginia, giving a right of ac-

tion for wrongful death. Upon motion of the defendant, the case was then removed to the District Court of the United States for the Eastern District of North Carolina; and thereafter in said District Court the defendant answered, setting up that the cause of action based on the Virginia law had expired by the very terms of the Virginia statute, since the complaint showed on its face that plaintiff's intestate died on August 19, 1915, more than 12 months prior to the filing of said amendment. The act invoked and upon which the amendment is based provides that—

"Every such action shall be brought by and in the name of the personal representative of such deceased person and within twelve months after his or her death." Pollard's Code of Virginia 1904, § 2903.

It was held in the federal District Court that the complaint had set out two causes of action, one based on the federal Employers' Liability Act and the other on the statute of the state of Virginia, and, further, that the latter cause of action had not been instituted within 12 months after decedent's death, and was therefore barred by the Virginia statute. The plaintiff then and in said District Court of the United States, on June 11, 1918, suffered a voluntary nonsuit upon the cause of action based on the Virginia statute. The original cause was then remanded to the superior court of Wilson county for trial.

Thereafter on May 12, 1919, within 12 months after the judgment of nonsuit in the United States District Court, as above set out, and while the original suit was still pending, the plaintiff issued a new summons against the defendant herein, and on June 25, 1919, following filed his complaint, setting out two causes of action in identically the same language as that used in the complaint, and amendment thereto, filed in the original suit. The defendant, on February 20, 1920, filed answer to the complaint in this second action, but made no objection to the plaintiff prosecuting two separate and independent suits in the same court at the same time with pleadings exactly alike.

At the fall term, 1919, of Wilson superior court, the original suit, based on the federal Employers' Liability Act, was called for trial. A judgment as of nonsuit was entered upon the ground that plaintiff himself was not engaged in work of the character of interstate commerce at the time of his injury. This was affirmed on appeal, and is reported in 178 N. C. 558, 101 S. E. 216. The plaintiff then applied to the Supreme Court of the United States for a writ of certiorari to have said judgment reviewed, which said writ was denied in the summer of 1920. 252 U. S. 580, 40 Sup. Ct. 345, 64 L. Ed. 726.

Subsequently, at the May term, 1921, of Wilson superior court, the case at bar was

called for trial, and the defendant's plea in bar and motion to dismiss were overruled, from which ruling the defendant appealed to this court, but said appeal was dismissed as premature. *Capps v. Railroad*, 182 N. C. 758, 108 S. E. 300.

Finally, at the November term, 1921, of Wilson superior court, this case again came on for trial, and was heard before his honor O. H. Allen, judge, and a jury. Upon motion of the defendant his honor dismissed the cause of action, based on the federal Employers' Liability Act, for that all the matters and things therein set out and complained of had been fully adjudicated and previously determined. The defendant also moved to dismiss plaintiff's second cause of action, based on the Virginia statute, upon the ground that the same had not been set up or begun within one year from the death of plaintiff's intestate, and that the action could not therefore be maintained. This motion was overruled, and the cause submitted to a jury, which resulted in a verdict for the plaintiff. From the judgment rendered thereon defendant appealed.

The theory upon which his honor below allowed a recovery herein is set out in the judgment of the superior court as follows:

"The defendant in apt time renewed its motion heretofore made to dismiss the complaint as to the second cause of action, which is laid under the statutes of the state of Virginia as appears in the complaint, for that the said second cause of action is a new cause of action, and not a mere amendment to the original complaint, and that the same, not having been filed within one year after the death of decedent, is barred by the statute. The court overruled this motion, holding as a matter of law that the cause of action set out in the three pleadings of the plaintiff, viz. the original complaint filed in the first suit, the alleged amendment thereto, and the complaint filed in the second suit, is one and the same, and submitted the issues to the jury upon the second cause of action. The defendant duly excepted."

The complaint in the first suit was based on the federal Employers' Liability Act. The amendment to the complaint, filed in that proceeding, set up a cause of action based on the Virginia law. The judge of the United States court, ruling on defendant's plea in bar, held that the cause of action, based on the Virginia statute, had not been instituted within 12 months after decedent's death, and hence was barred by the limitation contained in the statute under which it was brought. After this ruling, the first suit proceeded to final judgment without further amendment, and resulted in a judgment of nonsuit, as heretofore noted.

[1] The present suit, as shown by the record, was instituted May 12, 1919, more than three years after Williamson's death. Speaking to the question as to when suit must be

brought, under the Virginia statute, the Supreme Court of that state, in *Dowell v. Cox*, 108 Va. 460, 62 S. E. 272, held:

"That, when the declaration in an action for death by wrongful act shows on its face that the death occurred more than 12 months before action brought, advantage may be taken of the limitation by demurrer. This conclusion was clearly" correct "because, in such cases, the limitation affects the right as well as the remedy."

And to like effect is the holding of the same court in *Manuel v. Norfolk & W. Ry. Co.*, 99 Va. 188, 37 S. E. 957. Our own decisions, dealing with a similar statute, are in full accord with the doctrine announced in the Virginia cases. In *Taylor v. Cranberry I. & C. Co.*, 94 N. C. 525, referring to the limitation contained in the North Carolina statute which allows a recovery for wrongful death, it was said:

"This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it."

[2] The cause of action sought to be enforced in this proceeding was not known at the common law. It was essential, therefore, that it should be based on some applicable statute. There was a Virginia statute on the subject, and also the federal Employers' Liability Act. But these two laws dealt with different kinds of commerce, and occupied different, though contiguous, spheres. *St. Louis, etc., R. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156. If the federal statute were applicable, the state statute was excluded by reason of the supremacy of the former law. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; *Renn v. Railroad*, 170 N. C. 128, 86 S. E. 964, and cases there cited.

"Had the injury occurred in interstate commerce, as was alleged, the federal act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the state; in other words, the federal act would have been exclusive in its operation, not merely cumulative." *Wabash R. Co. v. Hayes*, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. Ed. 1226.

Conversely, if the state statute were applicable, the federal law was not pertinent. *Mondou v. Railroad*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

"There can be no doubt that a right of recovery [under the federal act] arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce." *Railroad v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1061, Ann. Cas. 1914C, 163.

[3, 4] The two statutes, federal and state, operated in different fields, the one in interstate commerce and the other in intrastate commerce, and each was controlling and exclusive in its respective field of operation. The plaintiff, at first, elected to sue under the federal Employers' Liability Act, and specifically alleged a cause of action arising thereunder. He failed to prove his case as laid in interstate commerce. *Capps v. Railroad*, 178 N. C. 558, 101 S. E. 216. His second cause of action, based on the Virginia statute, was not pleaded, or set up, until more than 22 months after the death of his intestate. This right of action was therefore barred at that time, or rather lost, as it did not extend beyond the period fixed in the statute. *Phillips Co. v. Grand Trunk, etc., Co.*, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774.

"There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. * * * But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability." *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252.

It follows, therefore, that under the Virginia law suit must be brought within one year from the death, or else the liability and right of action cease to exist, and this was not done in the case at bar. *Dowell v. Cox*, supra.

But passing over, for the present, any question as to whether plaintiff had the right to institute this action while another suit between the same parties and arising out of the same inquiry (if it be "one and the same" cause of action) was pending in the same court, the fact remains that the first reference made by plaintiff to the Virginia statute in any complaint, or amendment thereto, was the amendment to the original complaint, which amendment was allowed, over defendant's objection, on the 28th day of June, 1917, more than 12 months after the death of Williamson. Hence on June 28, 1917, when plaintiff for the first time set up an action under the Virginia statute, by the terms of which alone he could proceed, he was too late by more than 10 months.

Clearly, there were two causes of action set up and alleged by the plaintiff. A change from the one to the other not only involved a change from fact to fact, from interstate to intrastate commerce, but also a change from law to law, from the federal

to the state statute. *Union Pac. R. Co. v. Wyler*, 158 U. S. 235, 15 Sup. Ct. 877, 39 L. Ed. 983. Thus the amendment, filed in the original proceeding, alleged a new and independent cause of action, and was therefore a departure from the initial pleading.

"A departure may be either in the substance of the action or defense, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of Parliament." 1 Chitty on Pleading, pp. 674, 675.

[5] It is the general rule, and consistently held with us, that a new cause of action may be introduced by way of amendment to the original pleadings; but the established limitation on the operation of its relation to the commencement of the suit is that, if the amendment introduce a new matter, or a cause of action different from the one first propounded, and with respect to which the statute of limitations would then operate as a bar, such defense or plea will have the same force and effect as if the amendment were a new and independent suit. *King v. Railroad*, 176 N. C. 301, 97 S. E. 29; *Belch v. Railroad*, 176 N. C. 22, 96 S. E. 640; *McLaughlin v. Railroad*, 174 N. C. 182, 93 S. E. 743; *Railroad v. Dill*, 171 N. C. 176, 88 S. E. 144, and cases there cited; *Deligny v. Furn. Co.*, 170 N. C. 197, 86 S. E. 980; *Fleming v. Railroad*, 160 N. C. 196, 76 S. E. 212; and *Union Pac. Ry. Co. v. Wyler*, supra.

The case of *Mitchell v. Talley*, at the last term, 182 N. C. 683, 109 S. E. 882, contains nothing which would tend to militate against our present decision. The question there presented was whether an attachment would lie in an action for injury to the person resulting in death. We held that it would, under the broad and comprehensive terms of the sections of the Consolidated Statutes relating to attachments. The two cases are scarcely related; they are easily distinguishable.

[6] But conceding, for the sake of argument, that by eliminating or treating as surplusage the allegation touching the subject of interstate commerce in the original complaint and holding that, without this allegation, it may be considered as containing a defective statement of a good cause of action under the Virginia law, subject to be cured by amendment, under authority of *Lassiter v. Railroad*, 136 N. C. 89, 48 S. E. 642, 1 Ann. Cas. 456, yet, even in this event, the plaintiff is confronted with an insurmountable obstacle under the terms of the Virginia statute with respect to the institution of a second suit after the abatement or dismissal, without a determination of the merits, of the previous action. In this respect, the Virginia law is different from the law of North Carolina. Section 2903, *Polard's Code of Virginia*, already mentioned, further provides:

"But if any such action is brought within said period of twelve months after said party's death, and for any cause abates or is dismissed without determining the merits of said action, the time said action is pending shall not be counted as any part of said period of 12 months, and another suit may be brought within the remaining period of said 12 months as if such former suit had not been instituted."

It will be noted that, under the terms of this statute, the plaintiff is not given 12 months after the abatement or dismissal, without a determination of the merits, of the first suit, within which to bring his second action, but only the remaining period of the 12 months which had not elapsed prior to the filing of the first suit; or, in other words, the time during which the first suit is pending is not to be counted in determining the period of 12 months from the date of decedent's death. This being the correct interpretation of the Virginia law, as declared by the Supreme Court of that state, it will be observed that the plaintiff did not start his first suit until nearly 9 months after the death of his intestate. Then, on June 11, 1918, he voluntarily submitted to a judgment of nonsuit on his second cause of action, or the one set up under the Virginia statute. Regardless as to how we may treat the allegations of the original complaint, with respect to this cause of action, they were clearly withdrawn for any such purpose when the plaintiff was nonsuited upon his own motion. He then had only 3 months and 3 days within which to bring another suit—8 months and 27 days having elapsed before the institution of the first suit; and his second action, which is the case at bar, was not instituted until May 12, 1919, 11 months and 1 day after his voluntary nonsuit of the Virginia cause of action in the federal court. This was too late, as declared by the Supreme Court of Virginia in the case of *Manuel v. Norfolk & W. Ry. Co.*, *supra*.

Applying the above principles to the facts of the instant case, we think it is clear that the plaintiff's recovery must be denied and the action dismissed. There appears to be no logical basis upon which it may be sustained.

Action dismissed.

CLARK, C. J. (dissenting). The plaintiff's intestate was killed in South Richmond in the service of the defendant while repairing a coal chute that was used for coaling and sanding engines used in both interstate and intrastate commerce. Before the expiration of the year thereafter the plaintiff qualified as his administrator in Wilson county, N. C., and brought suit in the superior court of that county. In filing his complaint he alleged the remedy he sought to be under the federal Employers' Liability Act. After 12 months had expired, upon permission of the court,

he filed an amended complaint in which he reiterated the matters and things alleged in the original complaint, and in addition claimed the remedy under the Virginia statute. On motion of the defendant the case was moved to the federal court where a motion was made by defendant to dismiss the demand for the remedy alleged under the Virginia statute, because more than 12 months had elapsed since death of the plaintiff's intestate before filing the complaint. In the federal court it was held that the case was one that arose under the federal act, but intimated that the additional remedy claimed in the amended complaint was barred by the statute of limitations. Thereupon the plaintiff submitted to a voluntary nonsuit as to that, and on his motion the cause was remanded to the state court to be tried under the federal act.

In the state court the defendant renewed his motion to nonsuit the plaintiff on the ground that the plaintiff's intestate was not engaged in interstate commerce at the time of his death, and hence the action was not triable under the federal act. The nonsuit was granted, and on appeal to the Supreme Court of North Carolina this court affirmed the decision of the lower court, and an application thereafter by the plaintiff to the Supreme Court of the United States for a writ of certiorari was denied. Immediately, however, after the case was remanded to the state court, the plaintiff, who had submitted to a nonsuit on his right of remedy under the Virginia statute and before 12 months had expired, instituted a new suit in the superior court of Wilson. The defendant pleaded in bar, but this was overruled by Calvert, J., who held that the cause of action set out in the three pleadings, to wit, by the original complaint filed in the first suit, amendment thereto, and the complaint filed at the last suit, were the same, and not two distinct causes of action. The defendant appealed, but at September term of this court the appeal was dismissed as premature, and in the lower court the same plea was made at the October term of Wilson before Allen, J., and overruled. The case was tried on its merits, and a verdict of \$8,000 was awarded, and from the judgment the defendant appealed.

It would seem clear that the sole question is whether or not the cause of action set out in the three pleadings, to wit, the complaint filed in the first suit, seeking the remedy under the federal Employers' Liability Act, the amendment adding to that action on the same facts a recovery under the remedy allowed under the Virginia act, and the complaint filed in the second action brought in Wilson were on the same cause of action. The cause of action is one and the same, the wrongful death, which occurred but once, and therefore under the identical circumstances and at the time set out in all three com-

plaints. The jury have settled, upon the facts, that the death of plaintiff's intestate was caused by the wrongful act of the defendant, and that \$8,000 is a just measure of compensation which should be awarded.

While the remedy which could be awarded for recovery under the federal Employers' Act and the remedy under the Virginia act may be somewhat different, the fact remains that there is and can be only one cause of action. Whether the plaintiff claimed a remedy under one act or the other there was but one cause of action. It would follow therefore that when the amendment was allowed to set up a claim for the Virginia remedy, it was not another or different cause of action, but like a second count in a bill of indictment, where the transaction is stated in a different form, but in reference to the same offense.

When the plaintiff brought his action for the wrongful death, which was valid under the Virginia statute and under the federal act, if in either a wrong remedy was asked it in no wise affected the statute of limitations of the cause of action. The proceedings in each was in a court having proper jurisdiction, and the subsequent addition, not of another cause of action, but of a claim for a somewhat different remedy, in no wise affected it.

If these were separate and distinct causes of action for the same wrong, then if the plaintiff—who could not guess in advance how the court would hold—had sought to join them, the action would have been demurrable as multifarious. If he had brought two separate and distinct actions, then the defendant could have pleaded the pendency of two actions for the same transaction. This would be worse than the former system of pleading by which, if a man did not guess as to what the court might hold was the proper form of action, he would go out of court again and again until he could guess the form of action which the judge might approve; or, if he had brought his action at law when it should have been a suit in equity or vice versa, he would go out of court.

It seems according to the present common sense method of pleading that the plaintiff, who is entitled to bring an action for the wrongful death of his intestate, instituted a proceeding setting out the facts thereof, and he was in court claiming compensation for that wrong regardless whether he asked for a remedy under the federal act or under the Virginia statute. It follows therefore that, he having asked upon the identical facts set out in the complaint relief under the federal act, he could amend by asking the additional remedy under the Virginia statute. He could not guess how the judge might view the legal remedy applicable, and therefore the plaintiff has been in court since issuing the first writ under both statutes which give

a remedy for the same wrongful death, leaving it to the courts to decide whether it was under one statute or the other.

The amendment setting up and claiming a remedy under the Virginia statute was not a new cause of action, and dated back to the original summons. It is true that the plaintiff subsequently took a nonsuit as to the assertion of a claim for the remedy afforded by the Virginia statute, but he instituted a new action within 12 months, and therefore, having come into court within the time prescribed by the Virginia court, he was authorized to bring this new action.

In *Lassiter v. Railroad*, 136 N. C. 89, 48 S. E. 642, 1 Ann. Cas. 456, this court held:

In an action to recover damages for the death of plaintiff's intestate by wrongful act in another state, where the complaint would state a good cause of action had the death occurred in the state of the forum, and amended, the complaint setting forth the statute of the foreign state, which was not done in the original, does not introduce a new cause of action, nor admit the bar of the statute of limitations prescribed by the foreign statute giving the right of action. "Our Code provides that permitting an amendment setting up additional facts does not add to or change the cause of action even when there was a failure to allege an essential fact, but merely gives power to amend by inserting other allegations material to the case." The perfecting of the complaint to cure a defect in the complaint, even in material matters, is not changing the cause of action nor adding a new cause, but merely making a good cause out of that which was a defective statement of a cause of action because of the omission of material allegations. But this is not even that case. The facts were substantially the same as set out in all three instances, to the same tenor, and the only difference is as to what remedy the plaintiff asked or was entitled to receive, whether under the Virginia statute or under the federal Employers' Liability Act.

In *Lassiter v. Railroad* the court said:

"The subject of an action is the thing, the wrongful act for which the damages are sought, the contract which is broken, the act which is sought to be restrained, the property of which recovery is asked. The object of an action is the relief demanded, the recovery of damages or of the land or personally sued for, the restraint or other relief demanded."

In this case, there is but one state of facts, therefore there is but one cause of action, and they have been pending in court since the first writ was issued, and against that no statute of limitations has run under either statute. The demand for the damages, the relief, has been pending since the first complaint was filed, and it can make no difference that at one time the relief under the Virginia statute was added, and that at an-

other time it was withdrawn, because during all the time this state of facts has existed in court, which the jury has found to be true, that the plaintiff's intestate under those circumstances came to his wrongful death by the cause of the negligence of the defendant, and damages were asked to be assessed. Whether the particular form of relief should be granted under the Virginia statute or under the federal statute, there has been only one cause of action instituted. This was instituted within the statutory period, and has always been pending, and whether the relief sought was under one statute or the other there has been no laches on the part of the plaintiff which entitled the defendant to go out of court without payment for the wrongful death that he has caused.

In the *Lassiter Case* it is said:

"The cause of action, plus the right of action thereon, constitute what our Code styles a 'good cause of action.'"

The injuries complained of in the original complaint filed by the plaintiff, together with his right to sue thereon under the statute of Virginia, constitute a good cause of action, but since the allegation left out, to wit, pleading of the Virginia statute, it was simply a defective statement of a good cause of action, and not a good statement of a defective cause of action, and in such cases the courts have universally held that a complaint may be amended to cure a defective statement of a good cause of action, and in such cases the amendment relates back to the time of filing the original complaint.

In *Renn v. Railroad*, 170 N. C. 128, 86 S. E. 964, approved since in United States Supreme Court, the court held:

"If, however, the original complaint does not allege a cause of action under the federal act, we are of opinion that the court had the power to permit it to be amended by alleging that the defendant was employed in interstate commerce at the time of his injury."

In this case of *Renn v. Railroad*, the court cites from *Railroad v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, and says:

"In that case *Sallie C. Wulf* commenced an action in the United States Circuit Court * * * in her individual capacity to recover damages for the death of her son, who was killed in Kansas" under "a right of action * * * provided by statute for injuries resulting in death. The defendant was engaged in interstate commerce and the intestate was killed while employed in that commerce. The plaintiff could not sue in her individual capacity under the federal act. More than two years after the injury the circuit court permitted an amendment by which she was allowed to prosecute the action as administratrix of her son. The Supreme Court of the United States approved the amendment, and held that it was not equivalent to the commencement of a new action so as to render it subject to the two

years limitation prescribed by section 6 of the Employers' Liability Act, and that the amendment related back to the beginning of the action."

In the case of *Pelton v. Illinois Cent. R. Co.*, 171 Iowa, 91, 150 N. W. 236, 243, the court held, in effect, when the federal Employers' Liability Act was passed an anomalous situation was created, for that there were two lines of remedies for cases of this kind emanating from different legislative jurisdictions, the one necessarily exclusive of the other, both administered by the same court, and the respective applicability of the one or the other both determined solely by the relation, or want of relation, of the parties to intrastate commerce. It is manifestly desirable that such an anomaly should not be made a mere pitfall and that it should not become an undue obstacle to the prosecution of a cause of action on its larger merits.

This is exactly what the plaintiff is seeking to have held by this court on this appeal. There was but one occurrence, creating one cause of action upon the same identical state of facts. If among those facts the jury should find that the plaintiff's intestate was killed while employed in intrastate commerce, that would entitle the plaintiff to recover the remedy prescribed by the Virginia statute. If, on the contrary, the jury should determine at the trial that the plaintiff's intestate was killed while engaged in interstate commerce, then the plaintiff would be entitled to recover the remedy prescribed by the federal Employers' Liability Act. The merits are the same in either case. Whether the intestate was engaged in inter- or intra-state commerce does not affect either the cause of action or the right of action nor the jurisdiction, but merely the remedy to be granted by the same court. Our statute provides, and we have always held, that the relief demanded is immaterial, and that the plaintiff is entitled to recover whatever remedy the facts found by the jury entitle him to receive. C. S. 506(3) and cases cited thereunder.

This being so, and there having never been but one cause of action, the statute of limitations ceased to run from the issuance of the summons in the first case, and from that time the allegations in the complaint have constituted a pending cause of action on which, if proven, the plaintiff was entitled to recover. It might have been alleged in claiming the recovery that the defendant was engaged in interstate commerce, and in the same complaint or by amendment that he was engaged in intrastate commerce, but neither of these affected the right of action. Both could have been alleged at the same time, and if one of these was omitted it could be supplied by an amendment, and when this was done the statement of the cause of action, being thus perfected, dated back to the

issuance of the original summons. And when a nonsuit was taken under the Virginia cause of action this could be reinstated within 12 months after such nonsuit in the terms of their statute.

Shifting from asking one remedy to another, or adding an additional claim for remedy upon the same state of facts, does not work any change in the cause of action. This has been often decided. In *Woodcock v. Bostic*, 129 N. C. 243, 38 S. E. 881, the court held that an action at law may be converted into a suit in equity by an amended complaint when the facts of the transaction at the base of both are the same, without the statute of limitations coming into play. There are numerous decisions in the other states to the same effect, but this is a clear statement in our own court of the basic principle of our procedure which abolishes distinctions and forms of action and the distinction formerly existing between actions at law and proceedings in equity. In all the courts in which the reform procedure obtains, it has been held that a change from tort to contract, or vice versa, by amending the pleadings, is regarded as a mere variation in a matter of form. In *Howard v. Railroad*, 11 App. D. C. 300, it is said that when an amendment has been made to a declaration, the question whether the action has been thereby opened to the bar of limitations depends upon the matter of substance. Whether the question of action remains the same is the test, and the mere change from the form of action in assumpsit to one in tort is immaterial.

In several of the states where an action can be grounded upon a right conferred by statute, or upon a right at common law, it has been held that where the basic transaction is the same the change from one to the other does not make a new cause of action.

In *Railroad v. Pointer*, 113 Ky. 952, 69 S. W. 1108, the court held: Where in an action against a railroad corporation for negligently causing the death of the plaintiff's intestate in another state, the plaintiff omits to plead the foreign statute giving a right of action for such cause, he may amend and supply such omission, and the amendment will relate back to the commencement of the action so that the bar of the statute of limitations will not come into play.

The Supreme Court of North Carolina has

repeatedly held that there is a distinction between the cause of action and the right of action, the cause being the wrongful acts which caused the death and the consequences, the right of the action being the right to sue for that cause conferred by the statute, and the Supreme Court of the United States has repeatedly upheld such decisions of this court, though in some jurisdictions a contrary doctrine has been sustained.

There has been much ingenuity in arguing that the plaintiff has lost the right to recover for the wrongful death of his intestate, but upon the plain intentment of our statutes and procedure, and in equity and justice, in this case in which the allegations in the complaint have been approved by the jury, and therefore must be taken as true, the beneficiaries of the deceased are entitled to recover compensation for the wrongful death inflicted upon him by the defendant.

Within the statutory time, the plaintiff brought this action upon the allegations of facts which have been sustained by the jury and which, as a matter of law, whether under the federal statute or under the Virginia statute, entitle the plaintiff to recover. The only difference has been, not as to the cause of action, or as to the damages, or as to the right of the plaintiff to recover, but whether he was entitled to the remedy granted by the Virginia statute or under the federal statute. This being so, and the cause of action having been pleaded and pending in court ever since the original summons were issued, certainly the plaintiff should be entitled to recover, irrespective of whether the remedy asked should be that authorized by one statute or the other, or under both, or whether both remedies were asked in the same action, or whether one was added and unaffected by the fact that in deference to the ruling of a judge who took a contrary view a nonsuit was entered as to the demand for remedy under the Virginia statute, especially as that demand was reinstated in a new action instituted within 12 months as authorized by the Virginia statute.

An action for a serious wrong in a court of justice ought not to be denied upon metaphysical distinctions, or ingenious discussions based upon a matching of wits between counsel. The judgment obtained by the plaintiff, after so long a delay, upon a verdict of the jury, in my judgment, should be affirmed.

(183 N. C. 354)

DORSETT v. DORSETT. (No. 392.)

(Supreme Court of North Carolina. April 19, 1922.)

Husband and wife \S 41—Husband not liable to wife for aid in carrying on business.

In absence of an express promise or understanding, a husband is not made liable to his wife for her aid to him in carrying on his business by C. S. \S 2513, as to earnings of a married woman.

Appeal from Superior Court, Guilford County; Webb, Judge.

Action by Cora L. Dorsett against F. A. Dorsett. From judgment sustaining a demurrer to the complaint and dismissing the action, plaintiff excepts and appeals. Affirmed.

This action was brought by the wife to recover of her husband the sum of \$5,400 upon a quantum meruit for services rendered by her while they were living together as husband and wife. The complaint alleges:

(1) That the plaintiff and defendant intermarried July 21, 1917, in the county of Guilford.

(2) That at the time of their marriage the defendant was in the business, in Greensboro, of repairing bicycles, guns, keys, locks, etc., and was doing business on Davie street in the city of Greensboro, in a house which he rented for that purpose.

(3) That in November, 1917, after the plaintiff was married, she went into the said place of business of the defendant, and, besides her domestic duties which she carried on, she rendered service to her husband by waiting on his customers, made keys, worked on bicycles, guns, and other instruments to be repaired, which were brought into the shop, and other kinds of this character of business; that she continued to work for defendant until about November 15, 1920.

(4) That under the laws of North Carolina she is advised that she is entitled to pay for her services rendered the defendant as aforesaid, which were worth the sum of \$150 per month for the period of three years from November, 1917, to November 15, 1920, amounting to \$5,400. Wherefore, the plaintiff demands of the defendant the sum of \$5,400 and the costs of this action, to be taxed by the clerk.

The defendant demurred as follows: That it appears upon face of said complaint that said complaint does not state facts sufficient to constitute a cause of action, for that:

(1) It appears that at the time when plaintiff alleges she worked for defendant she and the defendant were married, that she was the wife of defendant, and that they

were at that time living together as husband and wife.

(2) That the complaint shows upon its face that plaintiff's alleged cause of action is upon a quantum meruit for alleged services to defendant, her husband, at a time when plaintiff and defendant were living together as husband and wife.

The court sustained the demurrer, and dismissed the action. The only exception is to the judgment assigned.

John A. Barringer, of Greensboro, for appellant.

King, Sapp & King, of Greensboro, for appellee.

CLARK, O. J. This action is based on C. S. \S 2513, which is as follows:

"The earnings of a married woman by virtue of any contract for her personal service, and any damage for personal injuries, or other torts sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried."

This statute was recently construed in Kirkpatrick v. Crutchfield, 178 N. C. 353, 100 S. E. 607, in which we said:

"It was felt to be unjust and illogical that the husband should recover for labor which the wife had performed outside the household duties, and under a contract which she had a legal right to make 'as if single,' and that when the wife had borne the physical and mental suffering of the amputation of her foot, and a broken arm and other injuries, compensation should go to her and not to her husband, who had suffered nothing. The discharge of household duties, unending and tiresome and without limitation of hours, the rearing of children, the loving companionship and attentions of a wife are full compensation for her right to support by her husband."

That case upheld the right of the wife to maintain an action "by virtue of any contract for personal services and any damages for personal injuries" against a third party. The right of the wife to recover her separate earnings, suing alone, was also sustained by Adams, J., Croom v. Lumber Co., 182 N. C. 219, 108 S. E. 735.

In Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206, the court held that the wife "might maintain an action against her husband for an assault or other personal injury, and in such case recover punitive as well as compensatory damages," saying:

"Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to 'love, cherish, and protect' her. Civilization and justice have progressed thus far with us, and never again will 'the sun go back ten degrees on the dial of

Ahaz.' Isaiah, 38:8." 180 N. C. 524, 105 S. E. 210.

Crowell v. Crowell was reaffirmed on rehearing, Stacy, J., 181 N. C. 66, 106 S. E. 149.

This case presents an entirely new feature. It is not the case of recovery of compensation on a contract against a third party, nor for personal injury against her husband, as well as others, but whether she can recover against her husband as upon contract for services rendered without any agreement for compensation.

It may be essential justice in many cases that, where a wife has rendered services outside the discharge of her household duties, she should receive compensation, and she certainly can do so where there is such agreement with her husband, but in this case there is no such agreement, expressed or implied or even alleged. An implied agreement for compensation always depends upon the surroundings and the conditions attendant upon the rendition of the services.

In *Prince v. McRae*, 84 N. C. 675, the court said:

"Whether the plaintiff's services shall be deemed a gratuity or constitute a claim for compensation, must be determined by the understanding of both parties. If they were intended to be and accepted as a gift or act of benevolence, they cannot at the election of the plaintiff create a legal obligation to pay."

The general principle of a quantum meruit is clearly stated in *Winkler v. Killian*, 141 N. C. 578, 54 S. E. 541, 115 Am. St. Rep. 694, in which Hoke, J., said:

"It is ordinarily true that where services are rendered by one person for another, which are knowingly and voluntarily accepted, without more, the law presumes that such services are given and received in expectation of being paid for, and will imply a promise to pay what they are reasonably worth. This is a rebuttable presumption, for there is no reason why a man cannot give another a day's work as well as any other gift, if the work is done and accepted without expectation of pay."

And that case further says that—

It is equally well established that where a child resides with a parent as a member of the family, "services rendered under such circumstances by the child for the parent are, without more, presumed to be gratuitous and no promise will be implied and no recovery can be had without proof of an express and valid promise to pay, or facts from which a valid promise to pay is to be reasonably inferred. This last position is usually considered as an exception to the general rule and in this and most other jurisdictions obtains both as to adult and minor children."

This same reasoning it seems should apply with equal, if not greater, force where the services are rendered by the wife, though outside her household duties, in aiding her

husband in the support of the family. It is not usual certainly that the wife should receive compensation in such cases, and obligation of payment cannot arise in the absence of an express agreement or such facts and circumstances from which an implied promise will arise independent of the mere fact that the services were rendered by the wife to the husband outside her household duties.

The general principle as to implied promises to pay as between members of the family has been thus stated:

"Where it is shown that a person rendering services was a member of the family of the person served, and received support therein, a presumption of law arises that such services are gratuitous and in such cases before the person rendering the service can recover, the express promise of the party served must be shown, or such facts and services as will authorize the jury to find that there was the expectation by the one of receiving and by the other of making compensation therefor."

This has been repeatedly and uniformly held by our courts. Among the numerous cases in point is *Dodson v. McAdams*, 96 N. C. 149, 2 S. E. 453, 60 Am. Rep. 408, in which it is said:

"The presumption against a promise to pay for such labor may be overthrown by an agreement to pay for the same, appearing in terms or by any proper proof to establish the same."

In *Avitt v. Smith*, 120 N. C. 393, 27 S. E. 92, the court said:

"In ordinary dealings the law implies a promise to pay for services rendered by one for another. This presumption may be rebutted by the relations of the parties, as father and child, stepfather and child and grandfather and child, etc. In the absence of some express contract, express or implied, showing an intention on the part of one to charge and the other to pay, the presumption is rebutted by the relationship."—cited in *Ellis v. Cox*, 176 N. C. 618, 97 S. E. 468; *Stallings v. Ellis*, 136 N. C. 72, 48 S. E. 548; *Hicks v. Barnes*, 132 N. C. 150, 43 S. E. 604, and other cases.

The principle running through all the cases is nowhere better summed up than by Walker, J., in *Dunn v. Currie*, 141 N. C. 127, 53 S. E. 534:

"These cases establish the principle that certain relations existing between the parties raise a presumption that no payment was expected for services rendered or support furnished by the one to the other. The presumption standing by itself repels what the law would otherwise imply, that is, a promise to pay for them; but this presumption is not conclusive and may in its turn be overcome by proof of an agreement to pay, or of facts and circumstances from which the jury may infer that payment was intended by one of the parties and expected by the other."

It is true that in none of our cases was the relationship that of husband and wife,

but the principle applies with as full, or greater, force in such a case as in those which have been presented. Where the wife has rendered services to a third party, the statute gives her a right to recover her earnings for herself without any participation therein by the husband, and she is also entitled to recover against her husband or any one else for injuries sustained; but we have no case holding (and it would be contrary to the principle laid down in the cases we have cited, obtaining as to other relationships in the family) that a wife can recover for services rendered to her husband, in the absence of an express agreement or facts and circumstances from which a jury can infer either an express promise or the understanding and intention of the parties that the wife should receive compensation.

There are instances where there is not only a matrimonial partnership between a husband and wife, but a financial or business partnership; also where the wife is to receive compensation from her husband for services rendered; but in all such cases the business partnership, or the liability of the husband to the wife for compensation, must arise out of an agreement, not out of the marital relation, *ex jure marito*, which, if it extended to business matters, would make each responsible for the debts of the other.

In this case there was not even allegation of such contract, or of an understanding or intention between the parties that the wife should receive compensation.

The judgment sustaining the demurrer is affirmed.

(183 N. C. 322)

TOWN OF SELMA v. NOBLE et al.
(No. 103.)

(Supreme Court of North Carolina. April 12, 1922.)

1. Eminent domain \S 68—Quantity of land selected in condemnation for cemetery is in petitioner's discretion, subject to judicial inquiry for bad faith or abuse of discretion.

In view of the power to condemn land for cemetery purposes conferred by the charter of the town of Selma (*Priv. Laws 1915, c. 116*), and *C. S. §§ 1705-1733*, and section 1714, limiting the power of condemnation in case of dwelling house, yard, etc., where the general power to condemn exists, the right of selection as to quantity, etc., is left largely to petitioner's discretion, not subject to judicial inquiry except on allegations showing petitioner's bad faith or manifest abuse of discretion.

2. Eminent domain \S 198(1)—It is clerk's duty in first instance to pass on all disputed questions of fact and assess the damages.

In a condemnation proceeding, notwithstanding issuable matter in the pleadings, it is the duty of the clerk in the first instance to

pass upon all disputed questions presented and assess the damages through the commissioners duly appointed, and to allow the parties by exceptions to raise any question of law, or fact issuable or otherwise to be considered on appeal from his award of damages.

3. Eminent domain \S 198(2)—Where clerk transferred condemnation proceeding without decision of issues presented, held that it was within court's discretion to submit issues to the jury.

In a proceeding to condemn land, where the clerk decided to transfer the cause for trial of the issues in the superior court and refused to proceed further, and complainant excepted and appealed, the superior court had jurisdiction, under *C. S. § 637*, and could order purchaser of portions of defendant's property made parties defendant; and, where they filed answer alleging that condemnation for cemetery purposes would contaminate their water supply and interfere with their homes, the case was brought within the exception of section 1714, which does not permit condemning dwelling houses, and, although such issue was not presented before the clerk, it was within the court's discretion to present it to the jury.

4. Eminent domain \S 198(1)—City's petition to condemn land for cemetery must fail, if creating nuisance doing substantial damage to defendants' homes.

The Legislature could confer on city power to condemn property for public purposes even to the extent of taking a man's house, for all private property is subject to such appropriation in the reasonable exercise of the police power, and in no event should a public need be lightly stayed; but, if clearly established on an appropriate issue that the maintenance of a cemetery on the site sought to be condemned therefor will create a nuisance causing substantial damage to defendants' homes, plaintiff's petition must fail.

Appeal from Superior Court, Johnston County; Cranmer, Judge.

Proceedings by the Town of Selma against Dr. J. R. Noble and others for condemnation of land, in which the clerk transferred the cause to the superior court for trial before a jury, and the court ordered other parties made defendants and entered judgment affirming the action of the clerk and denied petitioning city's motion to remand. The petitioner excepted and appeals. Affirmed.

It appears from a perusal of the record and case on appeal that the town of Selma, under and by virtue of chapter 116, *Private Laws of 1915*, amending charter of said town, instituted the present proceedings before the clerk of the superior court to condemn about 2½ acres of land belonging to defendant Noble as an addition to the public cemetery of the town, which was about filled except certain plots owned by individuals. Defendant Noble answered alleging that he owned a body of land lying in the suburbs of Selma or adjacent thereto, which he had

laid off and plotted into lots, showing designated streets, etc., and in which the plot desired had been made to appear as a public square, and various persons had bought lots in reference to this plot, and in reliance on the representation that same was to be and remain a public square, and some of them had improved these lots and were living thereon; and there was no necessity for this land as the town owned a body of land near there, much better suited for its purpose, and on his answer demanded, among other things, a jury trial as to necessity for taking defendant's land for the purpose indicated, and also as to the amount of damages to be awarded in case the same was taken, etc.

The clerk, being of opinion that the answer raised material issues, entered an order transferring the cause to the superior court for trial of same before the jury, and petitioners excepted and appealed to superior court. In the superior court, his honor, being of opinion that there were material issues raised, entered judgment approving the action of the clerk and that the defendant was entitled to have same tried by a jury, etc., and that the costs be taxed against the appellant. Petitioners excepted. The court further ordered that J. T. Newberry and four others, who had bought land of codefendant under conditions as stated and had improved same, be made parties defendant. Thereupon these defendants became parties and answered, alleging the facts of sale and dedication of this land as a public square by defendant Noble; that they had bought and improved their lots in reference to same and were living thereon with their families; that the town had not extended its water supply to this locality, but they procured their water from wells, and allege further:

"That the location of the cemetery on this lot of land will greatly damage and injure them, in the use and enjoyment of their property, by depriving them of the use of said public square, and by closing Chestnut street and by partially closing Third avenue.

"That from about the center of said public square the ground slopes both in a north-westwardly and easterly direction. That the town of Selma has not extended its water mains to defendants' property and that they are dependent upon wells for their water supply. That due to the condition of the soil and the sloping of the land from said public square, the drainage from said public square is by and through the lands of these defendants, and the use of said public square for burial purposes would contaminate and pollute the only water supply these defendants have, rendering it unsafe and unfit for drinking purposes of these defendants and the members of their families, to the very great damage of these defendants."

The court on this, and the answer of J. R. Noble, being of opinion that there were material issues raised which must be decided by a jury before further proceedings had,

entered judgment as stated affirming the action of the clerk and in denial of plaintiff's motion to remand, etc. Thereupon petitioner excepted and appealed to this court.

R. L. Ray, of Selma, and Winfield H. Lyon, of Smithfield, for appellant.

Walter L. Watson, of Raleigh, and Albert M. Noble, for appellees.

HOKE, J. [1] The charter of the town of Selma, as amended by chapter 116, Private Laws of 1915, conferred upon the municipal government the right to condemn land for purposes of a cemetery, "in the same manner as lands are condemned by railroads and public utility companies and with the same rights of appeal." Under Cons. St. c. 33, these companies have the right to condemn lands desired for the construction of their roads, etc., by special proceedings as therein described, and section 1714 of the statute provides that such power shall not extend to the condemnation of a dwelling house, yard, kitchen, garden, or burial ground without the consent of the owner, unless the same is expressly authorized by the charter or some provision of the Consolidated Statutes.

In construing this legislation, the court has held that, where the general power to condemn exists, the right of selection as to route, quantity, etc., is left largely to the discretion of the company or corporation and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith on the part of the company or corporation or an oppressive and manifest abuse of the discretion conferred upon them by the law. *Power Co. v. Wissler*, 160 N. C. 269, 76 S. E. 267, 43 L. R. A. (N. S.) 483, Ann. Cas. 1914C, 268.

[2] As to the procedure in a case of this kind, our decisions are to the effect that, notwithstanding the appearance of issuable matter in the pleadings, it is the duty of the clerk in the first instance to pass upon all disputed questions presented in the record, and go on to the assessment of the damages through commissioners duly appointed, and allowing the parties by exceptions to raise any questions of law or fact issuable or otherwise to be considered on appeal from him in his award of the damages as provided by law. *R. Co. v. Manufacturing Co.*, 166 N. C. 168, 82 S. E. 5, L. R. A. 1916A, 1079; *Abernathy v. R. Co.*, 150 N. C. 97, 63 S. E. 180; *R. Co. v. R. Co.*, 148 N. C. 59, 61 S. E. 683.

In *Abernathy's Case*, the principle is stated as follows:

"While in other special proceedings, when an issue of fact is raised upon the pleadings it is transferred to the civil issue docket for trial, in condemnation proceedings the questions of law and fact are passed upon by the clerk, to whose rulings exceptions are noted, and no ap-

peal lies until the final report of the commissioners comes in, when, upon exceptions filed, the entire record is sent to the Superior Court, where all * * * exceptions * * * may be presented."

The method of procedure indicated in these cases should hold, though there should be issues raised concerning an owner's dwelling house and other, the cases excepted from the operation of the statute, and in such case, on proper showing, the rights of the parties may in the meantime be protected from interference by injunction issued by the judge on application made in the cause. *Mountain Retreat Association v. Mt. Mitchell Development Co.*, 183 N. C. —, 110 S. E. 524.

This being the law applicable, we see nothing in the pleadings as presented before the clerk that should prevent his proceeding to an award of damages as the statute directs; the allegations being that the owner had laid off this property into streets and blocks, leaving this particular block as an open square, and that certain persons had bought property in reference to the plot made. This was throughout, as we understand the record, entirely a question of private ownership, the municipality never having accepted this as a dedication to the public, and, though the claimants might very properly have been made parties, there is nothing to prevent or modify the power of condemnation given to the municipality by its charter.

[3] Taking a different view of the matter, however, the clerk decided to transfer the cause for a trial of the issues in the superior court, and refused to proceed further, whereupon plaintiff excepted and appealed.

The cause having then been brought before the superior court, under section 637, Cons. St., the judge had "jurisdiction," and, in the exercise of the powers so conferred, his honor entered an order that the purchasers of portions of defendant's property abutting on the square should be, and they were, made parties defendant and filed an answer alleging, among other things, that they had bought and built on the abutting property and occupied same; that the town had not extended its water supply to that locality, but their water for drinking and other domestic purposes was obtained from wells on the premises; that the drainage was directly from the square in question on and through their premises, and an establishment of a cemetery on said block would create a nuisance, endangering the health of their families, etc.

It is held with us that the creation and maintenance of a nuisance which sensibly impairs the value of property is a taking within the principle of eminent domain, and condemnation proceedings thereunder. *Hines v. Rocky Mount*, 162 N. C. 409, 78 S. E. 510, L. R. A. 1915C, 751, Ann. Cas. 1915A, 182,

and authorities cited. And if it should be established that the maintenance of a cemetery at the place contemplated creates such a nuisance, so affecting the homes of these defendants, this would bring the case within the exception contained in section 1714, withdrawing dwellings from the effect of the statute, and the power to condemn would no longer exist. While no such issue was presented in the pleadings before the clerk, it is raised now by defendants, and being an issue in bar of plaintiff's right to proceed, and on the facts as presented, it was within the sound discretion of his honor to have the same passed on by a jury before proceeding further, a course approved and substantially pursued in *Clark v. Lawrence*, 59 N. C. p. 83, 78 Am. Dec. 241.

[4] Undoubtedly the Legislature could confer the power to condemn property for a public purpose even to the extent of taking a man's home, for all private property is liable to be appropriated for the public use in the reasonable exercise of the police power. *Thomas v. Sanderlin*, 173 N. C. 329, 91 S. E. 1028, citing 6 R. C. L. p. 193. And in no event should a public need of this kind be lightly stayed; but, if it should be clearly established on an appropriate issue that the maintenance of a cemetery on the proposed site will create a nuisance causing substantial damage to the homes of these defendants, then the plaintiff must fail in its petition, for in such case, as stated, the power to condemn the site has not been conferred.

His honor, therefore, was well within his legal discretion in directing that this vital question should be predetermined by the jury.

Affirmed.

(153 Ga. 151)

CONNELL v. STATE. (No. 2944.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

1. Criminal law §778(4)—Instruction as to presumption of innocence not erroneous.

The court did not err in charging the jury as follows: "The mere fact that the grand jury has returned a bill of indictment against the defendant in this case is no evidence of his guilt. And the defendant enters into the trial of this case with the presumption of innocence in his favor, and that presumption of innocence remains with the defendant throughout the entire trial, in the nature of evidence, as a shield and protection, until the state satisfies your minds by evidence in the case beyond a reasonable doubt of the defendant's guilt."

2. Criminal law §789(2)—Instruction on "reasonable doubt" held not erroneous.

The court did not err in charging the jury as follows: "A reasonable doubt means exactly what it says—a doubt that is founded upon

reason. A reasonable doubt may grow out of the evidence, or the want of evidence, or be engendered by the defendant's statement. While the law requires the state to demonstrate beyond a reasonable doubt, the law does not require the state to demonstrate the guilt of the defendant to a mathematical or an absolute certainty, and the reasonable doubt is not a vague, conjectural doubt; it is not a fanciful doubt. It is not an imaginative doubt, neither does it mean a possibility that the defendant may be innocent; but, as I said to you just now, it means a doubt that is founded upon reason."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Doubt.]

3. Criminal law §789(8)—Instruction as to burden on state to prove guilt beyond a reasonable doubt not erroneous.

The court did not err in charging the jury as follows: "The court charges you that, when the defendant enters a plea of not guilty to this bill of indictment, it puts in issue every material allegation contained therein. It then devolves upon the state to satisfy the minds of the jury, by evidence in the case, to a moral and reasonable certainty and beyond a reasonable doubt, of the guilt of the defendant before you would be authorized to convict him."

4. Constitutional law §206(1), 250, 258 — Criminal law §763, 764(18)—Rape §2—Statute as to sexual intercourse with girl under 14 does not deny due process or equal protection, or abridge privileges and immunities; instruction that sexual intercourse with girl under 14 was rape not erroneous.

The court instructed the jury as follows: "And I charge you, under a law passed by the Legislature in 1918, on page 259, which I shall hereafter read to you, the Legislature in 1918 has provided that no female under 14 years of age, in the state of Georgia, can give her consent to sexual intercourse; and this act was approved on July 31, 1918, and I now read it to the jury, 'That from and after the passage of this act it shall be unlawful for any person to have sexual or carnal intercourse with any female child under the age of fourteen years;' and I charge you as a correct principle of law that since July 31st in the year 1918, under the provisions of this law, no person can have sexual intercourse with a female under 14 years of age, whether she consents to it or does not consent to it, and if any person shall have sexual intercourse with any female under 14 years of age, with her consent or without her consent, then, under this law which the court has just read to you, such person would be guilty of the offense of rape." Movant assigns error on this charge, on the ground that the act of the General Assembly referred to therein "is unconstitutional and void, and deprives the defendant of due process of law under the Fourteenth Amendment to the Constitution of the United States, which forbids a state from depriving any person of life, liberty, or property without due process of law, or denying any person within its jurisdiction of the equal protection of the laws, and forbids the state from abridging the privileges and immunities of the citizens of the United States." It is also contended that the act is in conflict with the due

process clause of the state Constitution, and, further, that the charge virtually amounted to the direction of a verdict, while it was for the jury to say whether the girl's testimony was corroborated by other testimony as the law requires. These contentions are obviously without merit.

5. Statute not unconstitutional.

The court charged the jury as follows: "That any person violating the provisions of this act shall be guilty of rape, and on conviction thereof shall be punished as prescribed by section 94 of the Penal Code of Georgia of 1910, unless the jury trying the same shall recommend that the defendant be punished as for a misdemeanor, in which event the same shall be made the judgment and sentence of the court, provided, however, that no conviction shall be had for such offense on the unsupported testimony of the female in question." Movant contends that this charge of the court is in conflict with the due process clause of the Constitution of Georgia, and contravenes the Fourteenth Amendment to the Constitution of the United States, which declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws, or deprive any person of his life, liberty, or property without due process of law." Defendants contend further, that this charge was erroneous for the reason that the testimony of the female was not corroborated by any other witness in the case. This ground of the motion is substantially a repetition of the assignment of error stated in the next preceding headnote, and it also is obviously without merit.

6. Rape §59(3)—Instruction on corroboration not erroneous, because not specifying circumstances that would corroborate.

The court did not err in instructing the jury as follows: "Under the provisions of the law which I have read to you, the court charges you that you would not be authorized to convict the defendant in this case on the unsupported testimony of the female alleged to have been raped. Under this section of the Code, if you reach the conclusion that the female in question was under 14 years of age, and if you reach the conclusion that the defendant in this case had sexual intercourse with her during the year 1920, why then the law provides that, before you would be authorized to convict the defendant of the offense of rape, the testimony of the female would have to be corroborated by some fact or other circumstance in the case. The court charges you that the law does not require that corroboration to be of that strength to satisfy the minds of the jury by evidence in the case beyond a reasonable doubt of the defendant's guilt. But the law does require the testimony of the female to be corroborated by some other fact or circumstance in the case. And as to whether or not the testimony of the female in this case has been corroborated by other facts or other testimony in the case is exclusively a question for your consideration and for your determination." Movant contends that this charge was error, because "the court

narrowed the jury down to simply a corroboration of the girl by other testimony"; whereas the court should have instructed the jury that a woman in a rape case can be corroborated "by her clothing being torn, by her making some outcry, by her private parts being injured, or by her being stricken into unconsciousness or made drunk; that these and other circumstances may tend to corroborate the woman, but in this case the court simply told the jury that the woman must be corroborated in some way."

* * * The defendant could not be convicted, according to the act of the Legislature of 1918, upon the testimony of the girl alone, even though she be under the age of 14, unless her testimony is corroborated by other testimony in the case, going to connect him with the commission of the crime of rape."

7. Criminal law \S 763, 764(18)—Instruction not direction of verdict, because omitting proviso as to corroboration.

The court instructed the jury as follows: "You take these principles of law as given you in charge by the court, and you apply them to the facts and evidence in this case; and if, under the principles of law as given you in charge by the court, if you reach the conclusion, by evidence in the case, beyond a reasonable doubt, that the defendant any time during the year 1920, if he had sexual intercourse with the person alleged in that bill of indictment, Ellen Spivey, if you reach the further conclusion that at the time Ellen Spivey was under 14 years of age, and if you reach the conclusion that it was in the county of Wilkinson and state of Georgia, then the court charges you that under the law which I have just read to you, if the defendant had sexual intercourse with Ellen Spivey, and if she was under the age of 14 years of age, that would constitute the offense of rape, because no female in the state of Georgia, since the 31st day of July in the year 1918, under 14 years of age, can consent to sexual intercourse under the laws of the state of Georgia." It is complained that this charge "was practically a direction of a verdict against the defendant, and instructed the jury to find the defendant guilty of rape, without giving the proviso, and before they could convict the defendant of the offense of rape under this act of the Legislature, although they believed that the girl was under 14 years of age, they would have to believe, in addition to this, her testimony in the case, and the failure of the trial judge to give in this immediate connection this proviso is error." This assignment of error does not show cause for the grant of a new trial.

8. Criminal law \S 935(1)—New trial properly denied, when evidence sufficient.

The verdict was supported by evidence, and the court did not err in refusing a new trial.

Error from Superior Court, Wilkinson County; J. B. Park, Judge.

P. T. Connell was convicted of an offense, and he brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

Doyle Campbell, Sol. Gen., and A. Y. Clement, both of Monticello, and Geo. M. Napier,

Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

GILBERT, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 176)

DEDGE v. STATE. (No. 2907.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

1. Criminal law \S 782(15)—Instruction requiring alibi to be established to jury's satisfaction not reversible error; error to require alibi to be established to a reasonable certainty.

Movant complains that the court erred in charging the jury as follows: "I charge you, gentlemen of the jury, that, when a defendant sets up as a defense an alibi, the burden is upon the defendant to establish his defense of an alibi to your satisfaction and to a reasonable certainty; and I charge you further, in this connection, that it is your duty to consider the evidence on the question of alibi along with all the other evidence introduced in this case, and if all of the evidence, including the evidence introduced on the question of alibi, considered in connection with all the other evidence, creates in your minds a reasonable doubt, then it is your duty to give the defendant the benefit of the doubt and acquit him." The error pointed out is that the court placed too great a burden upon the accused in requiring the defendant to establish his defense of an alibi "to your satisfaction and to a reasonable certainty." It has been frequently ruled by this court that an alibi need only be established to the "reasonable satisfaction of the jury." The omission of the word "reasonable" before the word "satisfaction," if there had been no other infirmity in the charge, would not have required a reversal of the judgment. It has been held that the term "to a reasonable certainty" is the equivalent of "beyond a reasonable doubt" (Bone v. State, 102 Ga. 387, 80 S. E. 845), and it is error to require the accused to establish an alibi beyond a reasonable doubt (Harrison v. State, 83 Ga. 129, 9 S. E. 542).

2. Criminal law \S 695(6)—Judgment not reversed, when all evidence objected to not subject to objection.

The court admitted, over timely objection, the following evidence: "I didn't tell the inquest jury these facts, because I was scared to. I was scared they would do the same to me. They killed my stepfather, and I was scared they would do me the same way. I don't know whether they were under arrest or not. They wasn't at the time we came in here." The grounds of objection were that the evidence was hearsay, irrelevant, and a conclusion of the witness, and was calculated to prejudice the minds of the jury against the accused. Clearly a part of this evidence was not open to

the objection made, and the judgment will not be reversed for the admission of the testimony. Had the objection been specifically directed to the expression, "They killed my stepfather," quite a different question would have been raised.

3. Criminal law §922(1)—Inapplicable instruction as to cases requiring testimony of more than one witness not ground for new trial.

The following charge to the jury, under the facts of the case, was inapplicable, but is not cause for the grant of a new trial: "The testimony of a single witness is generally sufficient to establish a fact, except in certain cases such as treason or perjury, and in the case of a felony where the only witness is an accomplice, and in these cases (except treason) corroborating circumstances may dispense with another witness."

4. Criminal law §793—Charge should be adjusted to the facts.

The court instructed the jury as follows: "It is contended by the defendant now on trial that he is not guilty of the charge alleged in the bill of indictment; he further contends that neither he nor either of the codefendants participated in the commission of the alleged crime or was present at the scene of the crime." Error is assigned on this excerpt from the charge, on the ground that it was not adjusted to the facts, in that the defendant J. R. Dedge, who alone was on trial, had made no contention as to the guilt or innocence of those jointly indicted with him, but denied on his own part all knowledge as to who committed the offense. Since there is to be another trial, it is unnecessary to rule upon this ground of the motion, further than to say that in stating the contentions of the accused the court will adjust the charge to the facts of the case.

5. No error in remaining grounds.

The remaining grounds of the motion for a new trial show no error, and they are not of such character as will require special mention. As the case is to be tried again, no ruling is made as to the sufficiency of the evidence, nor upon the grounds of the motion based upon newly discovered evidence.

Beck, P. J., dissenting.

Error from Superior Court, Bacon County; J. I. Summerall, Judge.

J. R. Dedge was convicted of an offense, and he brings error. Reversed.

T. A. Wallace and Dickerson & Kelley, all of Douglas, L. D. Luke, of Alma, and Padgett & Watson, of Baxley, for plaintiff in error.

A. B. Spence, Sol. Gen., and John W. Bennett, both of Waycross, I. J. Russell, Andrew J. Tuten, and H. L. Causey, all of Alma, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

GILBERT, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent because of illness, and

BECK, P. J. (dissenting). While the charge upon the subject of alibi was not entirely accurate, the error was not such, in view of the entire charge, as to authorize this court to reverse the judgment of the court below refusing a new trial.

(153 Ga. 17)

PEEPLES v. RUDOLPH et al. (No. 2602.)

(Supreme Court of Georgia. Feb. 21, 1922.)

(Syllabus by the Court.)

1. Ejectment §75—Defect in abstract annexed to petition not ground for demurrer.

This is a statutory complaint for land. The plaintiffs rely on prior possession and adverse possession for seven years, under color of title. To the petition is attached an abstract of title as follows: Deed from W. B. Thomas, trustee, to W. R. Bunkley, dated in 1854; deed from W. R. Bunkley to the heirs at law of R. D. Fox, dated in 1894; deed from Robert Fox et al., "heirs at law of R. D. Fox," to J. H. Rudolph, dated in 1919; deed from J. H. Rudolph to plaintiffs, dated in 1919; and adverse possession by plaintiffs and those under whom they claim for more than seven years prior to the filing of the suit. Defendant demurred to the petition, on the ground that its allegations, considered in connection with the abstract, did not show title in the plaintiffs, and therefore did not set forth a cause of action. *Held*: The demurrer was properly overruled. Even if the deed from Robert Fox et al., "heirs at law of R. D. Fox," is not to be interpreted as a deed from "all the heirs at law of R. D. Fox," the demurrer is nevertheless without merit. "An action of complaint for land cannot be dismissed on demurrer to the abstract of title annexed to the declaration. The object of the abstract is not to show title in the plaintiff on the face of the pleadings, but only to give notice of what will be relied upon at the trial." *Crawford v. Carter*, 146 Ga. 523, 91 S. E. 780; *Chancey v. Johnson*, 148 Ga. 87, 95 S. E. 975.

2. Trial §228(1)—Correct instruction not erroneous because not embracing another appropriate instruction.

A complete, accurate, and pertinent instruction is not within itself erroneous because it fails to embrace an instruction which would be appropriate in connection with the instruction given. *Lucas v. State*, 110 Ga. 756, 36 S. E. 87; *Johnson v. State*, 150 Ga. 67(3a), 102 S. E. 439; *Shelton v. State*, 150 Ga. 71(2), 102 S. E. 355; *Wilson v. State*, 150 Ga. 285(1), 103 S. E. 682; *Green v. State*, 150 Ga. 121, 102 S. E. 813; *Bowden v. State*, 151 Ga. 336(4), 106 S. E. 575.

3. Adverse possession §109 — Title by description not lost by abandonment.

Prior to 1863 a statute of limitation, as applied to suits for land, was recognized in this state, and even though the adverse possession had been held for such a length of time as to bar any suit brought by the true owner to recover land, yet, if subsequently the adverse possession was abandoned, the true owner's

rights again attached. *Russell v. Slaton*, 25 Ga. 198; *Vickery v. Benson*, 26 Ga. 582(3); *Long v. Young*, 28 Ga. 130(1). By the Code of 1863 the doctrine of title by prescription was introduced in this state. See Code 1863, §§ 2641, 2642; Civ. Code 1910, §§ 4168, 4169. While a prescriptive title may be extinguished by the ripening of a prescription in favor of a subsequent adverse possession (*Godley v. Barnes*, 132 Ga. 513, 64 S. E. 546) yet if adverse possession be held for seven years under color of title, a title by prescription arises, and that title is not lost or impaired by any subsequent abandonment of the adverse possession. *Milliken v. Kennedy*, 87 Ga. 463, 13 S. E. 635; *Tarver v. Deppen*, 132 Ga. 798(7), 65 S. E. 177, 24 L. R. A. (N. S.) 1161.

4. Trial \S 193(2)—Instruction in action for land that issue is one of boundary not expression of opinion.

"The issue in ejectment, or in statutory complaint for land, arising upon the declaration and plea of not guilty, is: Did the plaintiff at the date suit was commenced have a legal title to the premises, or to any estate or interest in them, or any part thereof, coupled with the then present right of entry as against the defendant? Nevertheless, where it appears that the plaintiff and the defendant are coterminal owners, * * * it is not erroneous for the court to instruct the jury that the question resolves itself into one of boundary." *Barfield v. Birrick*, 151 Ga. 618, 108 S. E. 43. Such instruction is not open to the criticism that it expresses an opinion upon the facts of the case, where, as in this case, it appears from the undisputed evidence that the plaintiffs had title to the land adjoining the land claimed by the defendant.

5. No reversible error in charge.

Applying the rules above stated, the exceptions to the charge of the court do not show error requiring the grant of a new trial.

6. Deeds \S 31—Deed to heirs of deceased person is good.

While, in order to pass title, a deed must designate the grantee, nevertheless a deed to the heirs of a deceased person is good. 18 C. J. 159, § 36, note 88, and case cited.

7. Deeds \S 105—"Heirs at law" designated as grantees construed; deed to heirs of deceased person in lieu of lost deed to him properly admitted.

The words "heirs at law," when used in a deed to designate the grantees, will be interpreted to mean the persons appointed by law to succeed to real estate in case of intestacy, unless a different interpretation is required in order to give effect to the plain purpose and intention of the grantor, as disclosed by the language of the deed as a whole. *Ætna Ins. Co. v. Hoppin*, 249 Ill. 406, 94 N. E. 669. Accordingly it was not erroneous to admit the deed from W. R. Bunkley "to the heirs at law of R. D. Fox," the deed reciting that it was made in lieu of a lost unrecorded deed to "R. D. Fox, deceased."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs at Law.]

8. Ejectment \S 107—Failure to submit issue of improvements not error when no evidence offered.

The defendant filed a plea of improvements, setting out the value of the land, of the mesne profits, and of the permanent improvements alleged to have been made by defendant and those under whom he claimed. He prayed that the value of the improvements "be set off against the value of the mesne profits, if any, found to be due plaintiffs, and that the court mould a decree in the premises that will fully protect the interest of defendant." On the trial the plaintiffs abandoned their claim to mesne profits, and the defendant did not offer any legal evidence in support of his plea. The court did not err in failing to submit that issue to the jury.

9. Sufficiency of evidence.

The evidence authorized the verdict for the plaintiffs.

Error from Superior Court, Camden County; J. P. Highsmith, Judge.

Action by H. F. Rudolph and others against A. M. Peebles. Judgment for plaintiffs, and defendant brings error. Affirmed.

Cowart & Vocelle, of St. Marys, for plaintiff in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(153 Ga. 24)

ALLEN et al. v. POTTER. (No. 2386.)

(Supreme Court of Georgia. Feb. 22, 1922.)

(Syllabus by the Court.)

1. Trespass \S 20(2)—Owner of rented land may recover.

The petition of the plaintiff, alleging title to a given tract of land in herself, unlawful cutting of trees thereon, and her unlawful ouster therefrom, set up a cause of action in trespass; and she could recover in trespass for such damages sustained by her in consequence thereof, the same being to the freehold, although she had rented the land to a tenant for the year in which the trespass was committed.

2. Pleading \S 32, 210—Demurrer in trespass for failure to set out deed, properly overruled as speaking demurrer; plaintiff in trespass not required to set up deed under which land claimed.

The special demurrer to the petition, on the ground that it did not set out the deed under which the plaintiff claims title, or make proffer thereof to the court, is a speaking demurrer and was properly overruled, the plaintiff claiming in her petition title by prescription.

3. Pleading \S 204(2)—Demurrer to petition as a whole on ground that one paragraph complained of injury to another, properly overruled.

The special demurrer to the petition, on the ground that it seeks to enjoin a trespass

upon the land in the possession of the tenant, and in one paragraph thereof complains of an injury to the tenant and not to the plaintiff, was properly overruled, these facts showing no reason why the petition as a whole should be dismissed, and the special demurrer not being directed alone to that portion of the petition alleging injury to the tenant.

4. Demurrer not well taken.

The special ground of demurrer that the petition shows that the injury alleged to have been done was done to the tenant and not to the plaintiff is not well taken, injury to the freehold being alleged in the petition.

5. Pleading \S 248(9) — In trespass amendments seeking establishment of title and determination of mesne profits held germane and not to set up new causes of action.

The amendments allowed to the plaintiff's petition were germane to the relief sought in the original petition, and did not set up a new cause of action.

6. Sufficiency of evidence.

The verdict is supported by the evidence.

(Additional Syllabus by Editorial Staff.)

7. Appeal and error \S 232(1½)—Ground of demurrer not set up or passed on cannot be considered.

In trespass, a ground of demurrer that the petition prayed for injunctive relief which would dispossess defendants and give plaintiff possession, cannot be considered when not set up in the special demurrer or passed on by the lower court.

8. Dismissal and nonsuit \S 58(1)—That petition in trespass seeks injunction, not ground for dismissing whole complaint.

In trespass for cutting trees and ousting plaintiff from possession, that the petition prays for injunctive relief which would dispossess defendants and put plaintiffs in possession, is not ground for dismissal of the whole complaint, but only so much as seeks injunctive relief.

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Action by E. M. Potter against Arthur Allen and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Ellen M. Potter brought suit against Arthur Allen and Louisa Allen, on February 15, 1919, in which she alleged that she was the owner of a certain described tract of land containing 13 acres; that on February 22, 1896, she bought from Susan Potter a tract of land containing 45 acres, including the above tract of 13 acres, immediately went into possession thereof, and remained in the open, notorious, continuous, peaceable, and adverse possession thereof under a bona fide claim of right for more than 20 years; that Arthur and Louisa Allen were fully aware of her title, possession, and claim of right; that their conduct, hereinafter more fully described, is arbitrary, utterly without

excuse, and in disregard of her rights; that on January 24, they took possession of said tract of 13 acres, ran across said tract of 45 acres a wire fence 250 yards in length, thus cutting off from said body of land said 13 acres, and claimed that they would insist upon occupying and cultivating said 13 acres; that in October, 1913, Louisa Allen bought from Clara B. Walker a tract of land containing 37 acres, which bounds said 13 acres; that Louisa and Arthur Allen went into possession of said 37 acres, and have been continuously in possession of it since said date; that during 1914 the lines between her tract of land and that of said Louisa Allen were run by J. H. Gladden, surveyor of Baldwin county, by mutual consent of the adjoining landowners; and the line for which the plaintiff contends was fully agreed on in the presence of witnesses; that in 1917 the lines were again run, at which time Arthur Allen, representing Louisa Allen, was present, and he then and there fully recognized the correctness of the line as contended for by her; that she has rented said tract of land for the present year to D. W. Quinn, who is now preparing to cultivate the same; that unless the defendants are enjoined from interfering with the possession of her said 13 acres of land it will cause a great loss and inconvenience to her and to him; that the defendants are insolvent; that at the time they built the fence hereinbefore referred to they willfully cut down at least 100 pine trees on said 13 acres, of the value of \$1 each, and used them for the making of posts for the construction of said fence. The plaintiff prayed for judgment for the value of said trees, and that Arthur and Louisa Allen be enjoined from entering upon, trespassing upon, or in any way undertaking to take possession of said 13 acres of land.

The plaintiff filed an amendment alleging that the fee-simple title to the 13 acres of land is in her, and prayed the judgment of the court declaring the title to be in her. By another amendment she alleged that the rental value of the 13 acres is \$5 per acre per year, and that the total amount of rent claimed to date was \$135. The defendants objected to the first amendment, on the ground that it was not germane; and to the second amendment, on the grounds that it was not germane, and undertook to set up a new cause of action. The court overruled these objections, and allowed both amendments; to which the defendants excepted. The defendants demurred generally to the petition, on the ground that it set out no cause of action; and they demurred specially on the grounds: (1) That the petition failed to set out the deed under which petitioner claims title, or to make profert thereof; (2) that the petition seeks to enjoin a trespass

upon land therein described, in the possession of a tenant of the plaintiff, and paragraph 4 thereof complains of the injury to her tenant and not to herself; (3) that the petition shows on its face that the alleged injury was done, not to the plaintiff, but to her tenant. The court overruled both demurrers, and the defendants excepted *pendente lite*. They assign error on those exceptions.

The defendants moved for a new trial on the formal grounds, which were overruled; and error is assigned on the judgment refusing a new trial.

Edward R. Hines and Geo. S. Carpenter, both of Milledgeville, for plaintiffs in error.

Allen & Pottle, of Milledgeville, for defendants in error.

HINES, J. (after stating the facts as above). [1] 1. The plaintiff's petition, as amended, set out a cause of action in trespass. She alleged title in herself to the land, a trespass thereon by the defendants by cutting 100 or more trees thereon, of the value of \$100, the erection of a wire fence cutting off the 13 acres from the body of her land, and her ouster therefrom by the defendants. At the common law the plaintiff must have been in possession, to recover in trespass. Now the true owner can sue in trespass though out of possession. *Yahoola River Mining Co. v. Irby*, 40 Ga. 479. The petition set out all the elements of an action of trespass, title to the land, unlawful cutting of trees thereon, and her unlawful dispossession from her land by the defendants. The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a cause of action. Civil Code, § 4470; *Markham v. Brown*, 37 Ga. 277, 92 Am. Dec. 73; *Athens Mfg. Co. v. Rucker*, 80 Ga. 291, 4 S. E. 835; *Satilla Mfg. Co. v. Cason*, 98 Ga. 14, 25 S. E. 909, 58 Am. St. Rep. 287; *Stevens v. Stevens*, 96 Ga. 374, 23 S. E. 312. So the court did not err in overruling the general demurrer to the petition in this case.

[2] 2. The defendants demurred specially to the petition on the ground that it did not set out the deed under which the plaintiff claims title, or make profert of the same to the court. The reply is that the plaintiff claims under prescriptive title arising from 20 years of adverse possession. She does not set up title by deed; and this ground of the demurrer seems to be speaking in its nature. But in an action of trespass the plaintiff is not required to set out the muniments of title under which she claims. In such an action the plaintiff has to allege title only, and on the trial prove the same. In this respect the action of trespass stands upon the same footing as a claim to property, when the claimant is not required to set out the title under which he claims, or an

abstract thereof. *Jones v. Patterson*, 138 Ga. 862, 76 S. E. 373. In complaint for land the object of the abstract is not to show title in the plaintiff on the face of the pleadings, but only to give notice of what the plaintiff would rely on at the trial; and the complaint will not be dismissed on demurrer to the abstract of title annexed to the declaration. *Yonn v. Pittman*, 82 Ga. 637, 9 S. E. 667; *Crawford v. Carter*, 146 Ga. 526, 91 S. E. 780; *Peeples v. Rudolph*, 111 S. E. 548. Much less will complaint in trespass be dismissed because the plaintiff does not set out therein the muniments of title under which she claims, especially when she does set out the title in her complaint on which she relies.

[3] The defendants demurred to the petition, because it seeks to enjoin a trespass upon land in the possession of a tenant; and because paragraph 4 of the petition complains of an injury to the tenant, and not to the plaintiff. This, if well taken, would not be cause for dismissing the whole complaint, but only so much thereof as refers to damage and injury to the tenant. If a tenant be in possession, and the trespass be such as injures the freehold, the owner may still maintain trespass. Civil Code, § 4473. The petition sets up damage to the freehold, in cutting trees thereon and in the ouster and exclusion of the plaintiff from her lands. Cutting of timber on lands by a trespasser is an injury to the freehold, and there can be no greater interference with this property than the complete ouster of the owner therefrom. So the court did not err in overruling this ground of the special demurrer.

[4] The third and last ground of the special demurrer is that the petition shows that the injury alleged to have been done was done to the tenant, and not to the plaintiff. What is said above disposes of this ground of the special demurrer.

[7, 8] Counsel for the plaintiffs in error, in their brief, make the point that the petition prays for injunctive relief, the grant of which would result in the dispossession of the defendants and the admission of the plaintiff into possession of the premises in controversy. *Russell v. Mohr-Well Lumber Co.*, 102 Ga. 563, 29 S. E. 271; *Vaughn v. Yawn*, 108 Ga. 557, 29 S. E. 759; *Glover v. Newsome*, 134 Ga. 376, 67 S. E. 935; *Mize v. Herring*, 137 Ga. 815, 74 S. E. 534. Suffice it to say that this ground of demurrer was not set up by the defendants in their special demurrer, and was not passed upon by the court below. For this reason we cannot consider it. Furthermore, it would furnish no ground for dismissal of the whole complaint, but only so much as sought injunctive relief. So the court did not err in overruling the special demurrer filed by the defendants.

[5] 3. The amendments allowed by the court to the petition were clearly germane; and the one seeking to recover for mesne profits did not set up a new cause of action.

[8] 4. The verdict was sustained by the evidence, and was neither contrary thereto nor to the law. The court did not err in overruling the defendants' motion for new trial.

Judgment affirmed. All the Justices concur.

(152 Ga. 851)

ALEXANDER v. CHIPSTEAD. (No. 2608.)

(Supreme Court of Georgia. March 2, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 2 — Statute as to assigning error on exceptions pendente lite applies to bill of exceptions sued out and certified before passage.

By the act of August 15, 1921 (Laws 1921, p. 233), when the final bill of exceptions shows that exceptions pendente lite were properly filed in the trial court, and when the contents of such exceptions pendente lite are recited in the bill of exceptions, or a copy thereof appears in the transcript of the record, an assignment of error in the final bill of exceptions, either upon the exceptions pendente lite or upon the rulings therein excepted, is sufficient; and this act, being remedial in its nature, applies to bills of exception sued out and certified before its passage.

2. Appeal and error \S 750(1) — Assignment of error on rulings excepted to pendente lite is good.

Independently of said statute, an assignment of error on the rulings excepted to in exceptions pendente lite, and not on such exceptions themselves, is a good assignment of error.

3. Pleading \S 245(1)—Amendment, after hearing of demurrer and oral announcement that it would be sustained, good.

A plaintiff may at any stage of the cause, as a matter of right, amend his petition in all respects, whether in matter of form or of substance, provided there is enough in his petition to amend by; and this he may do, if made before any order or judgment sustaining a demurrer to his petition has been entered, although, in reply to a question by the court at the conclusion of the argument on the demurrer, his counsel replied that he had nothing further to offer, the amendment being offered after such question and reply.

4. Appeal and error \S 195 — Mortgages \S 335—Pleading \S 21—Indebtedness not due because of nonpayment of interest note which had been extended for valuable consideration; objection to amendment not made below not available on writ of error; allegations that bill of sale was void and that, in consideration thereof, time of payment was extended, held to seek alternative, and not inconsistent, relief.

The court erred in rejecting the amendment offered by the plaintiff, alleging that the defendant agreed with her intestate that if he would give additional security the defendant would extend the time of payment of the interest note due November 17, 1916, for one year, and that

in pursuance of the express agreement of the defendant to give such extension her intestate executed to the defendant a bill of sale of certain personal property to secure such indebtedness.

5. Mortgages \S 354, 360 — Sale void as between parties when property not advertised and sold as that of decedent's estate.

When the grantor in a security deed dies after the execution thereof, and the grantee undertakes to exercise a power of sale therein contained, the property should be advertised and sold as the property of the estate of the grantor.

6. Petition not demurrable.

The petition, without such amendment, set up a cause of action; and the court erred in sustaining the general demurrer thereto.

7. Mortgages \S 300, 335, 369(7)—Strict tender need not be alleged when payment refused; petition showing right to declare whole debt due had accrued when interest tendered not demurrable when alleging right not exercised; secured creditor assuring heir that debt would not be declared due held not entitled thereafter to exercise such right.

The court did not err in sustaining any of the grounds of special demurrer, except such as are pointed out in the opinion in this case.

8. Verdict erroneously directed.

The court erred in directing a verdict for the defendant, under the pleadings and evidence.

Error from Superior Court, Early County; W. C. Worrell, Judge.

Suit by Lillian B. Alexander, administratrix of Eric A. Gay, against M. T. Chipstead. Judgment for defendant, and plaintiff brings error. Reversed.

Lillian B. Gay (now Alexander), as administratrix of Eric A. Gay, filed her complaint against M. T. Chipstead, and made this case: She is the widow of said Eric A. Gay, who died November 21, 1916. Gay bought from Chipstead, on November 17, 1915, a plantation of 611 acres, more or less, known as Lime Branch place, and in payment conveyed to Chipstead another place which he owned, and gave to Chipstead his note for \$7,000, dated November 17, 1915, and due November 17, 1920, with five notes, each for \$500, for the interest on said principal note, falling due, respectively, one, two, three, four, and five years from date. To secure said notes Gay executed to Chipstead a deed to said place with power of sale. Gay died on November 21, 1916. On November 29, 1916, Chipstead approached petitioner about this indebtedness, and stated that he had no disposition to press her for the payment thereof, but was willing not only to give her time in which to arrange matters, but was also willing to assist her in any way he could in getting these matters adjusted. He suggested to her that it would be expensive to have ad-

ministration on the estate of her husband, and that the proper course to pursue would be to have said Lime Branch place sold for the purpose of putting the title in her, stating that she could bid the same in, and that he would bid it in for her, when she could give her notes for said debt secured by her deed to said place. He expressly assured her that, if a sale of the property were had, it would be merely for the purpose of vesting the title in her. On December 1, 1916, she offered Chipstead the sum due on the interest note which fell due November 17, 1916, with interest thereon to said date.

At the time said interest note fell due, Gay was in a dying condition. Owing to the death of her husband she was not able physically or mentally to look after the payment of said interest. At the time she tendered Chipstead said interest, he said he had not elected to declare said indebtedness due. He declined to accept payment of the interest note, stating that she had other things to think of, that there was no need of hurry, that all these matters could later be satisfactorily adjusted, and that she need not fear that he would do anything detrimental to her interest or the interest of the estate. On December 3, 1916, she, relying on said assurances, went to Florida, but before leaving she made arrangements with certain croppers to work on said Lime Branch place. These arrangements were well known to Chipstead, he having offered to assist her in procuring labor for the operation of said place for the coming year, and in her farming operations. While in Florida she received from him a telegram stating that her croppers were becoming dissatisfied and were leaving the place. She immediately came back, and ascertained that Chipstead had been the cause of the croppers leaving the place, he having told them that she had left Georgia for good, and was not coming back, causing them to leave the place. On December 26, 1916, Chipstead attempted, under said power of sale, to sell said place to himself. She is advised and believes that he made a deed to himself. He is now in possession of said place under said deed, which is not of record. He deliberately, and with the intention of defrauding the estate out of said property and the rents thereof, refused to accept the interest. She was lulled into security by his assurance that said land would be sold only for the purpose of vesting the title in her, and not for the purpose of subjecting the same to said indebtedness. This assurance was made to her by him with the intention of defrauding her husband's estate. The sale to himself of said place is void, for the reason that she was fraudulently induced to believe that the sale was being made only for the purpose of vesting the title in her, and the further reason that the notice, under which said sale was held, does not ad-

vertise the property to be sold as the property of the estate of her intestate.

The yearly rental value of said place is \$1,500 or other large sum. By the statement made by Chipstead to her croppers, and their consequent dissatisfaction, causing them to leave the place, and by his unlawful entry and continued occupation of said place, he has made it impossible for her to rent the place for the coming year, and has damaged her in the sum of \$1,500 or other large sum per annum. The fair market value of the place is \$15,000. Chipstead, just a few days prior to the death of her husband, and while he was practically in a dying condition and wholly unable to comprehend any business transaction, on November 14, 1916, fraudulently obtained his signature to a bill of sale of certain personal property, consisting of mules and farm products, knowing that he was in a dying condition and unable to transact business, as additional security for the above indebtedness. At the time Chipstead sold Lime Branch place he sold the personality described in said bill of sale, and became the purchaser at that sale. Said personality is worth the sum of \$1,500. The sale of it was wholly void, for the reason that the bill of sale did not confer upon Chipstead the power to sell it without due process of law, and because her husband was not rational at the time of his signature. The yearly rental value of said personality is \$150. It was the duty of said Chipstead, under the circumstances, upon his election to declare the entire debt due upon default of any payment of interest, to give her ample and sufficient time to protect her rights in the premises; but, instead of doing so, with the intention to defraud her he told her that he was in no hurry for said interest payment due November 17, 1916, and that she need not pay the same at that time. By the security deed Chipstead was given the power to sell said place after advertising the sale for two consecutive times in the official organ of Early county, should said indebtedness or any part thereof be not paid at maturity. The only amount due him by the estate of her husband was the interest note due November 17, 1916, which she had offered to pay, and payment of which he had declined. In view of these facts, there was no such default as would give the defendant the right to declare all of said indebtedness due. Said sale was void, because the advertisement did not state that it was sold in pursuance of a power of sale granted in the security deed, nor did it state that the sale would be made by any person authorized to sell under the power of sale; also, because the land brought a grossly inadequate price. Under the circumstances of the transaction, it was a fraud upon the estate of Gay for Chipstead to have treated the whole of the notes due so soon after his death, to have sold that quantity of

land in bulk, when it might easily have been subdivided and sold in parcels when it would have brought more money, and to have sold said lands on any other than the regular sales day. The plaintiff prayed that the deed from Chipstead to himself be delivered up and canceled; that the title to the land be decreed to be in the estate of Gay, subject to the lien of \$7,000 and the interest due thereon, less all proper offsets; that the bill of sale be delivered up and canceled, and the title to the personalty be decreed in her; that she recover the same from him with the profits thereof; that an accounting be had between her and Chipstead; and that she have a decree against him for the value of the rents of said place.

In the security deed from Gay to Chipstead was this provision:

"Should said indebtedness, or any part, be not paid at maturity, I hereby, for value received, agree that all of said indebtedness shall become instantly due, and I grant to M. T. Chipstead, his heirs and assigns, the following irrevocable power, to be exercised at his option in lieu of any proceeding he might take in law. In said event said person above named (the grantee) or his personal representative or the transferee of said notes is hereby empowered to advertise said property in the official organ of Early county, by him to be chosen, stating in said advertisement the day of sale, and, after advertising the same two consecutive insertions in said newspaper, to expose said property at public sale on the date in said advertisement named, and to sell the same to the highest and best bidder. Said sale need not be on the first Tuesday in any month, but may be at any time selected by the person to whom said indebtedness may be payable and advertised by him. The person exercising this power, or any agent or representative of him, may be purchaser at said sale. Said person above named (the grantee) or his personal representative or the transferee of said notes need not personally conduct said sale, nor be present at it, but may execute all the powers in this instrument given by an authorized agent or attorney. When said sale is made, the person making the same, or causing the same to be made, shall execute for me and in my name to the purchaser full and complete title to said property, just as I might do were I personally present; and he is further authorized to do all other and further acts I might do were I present, to make said sale complete and to pass title into the purchaser thereat, using my right and name for all of said purposes if he deem it necessary."

The advertisement of the sale was as follows:

"Georgia, Early County.

"Under and by virtue of a security deed executed on November 17, 1915, by Eric Gay to M. T. Chipstead, said deed being recorded in Mortgage Book EE, page 306, of the records of said county, the undersigned will, on Tuesday, December 28th, 1916, between the legal hours of sale, before the courthouse door in Blakely, said county, sell to the highest bidder, for cash, the following described land:"

(Here follows a description of Lime Branch place.) "Said sale will be had for the purpose of securing the purchase-price of said land, as set forth in said security deed, no part of which has been paid and all of which is due and owing under the terms of said instrument, it being stipulated therein that should any part of said indebtedness be not paid at maturity the whole of said indebtedness shall become due; and default having been made in the payment of a part of said indebtedness, the undersigned has elected to declare the whole of said indebtedness due as provided in said instrument.

"Also at the same time and place the undersigned will sell to the highest bidder for cash the following described personal property:" (Here follows a description of the personal property to be sold.) "Said sale to be had under and by virtue of a deed to said property to secure an indebtedness, executed by E. A. Gay to the undersigned on October 30, 1916, and recorded on November 14, 1916, in Book MM, page 56, of the records of said county, said last-mentioned instrument having been executed as additional security for the indebtedness secured by the above-mentioned security deed to the land above described.

"This November 30, 1916.

"[Signed] M. T. Chipstead."

The bill of sale from Gay to Chipstead recites that in consideration of \$1 in hand paid, and in order to further secure Chipstead on his notes due the latter for \$7,000, dated November 17, 1915, due five years after date, and five notes for \$560 each, bearing same date, and due one, two, three, four, and five years after date, said Gay does sell to said Chipstead seven described mules, and all corn, fodder, cotton seed, and cane then on Gay's place in Early county. It provides that, if said indebtedness or any part thereof is not paid when due, then all of the same shall become due at the option of Chipstead, and he is authorized to take possession thereof and sell the same at public or private sale; the proceeds to be applied to said indebtedness. This bill of sale was dated October 30, 1916, and recorded July 31, 1917.

The defendant demurred to the petition, upon the general grounds that no cause of action was set forth therein, because there was no equity in the petition, and that under the facts therein stated petitioner was not entitled to any legal or equitable relief. The defendant demurred specially to various paragraphs of the petition. By his answer he denied all allegations of fraud set out in the plaintiff's petition, and alleged:

"When the first interest note came due, the said Gay stated to defendant that he needed the money and preferred not to pay the note at that time, but asked defendant to permit him to execute the contract" (that is, the bill of sale hereinbefore referred to), "as additional security for the payment of the indebtedness due by him. This was done expressly at the request of said Gay and for his accommodation, he already being in default at the date of the execution of said paper in the payment of said indebtedness, and, rather than then and there

declare the whole debt due and proceed under the contract, defendant, for the convenience and accommodation of said Gay, agreed for him to execute said paper."

After the death of Gay, he approached his wife and other relatives with a view to seeing if they could carry out his contract, and ascertained that it was impossible for them to carry out the same. They did not offer to pay the note which was already in default, and apparently were not able to do so. He denied that he made any promise or agreement of any kind or character to Mrs. Gay to buy the property in for her. At the sale she, her mother, father, and her attorney, were all present. The sale was advertised once a week for four weeks; it was open and fair in all respects. He would have been more than pleased had Mrs. Gay been able to secure a purchaser at the amount of the indebtedness.

Mrs. Gay having married one Alexander, an order was passed that the case proceed in the name of Lillian B. Alexander, as administratrix. The case proceeded to trial. At the close of the evidence, both parties having introduced testimony, the court directed a verdict for the defendant. The plaintiff moved for a new trial on various grounds, which was overruled, and error was assigned upon the judgment.

Hall, Grice & Bloch, of Macon, O. A. Weddington, of Cochran, and B. W. Fortson, of Arlington, for plaintiff in error.

Pottle & Hofmayer, of Albany, and A. H. Gray, of Blakely, for defendant in error.

HINES, J. (after stating the facts as above). [1, 2] 1, 2. We have been asked to review and reverse the cases which bear upon the question as to the proper method of assigning error upon exceptions pendente lite, and leave was granted to counsel for plaintiff in error to have these cases reviewed. What is the proper practice in this matter? Must the assignment of error be on the exceptions pendente lite, or to the rulings excepted to therein? At any stage of the cause, either party may file his exception to any decision, sentence, or decree of the court; and, if the same is certified and allowed, it shall be entered of record in the cause; and, should the case at its final determination be carried by writ of error to this court by either party, error may be assigned upon such bill of exceptions. Civil Code 1910, § 6138. Does the language, "Error may be assigned upon such bill of exceptions," mean that the applicant must assign error upon exceptions, or does it mean that an assignment of error on the rulings embraced in such exceptions can be made? Can a party do either one or the other?

We do not find that this court has ever expressly ruled that an assignment of error on the rulings embraced in a bill of excep-

tions pendente lite is not good, and that the only way of assigning error on exceptions pendente lite is to assign error on the exceptions pendente lite and not on such ruling. This court, in many cases, has held that it will not decide on a bill of exceptions entered of record pendente lite unless error be assigned thereon, and both parties have opportunity to be heard in respect to such error. *Howell v. Howell*, 59 Ga. 145(7); *Runnals v. Aycock*, 78 Ga. 553, 3 S. E. 657; *Nicholls v. Popwell*, 80 Ga. 604, 6 S. E. 21; *Stover v. Adams*, 114 Ga. 171, 39 S. E. 864; *A. & B. R. Co. v. Penny*, 119 Ga. 479, 46 S. E. 665; *Sumner v. Sumner*, 121 Ga. 1, 48 S. E. 727; *Shaw v. Jones*, 133 Ga. 446, 66 S. E. 240; *Smiley v. Smiley*, 144 Ga. 546, 87 S. E. 668; *Cotton States Electric Co. v. Clayton*, 147 Ga. 228, 93 S. E. 204; *U. S. Fidelity & Guaranty Co. v. First National Bank*, 149 Ga. 132, 99 S. E. 529; *Brewer v. New Eng. Mortg. Security Co.*, 149 Ga. 497, 101 S. E. 116.

Where exceptions pendente lite are duly certified and entered of record when the case is brought up after final judgment, error may be assigned thereupon, upon motion in this court, though no mention be made of them in the main bill of exceptions. *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Hardee v. Griner*, 80 Ga. 559, 7 S. E. 102; *Hall County v. Gilmer*, 123 Ga. 173, 51 S. E. 307.

In none of these cases is the exact point under discussion passed upon. In all of them reference is made to the assignments of error on exceptions pendente lite, but none of them undertakes to point out the method in which this is done. In *Sumner v. Sumner*, supra, this court said, "Sumner's bill of exceptions contains merely a recital that such an order was passed, and that exceptions pendente lite thereto were filed, but does not assign error either on the order or the exceptions pendente lite"—and thus assumes that an assignment of error could be made upon the order, the granting of which is complained of in the exceptions pendente lite. The record in the case of *South Carolina Railroad Co. v. Nix*, supra, shows that the assignment of error was on the decision overruling the demurrer to the petition in said case, and not upon the exceptions pendente lite complaining of the judgment overruling the demurrer. This court approved this assignment of error, and passed upon the question raised in the exceptions pendente lite. In our opinion an assignment of error on exceptions pendente lite, or an assignment of error on the rulings therein complained of, is sufficient.

By the act of August 15, 1921 (Ga. Laws 1921, p. 233), this question cannot rise again in a case similar to this one. This act declares that—

"When the final bill of exceptions shows that exceptions pendente lite were properly filed in the trial court, and where the contents

of such exceptions pendente lite are recited in the bill of exceptions, or a copy thereof appears in the transcript of record, an assignment of error in the fiscal bill of exceptions either upon the exceptions, pendente lite or upon the rulings therein excepted to shall be held to be sufficient."

This being a remedial act, not affecting vested rights (*Ross v. Lettice*, 134 Ga. 866, 68 S. E. 734, 137 Am. St. Rep. 281), we hold that the same is applicable to bills of exception sued out and certified before its passage. By the terms of this act it is confined to cases where assignments of error are made in the final bill of exceptions; and will probably not cover cases where no mention of the exceptions pendente lite is made in the final bill of exceptions, and where no assignments of error on such exceptions are made therein, but under separate assignments of error are made in this court. For this reason we have dealt with the question of the proper practice in this matter in both classes of cases. We do not find that any decisions of this court, when properly construed, hold a contrary doctrine.

[3] 3. The plaintiff offered an amendment to her petition, in which she set up that the defendant proposed to her intestate that, if he would give him additional security for his indebtedness, the defendant would extend his interest note due November 17, 1916, until November 17, 1917; that in pursuance of this offer of the defendant her intestate executed and delivered to the defendant a bill of sale of certain personal property, upon the express promise and agreement of the defendant that said bill of sale was given and taken for that purpose; and that by reason of such agreement, and the acceptance by the defendant of said bill of sale, none of the indebtedness of her intestate to the defendant was due at the time he exercised the power of sale embraced in the security deed given by her intestate to said defendant upon the Lime Branch plantation, for which reason he could not exercise such power of sale. The defendant objected to the allowance of this amendment, on the grounds that it was presented too late, and that it set forth no reason in law or equity why the sale of the land described in the petition should be set aside. The court sustained the objection that the amendment was not presented in due time, and disallowed the same. In his order disallowing the amendment the judge certifies that the demurrers were set down to be heard at the time and place fixed by an order previously passed in term time. At this time and place, and after argument by both sides on the demurrers, the court inquired of counsel for the plaintiff if he had anything further to offer, and counsel responded that he had not. Thereupon the court pronounced his judgment sustaining the demurrer to so much of the petition as challenged the legality of the sale of the

Lime Branch place, and directed an order to be prepared accordingly. Counsel for the plaintiff then stated that he had an amendment to offer, but the same was not prepared; and the court stated that said amendment would not be considered, because judgment had been pronounced. When the order sustaining the demurrer, as above stated, was presented for the signature of the judge, counsel for plaintiff offered this amendment, which the court declined to allow, for the reason above stated.

Did this amendment come too late? Our statute upon the subject of amendments is very broad. It provides:

"All parties, whether plaintiffs or defendants, in the superior or other courts, whether at law or in equity, may at any state of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by." Civil Code 1910, § 5681.

A motion to amend is in time if made before any order or judgment sustaining the demurrer to a petition and dismissing the same has been entered, although the court has orally announced that the judgment was sustained. *Lytle v. De Vaughn*, 81 Ga. 226 (2), 7 S. E. 281; *Freeman v. Brown*, 115 Ga. 23, 41 S. E. 385; *Swilley v. Hooker*, 126 Ga. 353, 55 S. E. 81. What the judge orally declares is no judgment until it has been put in writing and entered as such. *Freeman v. Brown*, 115 Ga. 23, 41 S. E. 385. So we are of the opinion that the court erred in rejecting this amendment on the ground that it was presented too late. It was presented in time. It was offered before the judgment sustaining the demurrers had been entered by the judge.

[4] 4. It was further urged that this amendment did not set up any good reason in law or in equity why the sale complained of should be set aside. In this we cannot agree with counsel for the defendant. The latter understood to declare the principal of the debt due by reason of the fact that the interest note of his debtor which fell due November 17, 1916, had not been paid, which right he was authorized to assert under his security deed, if said note had not been paid when due. Clearly, if the debtor had extended the payment of this note, by agreement for a valuable consideration, before its maturity, for a period of one year, then the same was not due when the debtor undertook to exercise the power of sale in his security deed; and a sale under such circumstances would be null and void. *Scott v. Liddell*, 98 Ga. 24(2), 25 S. E. 935. This ground of attack on the sale, by the vendee in the security deed under the power of sale therein conferred upon him, was good. If he had extended the payment of the first interest note for the period of one year, then he could not in law, equity, or good conscience undertake to declare the principal of

his debt due by default on the part of his debtor in the payment of this interest note.

But it is further urged by counsel for the defendant that this amendment should not be allowed, for the reason that the plaintiff attacked this bill of sale on the ground that her intestate was mentally incapable of making it at the time he signed it; and that to now assert any rights thereunder in behalf of her intestate is inconsistent with the position that this bill of sale was void because of lack of mental capacity on the part of the maker, the plaintiff not having stricken from her petition the allegations upon the subject of the mental incapacity of her intestate. This contention of counsel is based upon the doctrine that a plaintiff cannot concurrently pursue inconsistent remedies in the same action. *Couch v. Crane*, 142 Ga. 22, 82 S. E. 459. Suffice it to say that this ground of objection was not urged by the defendant to the allowance of this amendment. In the second place, the plaintiff was not required, by an appropriate demurrer or proper objection, to elect upon which position she would rely in this case. Furthermore, she was not pursuing inconsistent remedies in the same action. In the first place, she undertook to attack the validity of the bill of sale on the ground of the mental incapacity of the maker. She then in effect asserted that the bill of sale, if valid, was made upon the promise of the defendant to extend the time of the payment of the interest note due November 17, 1916, and that on account of such agreement he could not undertake to declare the principal of his debt due and to exercise the power of sale to enforce its payment. The plaintiff was simply undertaking to obtain alternative relief, and we do not think that there was such inconsistency in her position as would render this amendment improper.

[5] 5. When the grantor in a security deed dies after the execution thereof, and the grantee undertakes to exercise the power of sale therein contained, the property should be advertised and sold as the property of the estate of the grantor. *Greenfield v. Stout*, 122 Ga. 303(5), 50 S. E. 111. This case was referred to approvingly in the case of *Baggett v. Edwards*, 126 Ga. 463, 466, 55 S. E. 250, but not expressly on this point. It is insisted that the contrary ruling was made in the case of *Sorrell v. British American Mortgage Co.*, 148 Ga. 513, 97 S. E. 441. In the last case, an administrator undertook to set aside a sale of lands, made under a power of sale contained in a security deed of the plaintiff's intestate, on the grounds, among others, that the property was advertised for sale and sold as the property of the grantor, when the latter was dead. This court held that under the state of the record it was impossible to determine the scope of the power of sale with such certainty as to pass upon the validity of the sale as a matter of law,

and did not make any decision upon the question involved in this case. In *Greenfield v. Stout*, supra, it was distinctly ruled that, when the grantor in a security deed was dead, the property should be sold as the property of his estate. It is insisted by counsel for the defendant that this ruling was obiter. This position does not seem to be well taken. This court directly ruled that "as Weston, the grantor in the deed to Pullen, is dead, the land cannot be sold as his property, but should be sold as the property of his estate," it appearing that the land was sold as the grantor's property. This was one of the grounds on which the sale was held to be void. We are not now prepared to hold that a sale, under such circumstances, to an innocent purchaser for value, would be void on account of such irregularity; but as between the parties to such power of sale, on the authority of *Greenfield v. Stout*, we hold that such sale would be void, it being the law until reversed.

[6] 6. The court sustained all the demurrers, both general and special, to the original petition, as amended, so far as it sought to set aside and declare illegal and void the advertisement, sale, and conveyance to the defendant of the tract of land embraced in the security deed from Gay to him. This ruling raises the question whether the petition, as amended, set forth a cause of action which, if proved, would entitle the plaintiff to have the sale of this place declared void and set aside. If we are right in the contention, above set forth, that under the power of sale in this security deed this land should have been advertised for sale and sold as the property of the estate of Gay when the grantee undertook to exercise this power after the death of the grantor, and that a sale not so conducted was irregular and void when the property was bought in by the vendee, and where no rights of innocent persons would be affected, then clearly the petition set forth a cause of action. Whether independently of this fact the petition set forth a good cause of action, so far as it relates to this tract of land, it is unnecessary now to decide. As we have held that the court erred in rejecting the amendment offered by the plaintiff, wherein she alleges that the payment of the interest note which fell due on November 17, 1916, had been extended for one year by the debtor giving additional security, by reason of which fact there was no default in the payment of any of the interest of Gay to the defendant, and that the power of sale could not be exercised because there was no default, said amendment will become a part of the petition; and the petition with such amendment will clearly set forth a good cause of action.

[7] 7. This brings us to the consideration of the grounds of special demurrer. The court did not err in sustaining any of the grounds of special demurrer, except as will

now be indicated. The court erred in sustaining the special demurrer to paragraph 12 of the petition, which alleged that the plaintiff, on December 1, 1916, had offered the defendant the sum due on the interest note which fell due on November 17, 1916. The grounds of special demurrer are: (1) That it is not alleged how plaintiff offered the defendant said sum; (2) that the facts do not show that this offer constituted a legal tender; and (3) the note had matured, and the defendant's contractual right to declare the whole debt due had accrued. As the defendant declined to accept payment of this interest note, it was not incumbent upon the plaintiff to show a strict legal tender. The fact that the defendant's right to declare the whole debt due had accrued at the time of this offer does not make this paragraph demurrable on that ground, the defendant not having exercised this right, as was alleged in paragraph XII-c of the amendment to the petition. We think that it was competent for the plaintiff, who was an heir at law of her husband and thus interested in his estate, to allege and prove that the defendant had expressly assured her, at the time she offered to pay him this interest note, that he had not exercised his right and that he would not exercise such right to declare the whole indebtedness due; and that she had offered to pay him the amount of this interest note, with the interest accrued thereon from its date, before the defendant had exercised his option to declare the whole debt due. He could certainly waive this right; and if before he had exercised this harsh right the plaintiff, who was interested in the estate of her husband, made this offer, then he could not afterwards exercise the right to declare the whole debt due. Certainly he could not do so when he had given the plaintiff his assurance that he would not do so. For the same reason the court erred in sustaining the demurrer to paragraphs XII-d and XL-a of the plaintiff's amendment to her petition.

[8] 8. The grounds of the motion for new trial, with the exception of the ninth ground, amount simply to allegations that the verdict is contrary to the evidence and to the law. The ninth ground is without merit. We hold that the court erred in directing a verdict

for the defendant, under the principles of law declared in this opinion.

Judgment reversed.

All the Justices concur.

(153 Ga. 168)

JACKSON v. STATE. (No. 2847.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

1. Homicide \S 309(3)—Charge on manslaughter properly refused, when not involved.

Frank Jackson was convicted of the murder of his wife by cutting her with a pocketknife. He made a motion for a new trial on the usual general grounds, and because the court failed to charge the jury on the law of voluntary manslaughter upon a written request therefor, and also because the court's charge on the law of self-defense was not full enough. The motion for new trial was overruled, and he excepted.

Voluntary manslaughter was not involved, either under the evidence for the state in this case or under the defendant's statement, and the trial court did not err in refusing a charge on that subject.

2. Criminal law \S 826—Fuller charge on self-defense should have been requested.

The charge on the law of self-defense stated correctly the rule on that subject; and if a fuller charge on the subject was desired, a timely request therefor should have been presented to the court.

3. Criminal law \S 935(1)—New trial properly denied, when verdict supported by evidence.

The verdict is supported by the evidence, and the court did not err in overruling the motion for new trial.

Error from Superior Court, Fulton County; W. C. Worrell, Judge.

Frank Jackson was convicted of murder, and he brings error. Affirmed.

Geo. F. Fielding and Len K. Roan, both of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., of Atlanta, Geo. M. Napier, Atty. Gen., Seward M. Smith, Asst. Atty. Gen., and E. A. Stephens, of Atlanta, for the State.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 82)

MAY et al. v. TROTTI. (No. 2401.)

(Supreme Court of Georgia. March 2, 1922.)

*(Syllabus by Editorial Staff.)***1. Trusts \Leftrightarrow 35(1)—Conveyances held to create valid executory trust.**

A conveyance of land to the grantee in trust to collect the rents, pay taxes, interest, etc., pay \$75 a month to the grantor and her husband as long as either of them lived, allow them to occupy an apartment without charge, and, after their deaths to pay specified amounts to persons named, and providing that any balance of the rents and the property itself, after such payments, should be the property of the grantee, created a valid, existing, executory trust.

2. Trusts \Leftrightarrow 359(1)—Beneficiary upon non-payment of monthly installments entitled to judgment establishing special lien and ordering sale of property.

Where land was conveyed upon the trust, among others, to pay plaintiff \$75 a month as long as he lived, and the improvements on the property had been destroyed by fire and the payments discontinued, plaintiff was entitled to judgment against the trustee for the amount overdue and for a special lien against the real estate and a sale thereof for payment of the judgment.

Beck, P. J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by F. B. Trotti against W. P. May and others. Judgment for plaintiff on demurrer, and certain defendants bring error. Affirmed.

Winfield Payne Jones, of Atlanta, for plaintiffs in error.

H. A. Etheridge, Madison Richardson, and W. O. Wilson, all of Atlanta, for defendant in error.

PER CURIAM. F. B. Trotti brought his equitable petition against Marion T. Benson, W. P. May, Frezelle Smoak, Nannie Puckett, and others for the purpose of having an alleged trust declared and established, and for other equitable relief. In the petition it is alleged that on the 3d day of March, 1916, Mrs. Marion P. Trotti, who was then the wife of petitioner, executed a certain written instrument, of which the following is a substantial copy of the material parts:

"This deed is made to (the grantee) in trust for the following uses and trusts, to wit: (1) To collect the rents on said property and to pay all taxes, interest on the loans thereon, water and light bills, janitor service, insurance, and all other expenses incident to the apartment house now located on said property. (2) To pay to the said (grantor and her husband) the sum of \$75 per month, as long as they or the survivor of them shall live, and at the

death of each to pay the funeral expenses of each. (3) To allow said (grantor and her husband) to occupy, without charge, the apartment now occupied by them in the aforesaid apartment house on said property, for and during the joint lives, and for and during the life of the survivors. (4) After the death of the said (grantor and her husband) and of the survivor * * * to pay within six years from that date the following amounts to the following parties, to wit: (Then follow the names of several persons, and a certain amount opposite each name.) The said (grantee) is hereby given full power and authority, without the order of any court, and at such terms and for such time as he may deem best, to borrow money upon the aforesaid property for and during the life of the said (grantor and her husband) and for and during the life of the survivor of them, for the purpose of paying off the encumbrances now on said property, and for making such necessary repairs thereon as may in the opinion of the said (grantee) be needed. In the exercise of this power the said (grantee) shall have full power and authority without obtaining the consent of any party whomsoever. (5) After the death of the said (grantor and her husband) * * * the said (grantee) shall have full power and authority, at public or private sale, without the order of any court whatsoever, and without obtaining the consent of any party whomsoever, to sell, mortgage or otherwise manage the aforesaid property, on such terms and on such time as he may deem proper for the purpose of paying off the amounts heretofore specified to (the third persons specially named as hereinabove indicated). (6) When the aforesaid conditions shall have been complied with during the life of (the grantor and her husband), * * * and when the aforesaid amounts to the aforesaid parties shall have been paid off after their death, the aforesaid property, or the remainder of the sums for which the same may have been sold, shall vest in and be the absolute property of the said (grantee). (7) The said (grantee) shall have a period of six years after the death of the said (grantor and her husband), * * * to pay off the aforesaid amounts without interest. (8) The said (grantee) shall also have such sums as may remain from the rents of said property during the life of the said (grantor and her husband), * * * after paying the amounts herein provided for during their lives and the life of the survivor, as above provided."

The defendant Benson is the grantee in the foregoing deed, and the other defendants are beneficiaries named therein. Petitioner by proper allegations contends that by the terms of the instrument set forth the property therein described is in the hands of Marion T. Benson as trustee, and is chargeable with the monthly payment of \$75 for the support of petitioner; that the named trustee did pay over that amount monthly until May, 1917, since which time he has discontinued the payments; that the improvements upon the land were destroyed by fire in that month, and the property now consists of the vacant lot, which has a value

of \$5,000 or \$6,000; and that the amount now due petitioner is \$2,625, with interest. Petitioner prays for a judgment and decree awarding him that amount of money up to the present time; and prays that the judgment be made a special lien against the real estate, but not a personal judgment against Benson. He prays that the property be sold, and that out of the proceeds he be paid the amount stated as due now, and that any excess derived from the sale of the property be impounded for the payment monthly of the amount of \$75, as long as he lives.

May, Smoak, and Mrs. Burkett demurred to this petition, on the grounds, among others, that the deed did not create a trust, but operated to transfer the legal title to the property to Marion T. Benson, subject to the provisions and conditions as therein specified, as personal obligations assumed by the grantee; that, if the grantor sought to create a trust, it is void on the ground of inability on the part of the grantor to create a trust for the purposes therein specified; that the plaintiff is entitled to a personal judgment against the grantee, by reason of his acceptance of the conditions imposed upon him by the deed; and that the deed did not create such a trust as would warrant or justify the court in decreeing that such judgment be a special lien on the land.

[1, 2] 1. The instrument set forth above created a valid, existing executory trust; and, under the facts and circumstances alleged in the petition, the petitioner was entitled to the relief sought.

Whether, if, in case of a sale of the property, the proceeds thereof should not be sufficient to discharge the amounts heretofore accumulated and due petitioner, as well as the amounts to become payable monthly, the defendant Benson would be personally liable therefor, is not decided, as no personal judgment is sought against Benson.

2. Consequently the court did not err in overruling the demurrers.

Judgment affirmed.

All the Justices concur, except

BECK, P. J. (dissenting). While the instrument set forth above, upon which the plaintiff bases his claim to the equitable relief sought, is in form a deed of trust, conveying to the grantee a trust estate, nevertheless, when we look to the substance and effect of the instrument and when the estate actually conveyed to Benson is considered, the instrument is seen to be, in effect, one of bargain and sale, and amounts to a conveyance, upon a condition subsequent, to Benson for a consideration; that is, the payment of the charges put upon the property, which was to be made through a series of years; and it is to be inferred that such was the view taken of this deed when the opinion

in the case of *Benson v. May*, 149 Ga. 555, 101 S. E. 177, was rendered (though it does not seem that this particular question was raised for determination); and consequently a failure upon the part of Benson to pay the monthly installments due Trotti, the petitioner, made him primarily personally liable; and, this appearing from the petition itself, it was competent for the other defendants, May, Smoak, and Burkett, to raise that question by demurrer.

(153 Ga. 120)

WALKER v. BEACHAM et al. (No. 2786.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by Editorial Staff.)

Execution \S 172(6)—Grant of temporary injunction in suit to set aside sale held not an abuse of discretion.

In a suit to set aside a resale of property under execution, on the original purchaser's failure to comply with his bid, the grant of a temporary injunction on conflicting evidence as to the value of the property, and evidence showing that the sale was made a few minutes before four o'clock, when only a few people were present, and there was only one bidder, held not an abuse of discretion.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Suit by C. T. Beacham against George Walker and others. Judgment for plaintiff, and defendant named brings error. Affirmed.

Evans & Evans, of Sandersville, and T. W. Evans, of Dublin, for plaintiff in error.

Ira N. Eubanks and R. D. Flynt, both of Dublin, for defendants in error.

HINES, J. An execution in favor of the International Life Insurance Company against C. T. Beacham was levied on lot 216 in the eighth land district of Laurens county, and the same was advertised for sale on the first Tuesday in July, 1921. The judgment on which this *fi. fa.* issued created a special lien in favor of the plaintiff on the entire tract. Prior to the sale this lot was divided into two tracts, one of 150 acres and the other of 52½ acres, and a plat made thereof at the defendant's expense, and by agreement between the attorney for the plaintiff in *fi. fa.* and the defendant, the tract of 150 acres, which had been sold by the defendant to one Nobles, subject to the lien of the plaintiff's judgment, should be first sold, and, if it brought enough to satisfy the plaintiff's judgment, the remaining 52½ acres should not be sold. At noon on the day of the sale the sheriff exposed the tract of 150 acres for sale, under the above agreement, when it was bid off by Ira N. Eubanks for the sum of

\$4,713.10. There was evidence tending to show that the sheriff then announced that that ended his land sales, that the crowd dispersed, and that the defendant, who had been in attendance upon said sale, immediately left for his home some eight miles from the county seat. About 2 o'clock the sheriff and the attorney for the plaintiff called on Eubanks for the amount of his bid, which the latter, without any sufficient legal excuse, failed to pay. Thereupon the attorney notified Eubanks that he would have the property resold during the legal hours of sale; but the defendant had no notice of such resale. About half past 3 p. m. the sheriff, after announcing to all within hearing that he would sell this land lot, sold the same, when it was bid off by said Eubanks for the sum of \$4,727. Eubanks announced that his bid was for O. E. Beacham. Thereupon the sheriff prepared a properly executed deed to this land to O. E. Beacham, and presented it to Eubanks, who did not comply with his bid, but directed the sheriff to call on O. E. Beacham, at the time pointing out that the deed tendered by the sheriff was without the required revenue stamps, and stating that they would have to be attached before he could or would accept the same. The sheriff then procured a stamp, and offered to attach it to the deed, if Eubanks would comply with his bid. Eubanks failed again to comply with his bid. The sheriff immediately hurried to the courthouse, and again offered said land for sale, when it was knocked off to George Walker, a business associate of the plaintiff's attorney, for \$4,713.10, and the sheriff then executed and delivered to Walker a deed to said lot.

The defendant filed his petition against the sheriff, the plaintiff in *fi. fa.*, and Walker, alleging the foregoing facts, and that said land was worth \$10,000, that the sale of his land in the manner above stated was a fraud upon him, and that his property would be grossly sacrificed if the sale was permitted to stand, and praying to set aside said sale, to cancel the deed from the sheriff to Walker, and to enjoin the sheriff from putting Walker in possession. The evidence was conflicting as to the value of the land. That for the plaintiff tended to show that this land was worth over \$10,000, and that for the defendants tended to show that its fair market value for cash was not more than half of that amount. There was evidence tending to show that the sale to Walker was made just a few minutes before 4 o'clock, that there were only a half dozen people present at the sale, and that Walker was the only bidder. The evidence was conflicting as to whether Eubanks was acting for C. T. Beacham in bidding off this land. The trial judge granted a temporary injunction as prayed by the plaintiff.

This court cannot say that the Chancellor abused his discretion in granting the injunction, under the law and the facts of the case. *Saunders v. Bell*, 56 Ga. 433; *Humphrey v. McGill*, 59 Ga. 649; *Suttles v. Sewell*, 109 Ga. 707, 35 S. E. 224; *Id.*, 117 Ga. 214, 43 S. E. 486; *Haunson v. Nelma*, 109 Ga. 802, 805, 35 S. E. 227.

Judgment affirmed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 20)

PENDERGRASS v. LORD et al. (No. 2623.)
(Supreme Court of Georgia. Feb. 21, 1922.)

(Syllabus by the Court.)

No error committed.

The court did not err in admitting evidence, nor in refusing to grant an interlocutory injunction.

Error from Superior Court, Jackson County; Blanton Fortson, Judge.

Action between J. B. Pendergrass and Mack Lord and others. Judgment for the latter, and the former brings error. Affirmed.

Ray & Ray, of Jefferson, for plaintiff in error.

A. C. Brown, of Jefferson, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur; HINES, J., specially.

(153 Ga. 127)

LANGSTON v. STATE. (No. 2920.)
(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

1. Criminal law \S 1036(1), 1064(4)—Ground of motion overruled when not showing objections made when evidence offered or motion to rule out; reasons why evidence inadmissible cannot be urged on review when not urged at proper time.

There was testimony of a witness to the effect that the accused made a confession of the crime with which he was charged. One ground of the motion for new trial excepts to the admission of this testimony, and states the ground upon which the evidence was objectionable; but it does not appear that these objections were raised when the evidence was offered, nor that there was any motion to rule it out. Therefore this ground of the motion must be overruled, under the application of the rule, that has been frequently stated, that grounds of a motion for

new trial based upon the admission of evidence will not be considered by this court unless the grounds show what are the objections to the evidence and that these objections were made when the evidence was offered. Nor will the reason or reasons why certain evidence should not have been admitted be considered here, unless such reasons appear to have been urged before the trial judge and at the proper time. *Lamkin v. Clary*, 103 Ga. 631, 30 S. E. 596; *Grace v. McKinney*, 112 Ga. 425, 37 S. E. 737.

2. Witnesses *§*41—Rules governing testimony of one of insufficient mental capacity the same as those governing testimony of child.

It does not appear that there was such an abuse of discretion on the part of the trial judge in admitting the testimony of a witness, whose testimony was objected to by the defense on the ground that the witness was an idiot, as would authorize this court to reverse the judgment of the court denying a new trial on this ground. The rules governing courts in the admission of evidence of an idiot, or one alleged to be a lunatic, or one of insufficient mental capacity to understand the nature of an oath and appreciate its sanctity, are analogous to those applicable to a case where testimony of a child is offered and objected to on the ground that the child, because of its tender years and the mental incapacity resulting therefrom, is incapable of understanding the nature of an oath. Penal Code 1910, § 1038. See, also, *Beebee v. State*, 124 Ga. 775, 53 S. E. 99; *Minton v. State*, 99 Ga. 254, 25 S. E. 626.

3. Criminal law *§*780(3)—Instruction as to corroboration by facts and circumstances tending to connect defendant with the crime properly given.

The court did not err in instructing the jury that, while they would not be authorized to convict on the testimony of an accomplice alone, they would be authorized to convict on such testimony if it is "corroborated by some fact or circumstance [which], independently of the testimony of the accomplice, tends to connect the defendant with the perpetration of the crime." *Callaway v. State*, 151 Ga. 342, 106 S. E. 577; *Hargrove v. State*, 125 Ga. 270, 54 S. E. 164; *McCrary v. State*, 101 Ga. 779, 28 S. E. 921; *Parham v. State*, 3 Ga. App. 468, 60 S. E. 128.

4. Criminal law *§*511(7), 535(2)—Clear evidence of corpus delicti will corroborate confession, and this will corroborate accomplice.

The evidence authorized the verdict of guilty. "Clear and undoubted evidence of the corpus delicti will serve to corroborate a confession made by the accused, and his confession thus supported will serve as sufficient corroboration of the evidence of an accomplice." *Schaefer v. State*, 93 Ga. 177, 18 S. E. 552; *Partee v. State*, 67 Ga. 570.

Error from Superior Court, Morgan County; Jas. B. Park, Judge.

Henry Langston, Jr., was convicted of murder, and he brings error. Affirmed.
See, also, 151 Ga. 388, 106 S. E. 908.

E. R. Lambert, of Madison, for plaintiff in error.

Doyle Campbell, Sol. Gen., and A. Y. Clement, both of Monticello, Geo. M. Napier, Atty. Gen., and S. M. Smith, Asst. Atty. Gen., for the State.

BECK, P. J. [1-4] The plaintiff in error, Henry Langston, Jr., and one John Henry Brady, were jointly indicted for the murder of one Henry Moody. The plaintiff in error was put on trial, and the jury returned a verdict of guilty. A motion for new trial was overruled, and the accused excepted.

The rulings made in the headnotes require no elaboration. They involve no new proposition of law; on the contrary, the principles there laid down have been frequently stated and discussed in decisions made by this court, and they are controlling upon the questions raised by the motion for a new trial.

Judgment affirmed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 161)

HUBBARD v. STATE. (No. 2746.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

1. Criminal law *§*942(1) — New trial not granted for newly discovered evidence impeaching in character.

The only special ground of the motion for a new trial is based upon newly discovered evidence which is entirely impeaching in character. The court did not err in overruling the motion for new trial based upon this ground.

2. Criminal law *§*935(1)—New trial properly refused, when verdict supported by evidence.

The verdict is supported by the evidence, and the court did not err in refusing a new trial.

Error from Superior Court, Meriwether County; O. E. Roop, Judge.

Action between Edmond Hubbard, Jr., and the State. Judgment for the State, and Hubbard brings error. Affirmed.

G. A. Huddleston, of Greenville, and Terrell & Foley, of Columbus, for plaintiff in error.

Wm. Y. Atkinson, Sol. Gen., of Newnan, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., Hatchett & Hatchett and M. Z. O'Neal, all of Greenville, for the State.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 154)

CLOWER v. LANGLEY. (No. 2955.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

Appeal and error \Leftrightarrow 781 (2)—Bill of exceptions dismissed, when dispossession sought to be enjoined has taken place.

Exception is taken to the refusal of an injunction to restrain the execution of a dispossessionary warrant. The brief of counsel for the plaintiff recites that, "since the filing of the bill of exceptions in this case, about 10 days ago, plaintiff was dispossessed by the marshal of the municipal court; she is no longer in possession of the premises involved in this action; and therefore the questions involved are moot." The bill of exceptions is therefore dismissed. *Clements v. Wilkerson*, 151 Ga. 467, 107 S. E. 47.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by Mrs. C. P. Clower against J. A. Langley. Judgment denying an injunction, and plaintiff brings error. Writ of error dismissed.

W. H. Terrell, of Atlanta, for plaintiff in error.

Richard B. Russell and Robert L. Russell, both of Atlanta, for defendant in error.

GILBERT, J. Writ of error dismissed. All the Justices concur, except FISH, C. J., absent because of sickness.

(152 Ga. 371)

STATE et al. v. CALLAWAY et al.
(No. 2380.)

(Supreme Court of Georgia. March 4, 1922.)

(Syllabus by Editorial Staff.)

1. **Taxation** \Leftrightarrow 500—Demurrer to petition to set aside award of arbitrators assessing property held properly sustained, and petition dismissed.

In a suit to enjoin an arbitration of the alleged excessiveness of assessments under Laws 1910, p. 22, and, by supplemental petition, to set aside the award on the ground that it was contrary to the only evidence of value introduced, and that the arbitrators considered evidence of the assessments of similar property, a demurrer to the supplemental petition held properly sustained, and the petition dismissed, especially in view of Laws 1918, p. 232.

2. **Pleading** \Leftrightarrow 149—Cross-petition in suit to enjoin and set aside arbitration proceedings held subject to dismissal as introducing new and distinct matters.

In a suit to enjoin arbitration proceedings under Laws 1910, p. 22, and, by supplemental petition, to set aside the award, a cross-pe-

tition to have declared illegal and void contracts of the state and county to pay certain persons commissions on taxes which they might collect on unreturned property sought to introduce new and distinct matters, not involved in the original action, and should have been dismissed on demurrer.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Suit by the State and others against E. H. Callaway, executor, and others. Judgment for defendants on demurrer, and plaintiffs bring error. Affirmed in part, and reversed in part.

On July 28, 1919, the tax receiver of Richmond county made assessments for taxation of certain corporate stocks and bonds belonging to the estate of J. B. White, late of Richmond county, this state, who died testate in 1917. The assessments were for the years 1911 to 1917, both inclusive. White had not returned these securities assessed by the receiver for any of those years, nor had Callaway, as executor of his will, returned the same. The executor, being dissatisfied with the assessments made by the receiver, as they were in his opinion excessive, demanded that the matter of such assessments be submitted to arbitration in accordance with the act of 1910 (Georgia Laws 1910, p. 22) codified in Political Code, § 1116 (d). Thereupon the executor chose an arbitrator, the tax receiver chose another, and, these two being unable to agree upon the assessments and upon an umpire, the county commissioners of Richmond county appointed an umpire. On September 2, 1919, the state, for itself and in behalf of Richmond county, presented to the judge of the superior court of that county a petition to enjoin the arbitration proceeding, on the ground of alleged disqualification of two of the arbitrators, and because they had not taken oaths applicable to arbitrations under the act of 1910, above referred to. The judge refused, on the last-mentioned date, to grant an interlocutory injunction, and denied a supersedeas. The petitioners excepted to such rulings, and upon a review of them by writ of error this court affirmed the rulings made by the trial judge. *State v. Callaway*, 150 Ga. 235, 103 S. E. 792. Afterwards and on the same day the interlocutory injunction and supersedeas were denied, the arbitrators had a meeting, at which all parties at interest, including the state and the county, were present by counsel, introduced evidence, and submitted arguments. At this meeting no objections were urged to the arbitration proceedings. An award was made immediately after the hearing. Four days thereafter, September 6, the state, for itself and in behalf of the county, filed the petition now under review, which is supplementary to the original petition noted above, to set aside the award, the grounds of the

petition being in substance that no evidence was introduced before the arbitrators as to the true value of the property assessed, except that submitted by the state and county, which showed the value of the property to be something like ten times as much as the valuation placed upon it for taxation in the award, and that the arbitrators had not confined themselves, in making the award, to the true value of the property, but considered evidence tending to show that a very large percentage of the owners of similar property residing in Richmond county, and other counties in the state, and particularly in the counties of Bibb, Chatham, and Fulton, had returned a very small percentage of it for taxation, and, where returns had been made, the assessments on it were insignificant.

At the appearance term the executor demurred to this petition on various grounds, which, in the view we take of the case, are not necessary to be set forth. At the same time the executor filed a cross-petition to have declared illegal and void a certain contract, which was set out, made by the county of Richmond with Pierce Bros. to pay them certain commissions on taxes which they might collect on unreturned property, alleging that these attorneys had represented the county from the inception of the proceedings to have assessments for taxation of the securities owned by White for the years 1911 to 1917, both inclusive, and were directly interested in the result of the proceedings. The cross-petition also sought to have declared void a contract made by the state with Pierce Bros. and A. L. Franklin, of a similar character as that made by the county of Richmond with Pierce Bros.; it being alleged, in substance, that both of such contracts were contrary to public policy and the law of the state, and therefore illegal. On a hearing the demurrer of the executor to the supplemental petition was sustained, and the petition was dismissed. The demurrer to the cross-petition was overruled. Petitioners in the supplemental petition, by writ of error, excepted to both of such rulings.

R. A. Denny, Atty. Gen., and Pierce Bros., A. L. Franklin, and Wm. K. Miller, all of Augusta, for plaintiffs in error.

Callaway & Howard, of Augusta, for defendants in error.

FISH, C. J., and HINES, J. The act of 1918 (Georgia Laws 1918, p. 232), approved July 31, 1918, is in part as follows:

"That when the owner of property has omitted to return the same for taxation at the time and for the years the return should have been made, or having returned his property or part of the same, has grossly undervalued the property returned, or his property has been assessed for taxation at a figure grossly below its true value, such owner, or, if dead, his personal representative or representatives, is required to return such property for taxation for each year he is delinquent, whether delin-

quency results from failure to return or from gross undervaluation, either by the delinquent or by assessors, said return to be made under the same laws, rules, and regulations as existed during the year of said default, or said property was returned or assessed for taxation at figures grossly below its true value."

Section 3 is as follows:

"Be it further enacted, that when such property is of that class which should be returned to the tax receiver of the county, the said tax receiver shall notify in writing such delinquent, or, if dead, his personal representative or representatives, of such delinquency, requiring that a return shall be made thereof within twenty days."

Section 5 provides:

"That if the delinquent or his personal representative or representatives, as provided under section 3 of this act, refuses or fails to return such property after notice given him, it shall be the duty of the tax receiver to assess such property for taxation from the best information he can obtain as to its value for the years in default, and notify such delinquent of the valuation, which shall be final, unless the person or persons so notified raise the question that it is excessive; in which event the further procedure shall be by petition in equity in the superior court of the county where such property is assessed."

Section 8 is:

"That all laws and parts of laws in conflict with this act be and the same are hereby repealed."

[1] 1. The assessments of the property for taxation involved in this case having been made in July, 1919, and the arbitration proceedings as to such assessments having been had in September of that year, the above-quoted provisions of the act of 1918 provided the remedy, that is, by petition in equity, by the dissatisfied delinquent taxpayer, for having such assessments corrected because excessive. The procedure for arbitration of tax assessments claimed by delinquents to be excessive in force prior to the enactment of the act of 1918 is by it repealed. It follows, therefore, that the arbitration proceedings for the assessments of property for taxation here involved and the award made by the arbitrators were wholly void; and the petition now under review for the purpose of setting aside the void award was unnecessary, and the judge of the superior court did not err in sustaining the demurrer to the petition and dismissing the same.

It follows that we concur in the judgment affirming the judgment of the lower court, sustaining the demurrer of the defendants to the supplementary petition in this case. We do so because the complainants have an adequate, full, and complete remedy at law. The arbitration proceedings were null and void under the act of August 17, 1918 (Georgia Laws 1918, p. 234 et seq.). Under this act there is now no provision of law for arbitrat-

ing an assessment made by a receiver of property of a delinquent taxpayer, claimed by the latter to be excessive. In the case of such delinquent taxpayer any objection to the assessments by the receiver on the ground that they are excessive must be raised by petition in equity, addressed to the superior court of the county where such property is assessed, under section 5 of this act. This being so, the complainants have a full and complete remedy at law. This void award did not stand in the way. The tax collector can issue his executions based upon the assessments made by the receiver, and proceed to collect the taxes thereunder. If the executor of the delinquent taxpayer is dissatisfied with these assessments, on the ground that they are excessive, he has his remedy under this act. We concur in the judgment of affirmance solely on the ground that the award was void, and equity will not undertake to set aside a void proceeding which does not stand in the way of the enforcement of the payment of taxes, based upon these assessments by executions, levies, and sales.

[2] 2. The cross-petition sought to introduce new and distinct matters, not involved in the original action, and the court erred in not dismissing it on demurrer. *Peterson v. Lott*, 137 Ga. 179, 73 S. E. 15; *Atlanta Northern R. Co. v. Harris*, 147 Ga. 214, 218, 93 S. E. 210.

Judgment affirmed in part and reversed in part.

All the Justices concur, except HILL and GILBERT, JJ., absent.

BECK, P. J. I concur in the judgment of affirmance in this case, though I doubt whether the provisions in the act of 1918, declaring when the alleged delinquent taxpayer may report to equity, is applicable under the facts of the record. The petition in the present case is supplementary to the former original petition in which the petitioners sought to show that the proceedings before the arbitrators were illegal for certain specified reasons. Among the reasons specified, there was no claim that under the act of 1918 the arbitrators in this case could not entertain an appeal from the assessment made by the tax receiver. But, construing that original petition as a whole, it recognized the right of the taxpayer to have arbitration. Furthermore, the complainants participated in the arbitration, and cannot now raise objections to the jurisdiction of the arbitrators, based upon the act of 1918, after having in their original petition recognized that the arbitrators would have had jurisdiction but for the reasons there pointed out. I also concur in the judgment of affirmance on the ground that equity will not afford the relief here sought, as the petitioners have a statutory remedy as pointed out above, even if the act of 1918 is applicable to this case.

ATKINSON, J. (concurring). Construing the petition most strongly against the pleader, the sole ground of attack upon the award was that the valuation placed upon the property was so grossly inadequate as to show fraud upon the part of the arbitrators. The assignments of error in the bill of exceptions are limited to that question. Under the act by virtue of which the arbitration was had, Political Code, § 1116(d), the arbitrators had jurisdiction, and their power was limited to the question of valuation of the property, and their decision was final. Valuation of property was necessarily a matter of opinion. It would require actual fraud or corruption on the part of the arbitrators to set aside the award. In this view the allegations of the petition were insufficient to show fraud, and the court properly dismissed the petition on demurrer. In view of the record in the trial court and the assignments of error in the bill of exceptions, it is unnecessary to make a ruling as to the applicability or effect of the act of 1918.

(153 Ga. 88)

CANNON v. LAING. (No. 2517.)

(Supreme Court of Georgia. March 4, 1922.)

(Syllabus by Editorial Staff.)

1. Wills \S 916(4)—Gift with power to sell, with limitation over of property undisposed of, held to give life estate with power of disposal.

A will giving real and personal property to the testator's wife during her natural life, to use as she thought proper, and providing that she might dispose of any property as she thought to the best interest of the estate, and to maintain herself, and that whatever might be left at her death should be divided between the testator's heirs, created a life estate with remainder over, and conferred power on the wife individually to dispose of any property as she thought to the best interest of the estate, or for her own maintenance.

2. Wills \S 691—Life tenant named as executor held given power to manage and control property in as full manner as testator could do.

Under a will giving the testator's wife a life estate with power of disposition and naming her as executrix, and providing that the executrix should take charge of the estate and manage and control it in her own right and title, and manage it as if the testator were living, the wife was given power to take possession of, manage and control all of the property in as full manner as the testator could do if living.

3. Wills \S 692, 693(5)—Whether lease was execution of power held dependent on intent of testator and intent of donee of power.

Whether a lease by life tenant given a power of disposition, and named as executrix, with power to manage and control the property in as

full manner as the testator could do, was a good execution of the power depended on the intention of the testator as to the extent of the power and the intention of the donee manifested by the lease as to whether she was attempting to exercise the power.

4. Wills ¶692, 693(5)—Lease held execution of power in will, and not terminable on life tenant's death.

Where a life tenant, given a power of disposition, and given power as executrix to manage and control the property in as full manner as the testator could do, executed a lease for five years for a valuable consideration which on its face was a fair rental value, the lease was a good execution of the power, and was not merely a lease of the life estate, and terminable on her death.

5. Landlord and tenant ¶180(1) — Evicted tenant unable to give required bond held entitled to sue for damages.

One evicted as a tenant at sufferance before the expiration of the time for which he had a lease, and failing to make a counter affidavit because of his inability to give the required bond for double rent, could maintain a suit for the damages from the wrongful eviction.

Hill, J., dissenting.

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Action by L. E. Cannon against R. H. Laing. Judgment dismissing the petition on demurrer, and plaintiff brings error. Reversed.

W. H. Gurr, of Dawson, for plaintiff in error.

Yeomans & Wilkinson, of Dawson, for defendant in error.

ATKINSON, J. In the sixth item of a will, the wife of the testator was appointed sole executrix. In item 3 it was declared:

"I give and bequeath, after paying the amounts heretofore named, all the balance of my estate, real and personal, * * * to my wife, Julia A. Stevens, during her natural life, to be used as she thinks proper. This is to say, she may dispose of any piece of property or any part of the estate as she thinks to be (to the?) best interest of the estate and to maintain herself, and at her death whatever may be left by her shall be equally divided between my legal heirs, and each shall share and share alike."

In item 4 it was declared:

"That my executrix hereinafter named shall take charge of my estate after my death, and manage and control the same in her own right and title, without making an inventory or making any return to the court, and shall be relieved from making bond or giving security for same, of all moneys, notes, insurances, accounts, or any other piece of property that may go into her hands. In fact, I mean for her to take possession of my estate in her own right and title, and manage it as if I were living."

After probate of the will the executrix executed a contract as follows:

"This contract made between Mrs. Julia A. Stevens, executrix, of the county of Fulton, state of Georgia, and L. E. Cannon of Terrell county, Georgia, shows: That for a consideration of five promissory notes, each all dated this date, and one of each to be paid as per annum, one in 1917, 1918, 1919, 1920, and the last in 1921, each for the principal sum of two hundred and forty-five (\$245.00) dollars. These notes are due and payable the 1st day of October of each of the above-mentioned years. Now these notes and this contract is for the rental of two tracts of land for a period of five years, beginning January 1st, 1917, these lands being: [Then follows description of two tracts of agricultural land.] It is further agreed that expense for improvements (in case there should be such) shall be borne by L. E. Cannon. The notes for rental and this agreement are executed, signed, and delivered at ——. In witness whereof, both parties have hereunto signed, this October 13th, 1916. [Signed] L. E. Cannon. Mrs. Julia A. Stevens, Executrix of Estate of O. B. Stevens."

The lessee executed negotiable rent notes as specified in the contract, to cover the entire period of five years, and at a time when the lease had two years to run he had paid in advance substantial portions of the rent due for the last two years. In such circumstances the life tenant died on June 23, 1919, and in December of the same year the land was regularly sold at public outcry by the administrator de bonis non of the estate of the testator. It was announced by the auctioneer that the sale was made subject to the lease. R. H. Laing, having become purchaser with actual notice of the lease, received a deed which was in the usual form, and did not make any reference to the lease. The purchaser instituted statutory proceedings to evict the lessee as a tenant at sufferance, and the latter, being unable on account of poverty to give the required bond for double rent, failed to make a counter affidavit, and was evicted in January, 1920, before his term expired. He brought an action against the purchaser for damages, consisting of the loss of the rental value of the property, and costs which he was required to pay in the dispossession proceeding, based on wrongful eviction and malicious abuse of process by suing out the dispossession warrant without probable cause. The petition as amended, when properly construed, alleged in substance all that is stated above. The judge dismissed the action on general demurrer to the petition, and the plaintiff excepted.

[1, 2] 1. Item 3 of the will creates a life estate for the wife, with remainder over, and confers a power on the wife individually to dispose of any piece of the property or any part of the estate, as she thinks to the best interest of the estate, or for maintenance of herself. Item 4, construed in connection with

item 3, confers power upon the testator's wife specifically to take possession, manage, and control all of the property which the testator should leave, in as full manner as testator could do if living.

[3, 4] 2. Whether or not the lease executed by Mrs. Stevens to Cannon was a good execution of the power contained in the will depends upon a construction of the will, and also of the lease; the final test as to a proper construction of those instruments being: What was the intention of the testator as to the limit or breadth of the power, and the intention of the donee, manifested by her lease, as to whether she was attempting to exercise the power? At the time the lease was executed the donee could have exercised the power, or, having a vested life estate in the land, could have leased the land individually to terminate with that estate. Her lease purported to be upon a valuable consideration, which upon its face was a fair value for the rent of the property, and rent notes were given for the whole term. The lease was for a definite term of five years. If the intention of the donee was to refer to her individual interest in the land, an appropriate lease would have qualified the term so that it should be limited to the term of her life. Under these circumstances, the only reasonable inference is that Mrs. Stevens intended, by executing the instrument, to lease the land for the definite term it purported to provide. As only the life estate was vested in her, and her right to lease unqualifiedly for the term of five years depended upon exercise of the power, it must be held that the lease was a good execution of the power. *Mathis v. Glawson*, 149 Ga. 752, 102 S. E. 351.

3. Under application of the principles stated in the preceding divisions, the petition as amended alleged a right of possession in the lessee as a tenant for a term which had not expired at the time of his eviction from the land.

[5] 4. Under the facts stated above, the plaintiff in this case could maintain the suit as brought for the recovery of the damages claimed, and the court below erred in dismissing the action on general demurrer to the petition as amended. *Porter v. Johnson*, 96 Ga. 145 (1), 23 S. E. 123.

Judgment reversed.

All the Justices concur, except HILL, J., dissenting, and GILBERT, J., absent.

HILL, J. (dissenting). Under a proper construction of item 3 of the will of O. B. Stevens, Mrs. Julia A. Stevens, in her individual capacity, took a life estate in the land in controversy, with a power of disposal. *Melton v. Camp*, 121 Ga. 693, 49 S. E. 690; *Patterson v. Gaissert*, 147 Ga. 472, 94 S. E. 563. The lease contract executed to L. E. Cannon to the property in controversy by Mrs. Julia

A. Stevens, "executrix of the estate of O. B. Stevens," was not an execution of the powers conferred by item 3 of the will. *Patterson v. Gaissert*, 147 Ga. 472 (2), 94 S. E. 563. A life tenant cannot convey or lease property for a time beyond his own term, without express authority in the instrument creating the power. There is no such express authority conferred by the present will. The execution of the lease was an effort to exercise the power contained in item 4 of the will, which was as follows:

"My executrix shall take charge of my estate after my death, and *manage* (italics mine) and control the same in her own right and title, without making an inventory or making any return to the court. * * * In fact, I mean for her to take possession of my estate in her own right and title, and manage it as if I were living."

The power there expressed did not authorize the executrix, as such, to execute the lease contract in question beyond the period of her term as life tenant. *Broach v. Kitchens*, 23 Ga. 515; *Rakestraw v. Rakestraw*, 70 Ga. 806; *Belt v. Gay*, 142 Ga. 366, 82 S. E. 1071. The court did not err in sustaining the demurrer.

(153 Ga. 106)

MATHIS v. STATE. (No. 2713.)

(Supreme Court of Georgia. March 17, 1922.)

(Syllabus by the Court.)

1. Homicide \S 250—Circumstantial evidence held sufficient to support conviction.

The evidence was sufficient to authorize the verdict.

2. Criminal law \S 775(5)—Homicide \S 234 (1)—Evidence insufficient to establish alibi; failure to charge on alibi not error when evidence did not reasonably exclude possibility of presence.

"Alibi, as a defense, involves the impossibility of the prisoner's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as reasonably to exclude the possibility of presence. The evidence, construed most favorably for the defendant, did not reasonably exclude the possibility of the presence of the defendant at the scene of the homicide, and therefore it was not error to fail to charge the law of alibi.

3. Not error to refuse new trial.

The court did not err in refusing a new trial.

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Clint Mathis was convicted of murder and he brings error. Affirmed.

See, also (Ga. App.) 107 S. E. 347.

Porter & Mebane, of Rome, for plaintiff in error.

E. S. Taylor, Sol. Gen., of Summerville, J. F. Kelly, of Rome, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

HILL, J. Clint Mathis was indicted for the murder of Lewis E. Kinsey, and on the trial of the case a verdict was rendered finding the defendant guilty with a recommendation to mercy; and he was sentenced to life imprisonment in the penitentiary. The defendant filed a motion for new trial, which was overruled, and he excepted. The case is here, the plaintiff in error assigning error on two grounds. The original motion sets forth that the verdict is contrary to law, contrary to evidence and without evidence to support it. The only question raised by the amendment to the motion for new trial is on the failure of the court to charge the jury the law of alibi. We will consider first the usual general grounds raising the question as to whether the verdict is supported by the evidence.

[1] 1. The evidence in the case as made by the state and the defendant whose sole defense was alibi, is substantially as follows: The deceased was a rural mail carrier in the county of Chattooga, and carried mail from Summerville along his route and returned in the afternoon of the same day. He was 49 years of age. On January 27, 1921, after carrying the mail and returning late in the afternoon, he disappeared, and his whereabouts were unknown until the 12th day of March, 1921, a period of 44 days. On the last-named date his body was found in the woods within 20 yards of a public road and within about 120 yards of a public schoolhouse, 3 or 4 miles from Summerville. From the disappearance of the deceased until the day his body was found numbers of people had constantly passed along the road where the body was found, and a number of school children had played within a short distance of where the body was found, without discovering it and without detecting any odor from the body. There was a dwelling house near where the body was found, and the inmates of the dwelling house testified that they had never detected any odor as from a decomposed body, nor had they seen indications of vultures circling over or around the body. The body was first discovered by a Mr. Norton on March 12, 1921, after the woods had been burned off and the fire had burned the leaves and broom sedge and some of the tree tops which surrounded the body, thus exposing it partially to view. In the early part of the night of January 27 the defendant was at his sister's, a short distance from where the body was found. The deceased had carried the mail on that route. The defendant had been indicted by the grand jury of Chattooga county in six misdemeanor cases, and was hiding from the arresting officers

of the law. The deceased knew of this fact; and on January 27, while delivering mail along his route, he made an engagement to meet the defendant in the road at the mail box at the home of his sister, for the purpose of taking the defendant to Rome in his automobile. In addition to carrying the mail, the deceased used his car for carrying passengers after his day's work was done. On the day of his disappearance the deceased had finished carrying his mail; and, after going to his home and also to the railroad station at Summerville to meet a train, he met the defendant at the appointed place and took him into his car. Several witnesses testified to meeting the deceased in his Ford car, which they recognized, going toward the home of the sister of the defendant. In fact, the defendant admitted that the deceased came to his sister's home about 6 o'clock p. m. and took him in his automobile to Rome. The spot where the body of the deceased was found was about a mile and a half from where the sister of the defendant lived, and where he was taken into the car. The wife of the deceased testified that when he left home he had \$5 or \$6 in money in his pocket, and when his body was discovered he had 6 cents in his pocket, besides other articles which were identified as belonging to him. A witness for the state testified that on the night of January 27, about 6 o'clock, he heard six shots fired in the direction of the schoolhouse from where he lived. The body of the deceased was found about a quarter of a mile from where this witness, John Dodd, lived. He also testified that the six shots were heard about 15 or 20 minutes after the automobile had passed his house, going in the direction of the schoolhouse. When the body was found in a badly decomposed state, a metal tag was found in the pocket of the deceased which corresponded to the license number of the Ford car which belonged to him, which automobile was found in Chattanooga, Tenn., a few days later, and identified by the son of the deceased as that of his father.

Two witnesses, who were employees of the terminal station company in Chattanooga, testified that the Ford car which was later identified as belonging to the deceased was driven up to a point near the station at about 3 o'clock a. m. on the morning after the disappearance of the deceased, by the defendant, and was parked at or near the curb. The car was abandoned by the defendant, and it remained where it was left by him for 2 or 3 days until it was taken possession of by the chief of police of Chattanooga and by him restored to the family of the deceased. The witnesses recognized and identified the defendant on the trial as being the man who drove the car into Chattanooga and left it in front of the terminal station. The ticket agent sold a ticket to a man who fitted the description of the defendant, between 3 and 4 o'clock a. m. on the morning of the 28th of

January, to Asheville, N. C., and the purchaser of the ticket hurried to catch the 4:15 a. m. train on that day for Asheville. Shortly thereafter the defendant was arrested by the chief of police in Marion, N. C., in a "crap game"; and he gave his name as Henry Martin. While he was incarcerated in the jail in Marion, the chief of police brought to the jail a card advertising and offering a reward for the defendant, Clint Mathis, and showed the card to the defendant, who admitted that he was not Henry Martin, but was Clint Mathis. The defendant was brought from Marion, N. C., and placed in the jail of Fulton county, Ga., where he was identified by one of the employees of the terminal station in Chattanooga as being the man who drove the Ford car into Chattanooga and left it in front of the terminal station. Near where the body of the deceased was found automobile tracks were found in the woods. The tracks had the appearance of having been made some weeks prior to the time they were seen. Several 38-caliber pistol shells were also found near where the body of the deceased was found, the shells looking comparatively new. When the defendant was arrested in Marion, N. C., the chief of police took from the defendant a Smith & Wesson improved pistol of 38-caliber. Two doctors who examined the body of the deceased after it was found testified that the deceased had on his person several pistol shot wounds; one of the doctors stating that he thought the wounds were produced by a 38-caliber pistol, and the other that he thought they were produced by a 44-caliber, but that they could have been produced by a 38-caliber. They also testified that the head of the deceased was entirely gone, and only a part of the skull remained, and that the skull had been crushed with some heavy instrument which would have produced death.

The ex-sheriff of Chattooga county, who went to Marion, N. C., for Clint Mathis, testified that at first the defendant said he did not know anything about Kinsey, the deceased, and the witness informed the defendant that he had some information before he left home that he imparted to the defendant; and then the defendant told the witness and those who were with him that Kinsey did go down to his sister's after him and carried him to Rome and left him on Broad street, and that he got on the street car and went to Lindale, and that was the last he ever saw of Kinsey. Witness asked the defendant what time that was, and he said it was 10 o'clock. Then the witness told the defendant about a letter that he had read from the defendant, and the defendant said, "Well, I did see him after I came back from Lindale." The witness asked, "If you saw him when you came back from Lindale, then what time was it when you left him?" The defendant replied, "It was 12 o'clock." Defendant had stated to the witness previously that he did

not go to Marion by Chattanooga, but went by Atlanta; and the witness said, "You could not have gone by Atlanta and got to Marion at the time you got to Marion," and "You know you did not go to Atlanta," and the defendant said, "No; I did not go by Atlanta; I went to Chattanooga." Defendant also told this witness that he went to Chattanooga "in a Buick Six with a negro." He also said that the negro did not charge him anything, and said Kinsey charged him \$10 for bringing him to Rome. He said that he had never been to North Carolina before, and that he took the first train going out of Chattanooga. He also told this witness, in his first statement to him, that he went to Rome with a man by the name of Robinson, and that he went to Atlanta on the train from Rome, and that he never did see Lewis Kinsey that night; and, after witness told him that he knew he went to Chattanooga, he said that he did. In this conversation the defendant also said that he got to Chattanooga about 8 o'clock, that he left there at 4:15, and that he went to Chattanooga by Summerville. The defendant also wrote a letter from Asheville, N. C., on January 28th, addressed to Miss Lona Wilson at Lindale, in which he stated that he had gone from Rome to Atlanta. A witness for the state, Lester Norton, testified that Kinsey about two weeks before his disappearance on January 27 came along the road in his car carrying the mail, and the defendant said, referring to the deceased, "He has it in for me because I beat him out of his woman once."

The foregoing evidence is circumstantial only, but we are of the opinion that it is sufficient to exclude every other reasonable hypothesis save that of the guilt of the accused.

[2] 2. The sole defense of the defendant upon the trial of the case was that of alibi. In the only special ground of the motion for new trial the plaintiff in error complains that the court failed to charge the jury on the law of alibi. Section 1018 of the Penal Code of 1910 provides:

"Alibi, as a defense, involves the impossibility of the prisoner's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as reasonably to exclude the possibility of presence."

On the trial of the case the defendant offered as a witness Miss Lona Wilson, of Lindale, who testified:

That the defendant came to her sister's house, where she was living, on January 27, which was Thursday night. "He came in and told me he was going away, said he was going somewhere to get him a job to go to work, and he asked me to loan him some money, and I let him have \$40, and he said as soon as he got work he would send it back to me. I says, 'Where are you going?' and he says he thought he was going to Atlanta from there, but did

not know where he would go from Atlanta; said though he was going to stop at the first place he could get a job, and that when he stopped he would write to me. On Sunday I received a letter from him, and he was in Asheville, N. C., where he wrote the letter. This is the letter already introduced in evidence by the state. * * * Clint got to Lindale that night about 8 o'clock by his watch. He stayed there something like 2 hours, and he looked at his watch a few minutes before he left. I have traveled over the car line from Rome to Lindale many, many times. It takes from 30 to 45 minutes to go on the street car from Rome to Lindale. It takes about 10 minutes to walk from the car line to where I live. * * * He told me then that Mr. Robinson brought him to Rome, and that he came out to Lindale on the car and was going back to Mr. Robinson and go on to Atlanta with Robinson. Lindale is five miles from Rome."

In his statement to the jury the defendant said, among other things:

"On the 27th day of last January, I met Mr. Kinsey on his mail route, and I made arrangements with him to carry me to Rome, Ga., that night, and that night at 6 o'clock he met me at the place where we agreed to meet, at Mr. Dodd's mail box, and I got in his car and he drove me to Rome; and he knew the reason I wanted to go to Rome; he knew that I was in some trouble here; the grand jury had returned six true bills against me for misdemeanors at the last term, and he knew that, and he knew that was the reason I wanted to go; and the reason I asked him to carry me was he was my friend, and I knew he would carry me and nobody would know it, and he would not tell it. He drove me to Rome, and I left him on Broad street; and he knew I did not have any money, and I told him to wait there in Rome till I went to Lindale and got some money and came back. He kept my suit case in the car, and he was there when I got back, and he was talking to some man there on the street; the man was in a Buick Six automobile, standing right by Mr. Kinsey; and just as I walked up I overheard this man say he was going to Chattanooga, and I was intending to wait till the next morning and go to Atlanta and go to North Carolina. Mr. Kinsey knew that I was going to North Carolina. After hearing this man say he was going to Chattanooga, I asked him if I could go along with him, and he says I sure could, that he was glad to have my company, as he was by himself; and this man drove me to Chattanooga, and I got out of his car directly in front of the terminal station. I walked in and set my suit case down and bought a ticket to Asheville, N. C., and went in the train at 4:15, and got to Asheville the next day around or about 1 o'clock. I stayed in Asheville from 1 o'clock until the next day at 2. I caught the train then at 2 o'clock in Asheville the next day, and went to Marion, N. C. There is where I was arrested in a crap game," etc.

The above is substantially all the evidence relating to the question of alibi. We are of the opinion that this evidence is not such as reasonably to exclude the possibility of the

presence of the defendant at the scene of the homicide. It was also in evidence that the distance from the place where the body of the deceased was found to Rome is about 24 miles; and, assuming that the homicide occurred at or about 6 o'clock, when the 6 shots were heard to come from the direction in which the body was found, we cannot say that the appearance of the defendant in Lindale, which is approximately 29 miles away, at 8 o'clock, would reasonably exclude the possibility of the presence of the defendant at the scene of the homicide. Besides, there is positive evidence in the record, to show that the distance between where the body of the deceased was found and Rome could be made within an hour or an hour and 15 minutes. From what has been said above, we conclude that the evidence, construed most favorably for the defendant, did not exclude the possibility of the presence of the defendant at the scene of the homicide; and therefore the presiding judge did not err in failing to charge the jury on the subject of alibi.

[3] 3. The court did not err in overruling the motion for new trial.

Judgment affirmed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 37)

CHATHAM BANK & TRUST CO. v. OCILLA SOUTHERN R. CO. et al.
(No. 2415.)

(Supreme Court of Georgia. Feb. 23, 1922.)

(Syllabus by the Court.)

1. Railroads \S 188—Petition for foreclosure of mortgages and receivership held to state cause of action.

The petition in this case sets forth causes of action.

2. Abatement and revival \S 4—Action \S 8—Rule requiring intervention in receivership suit inapplicable, when appointment of receiver collusive and colorable; appointment of receiver held collusive and colorable, as against mortgages.

Where a receiver is appointed, on a petition brought by a minority stockholder against an insolvent railroad corporation, to operate the same as a means of preventing the holder of first and second mortgages, both of which are in default, from foreclosing the same and selling the property of the railroad company embraced therein, and where there is evident collusion between the plaintiff stockholder and the company, the institution of such suit and the appointment of a receiver to take charge of and operate the railroad of the defendant company as a common carrier will not prevent the holder of such mortgages from instituting an independent suit to foreclose such mortgages, and hav-

ing a receiver appointed to take charge of the properties embraced in such mortgages.

(Additional Syllabus by Editorial Staff.)

3. Receivers \S 174(1)—When appointment of receiver collusive, foreclosure suit can be brought without leave.

Where a suit for the appointment of a receiver for a railroad was collusive and for the purpose of preventing foreclosure suits, a trustee under mortgages could sue for foreclosure and the appointment of receivers under the mortgage without any order permitting the prosecution of the suit.

4. Receivers \S 174(1) — Leave to foreclose mortgages pending receivership sufficiently granted by sanction of petition before filing.

Where receivers for a railroad had been appointed in a collusive suit, if an order permitting the prosecution of foreclosure suits was necessary, the court's sanction of the petition before it was filed was tantamount to the granting of such authority.

Error from Superior Court, Irwin County;
R. Eve, Judge.

Suit by the Chatham Bank & Trust Company, trustee, against the Ocilla Southern Railroad Company and others. Judgment for defendants on demurrer, and plaintiff brings error. Reversed.

Chatham Bank & Trust Company, as trustee, brought its equitable petition in Irwin superior court, to foreclose two mortgages of the Ocilla Southern Railroad Company, one being a first mortgage made to this trustee to secure an issue of first mortgage bonds, and the second being a mortgage to this trustee to secure certain short-term notes. The railroad company was in default under both mortgages, and the trustee's right to foreclose them had fully accrued. Garbutt, a stockholder of the railroad company, had previously brought an equitable petition against this company in the same court, and under it the court appointed said Garbutt, J. A. J. Henderson, and Joseph F. Gray as receivers of all the assets of the defendant railroad company. A number of other stockholders intervened in Garbutt's petition, and were made parties plaintiff with Garbutt.

The defendants in the case at bar are the railroad company, Garbutt, and the other intervening stockholders in his petition, and Henderson and Garbutt as receivers of the railroad; Gray, the other receiver, having previously resigned. The petition of the trustee in this case prayed for the foreclosure of said mortgages, for injunction and receiver, and that the receiver to be appointed therein should make an application in the Garbutt cause for an order for the receivers thereunder to turn over all property and assets of the railroad company in their hands to the receiver to be appointed in this case.

Attached to the petition of the trustee is

a copy of the petition and proceedings in the Garbutt case. In his petition Garbutt alleged, that the Ocilla Southern Railroad Company was duly chartered under the laws of Georgia, and was engaged in the operation of lines of railway in this state owned and leased by it; that in addition to its lines of railroad the railroad company owns other valuable property, consisting of rights of way, rails, cross-ties, depots, rolling stock, etc.; that the railroad company had conveyed all its properties to secure bonds and similar securities in the sum of approximately \$700,000; that the amount of the company's other indebtedness was unknown to the petitioner; that since December 1, 1916, one Gray had held the position of general manager of said company; that while he was exercising the usual and customary powers of a general manager, he was likewise exercising far more power and much more authority than is ordinarily exercised by such a manager, and in fact the railroad company and its properties have been completely in charge of said Gray since the date of his election, the directors of said railroad company having either directly conferred upon him all the powers vested in them or having allowed him to assume and exercise all such powers; that Gray, since the date of his election as general manager, had confederated with the holders of the securities of the railroad company to operate, manage, and control its properties and conduct its business in such a manner as had been deemed by him and the holders of the securities to be to their interests, rather than to the interests of the stockholders generally, to the end that the interests of the stockholders and the public should suffer; that in pursuance of such conspiracy the franchises and properties of the railroad company have been and are now being mismanaged to the damage of petitioner and other stockholders, having been allowed to deteriorate in value to such an extent that its business is not a paying business; that the railroad company is insolvent; that it is the plan of the security holders, confederating with Gray, to so reduce the value of the physical properties and franchises of the company and its income that its affairs shall be made to appear to be hopelessly involved and the company insolvent, so that said holders may procure foreclosure of their securities and have the property sold by the order of some court in a foreclosure proceeding, and buy said properties for the amount of their securities, to the damage of its common creditors and the destruction of the rights of said Garbutt and other shareholders in said company; that in pursuance of said scheme the business done by said railroad company has been so reduced that its operating expenses and the interests on its bonds are past due and unpaid, which will render it liable at any time to be put in the hands of

a receiver at the instance of bondholders; that in pursuance of such scheme the road-bed and rolling stock of the company have become dilapidated; that it is the purpose of Gray and the holders of said securities to discontinue the operation of trains on said railroad altogether, and procure a sale of its physical properties as junk; that if the affairs of the company were placed in the hands of competent and honest officials and they were directed to carry on its business, it could again become solvent, so that the stock of shareholders would be of value. On behalf of himself and all other stockholders who may become parties, Garbutt prayed that a receiver be appointed to take charge of all the properties of the railroad company, and be required by order of the court to operate the same as a going railroad company.

By an amendment Garbutt alleged that there were suits pending against the company, ripe for trial, amounting to \$214,000; that if a permanent receiver be appointed and the road continued in operation, the company would probably be able to pay the full amount of all said claims; that if any one of said suits be tried and a receiver be applied for by the judgment plaintiff, it would wreck the road; that on July 16, 1917, a valid judgment was obtained in Irwin superior court against the defendant company, by the Seaboard Air Line Railway Company, for \$18,891.05, which has not been paid, and the same is pending on appeal in the Supreme Court; that on affirmance of said judgment the judgment creditor is likely to apply for a receiver, which could not be successfully resisted; that Gray and the bondholders are making no effort to take care of said judgment; and that there are outstanding against said company tax executions amounting to \$656.10. None of the creditors of the railroad company were made parties to the Garbutt suit.

The railroad company answered the petition, admitting the material allegations thereof. It alleged that persons holding securities of said company were preparing to file a petition in the United States district court, asking for the appointment of a receiver to take charge of the properties of the company, with the intention of procuring an order allowing its dismantling. The railroad company joined in the prayer for the appointment of a receiver to take charge of and operate its railroad. On August 8, 1918, the court appointed said Garbutt, J. A. J. Henderson, the president of the company, and J. F. Gray, its manager, permanent receivers of its property, and authorized and directed them to operate the railroad as a common carrier.

The railroad company, the receivers in the Garbutt cause, and other intervening stockholders in the Garbutt cause, filed separate demurrers upon the identical grounds: (1) Because there is no equity in the petition; (2) because interveners in the Garbutt petition,

other than intervening stockholders, were not made parties defendant to the petition in this case; (3) because no previous order was obtained authorizing the plaintiff to file suit against the railroad company or against the receivers thereof; and (4) because the property of the railroad company being in the hands of receivers appointed under the Garbutt bill, the trustee in this cause could not file an independent bill to foreclose its mortgages, and have receivers appointed under its bill, but must intervene in the Garbutt suit.

The court sustained all these demurrers and dismissed the plaintiff's petition. This is the error assigned.

Lawton & Cunningham, of Savannah, and W. E. Kay, of Jacksonville, Fla., for plaintiff in error.

Quincey & Rice, of Ocilla, Wall & Grant-ham, of Fitzgerald, and Walter F. George, of Vienna, for defendants in error.

HINES, J. (after stating the facts as above). [1, 2] 1. The petition in this case sets up causes of action. About this there cannot be even a fanciful doubt; but counsel for the defendants insist, that, as the property of the Ocilla Southern Railroad Company, including that embraced in the plaintiff's mortgages, had been placed in the hands of receivers, the plaintiff can only prosecute these causes of action in the receivership case by intervention, and not by an independent proceeding of foreclosure and for receiver. In reply to this position counsel for the plaintiff contends that the receivership proceedings should be treated as a mere nullity, because there is nothing in that case to support a receivership, there being no controversy between the parties, no justiciable question involved, and the application for a receiver, by a minority stockholder of the corporation, based on loose and general allegations of mismanagement of its affairs by its general manager in conspiracy with its security holders, being colorable and collusive.

2. The general rule is that, where property of a corporation has been placed in the hands of a receiver, persons seeking to assert equitable remedies against its assets should become parties to the cause by intervention and prosecute their remedies therein. Civil Code. § 5478; National Bank of Augusta v. Richmond Factory, 91 Ga. 284, 18 S. E. 160; Empire Lumber Co. v. Kiser, 91 Ga. 643, 17 S. E. 972. To this general rule, as to all general rules, there are exceptions. It is probably impossible to find any general statement of the law so inclusive and exclusive as admit of no exceptions.

In the first place this principle is applicable to creditors' bills and similar suits to wind up the affairs of insolvent corporations and others, and to distribute their assets among creditors, stockholders, and others entitled thereto. National Bank of Augusta v. Richmond Factory, *supra*. So proceedings,

authorized by statute to forfeit the charter and franchises of an insolvent corporation, to appoint a receiver to take charge of its assets, and to wind up and distribute its assets, are exceptions to the general rule. *People v. New York City Ry. Co.*, 57 Misc. Rep. 114, 107 N. Y. Supp. 247; *State v. Port Royal & Augusta Ry. Co.*, 45 S. C. 470, 23 S. E. 383; *Herring v. N. Y., L. E. & W. R. Co.*, 105 N. Y. 340, 12 N. E. 763; *In re Klittanning Ins. Co.*, 146 Pa. 102, 23 Atl. 336; *St. Louis Car Co. v. Stillwater Ry. Co.*, 53 Minn. 129, 54 N. W. 1064; *Texas Trunk Ry. Co. v. State*, 83 Tex. 1, 18 S. W. 199; *City Water Co. v. State of Texas*, 88 Tex. 600, 32 S. W. 1033; *De La Vergne Ref. Mach. Co. v. Palmetto Brewing Co. (C. C.)* 72 Fed. 579; *Met. T. Co. v. Lake Cities Elec. Ry. Co. (C. C.)* 100 Fed. 879; *Merchants', etc., Bank v. Trustees of Masonic Hall*, 63 Ga. 549; *People v. Hasbrouck*, 57 Misc. Rep. 130, 107 N. Y. Supp. 257; *Hitchcock v. Am. Pipe & Construction Co. (N. J. Ch.)* 105 Atl. 655; *Taber v. Royal Ins. Co.*, 124 Ala. 681, 26 South. 252. So there is an exception where one party "becomes the sole party in interest and dominus litis on both sides. *Cleveland v. Chamberlin*, 1 Black, 419, 17 L. Ed. 93.

The case at bar is stronger. From the beginning the interests of the plaintiff and the defendant in the receivership proceedings were identical. The proceedings were colorable and collusive, and are an exception to the general rule that parties must intervene in receivership proceedings to enforce liens on the property in the hands of the receiver. *Lord v. Veazie*, 8 How. 251, 12 L. Ed. 1067; *Harp v. Abbeville Investment, etc., Co.*, 108 Ga. 168, 33 S. E. 998; *May v. Printup*, 59 Ga. 128; *Merchants', etc., Bank v. Trustees*, 63 Ga. 549. This is especially so, when by collusion the receiver was appointed to head off the plaintiff from proceeding to foreclose its mortgages and obtain a receiver. *Merchants', etc., Bank v. Trustees*, supra.

A casual inspection of the record in this case shows the proceedings under which the receiver was appointed were collusive, and colorable. The allegations of mismanagement are very loose and general. No application was made to the directors and stockholders of the corporation for redress, *Civil Code*, § 2224; *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337. If the general manager of this corporation was mismanaging its affairs, he could have been removed by the directors. Yet no relief was

sought at the hands of the directors. The application for a receiver was avowedly made to head off the plaintiff from foreclosing its mortgages, and from obtaining from the court in which the proceedings were instituted such rights as the plaintiff was entitled to. In its answer the company joined in the prayer for a receiver; and the appointment of the receivers was by consent.

An inspection of the minutes of the meeting of the stockholders of this company at which a resolution was passed endorsing this Garbutt petition for a receivership, will show that these proceedings were collusive and intended to prevent the bondholders having the road put in the hands of a receiver in the United States district court, and possibly securing an order for dismantling it. Mr. Elkins, of counsel for Garbutt, stated to this meeting that probably some of the Garbutt petition for a receiver was camouflage; but its main purpose was as above stated. The general manager was not even made a party to the proceeding.

As the application and appointment of a receiver were colorable and collusive, we think that this constitutes an exception to the general rule requiring persons who have liens on corporate property in the hands of a receiver to intervene and prosecute the same in the case in which the receiver was appointed. Furthermore, the receivership in the Garbutt case was for one purpose only, and that was to operate this railroad. The plaintiff seeks a receiver for another and distinct purpose. The receiverships were for separate and distinct purposes. So we are of the opinion that the plaintiff could file an independent proceeding to foreclose its mortgages, to have a receiver appointed, and to request the court to pass an order to require the present receiver to turn over the property of this railroad to the receiver appointed in this cause.

[3.] 4) 3. The plaintiff could file this proceeding without first obtaining an order from the court permitting its prosecution. Such order was unnecessary. *Harp v. Abbeville Inv., etc., Co.*, supra. If such order was necessary, the sanction of the petition by the court before it was filed was tantamount to the granting of such authority by the court. *Vestel v. Tasker*, 123 Ga. 213, 51 S. E. 300; *Donehoo v. Rogers*, 146 Ga. 75 (3), 90 S. E. 382.

Judgment reversed.

All the Justices concur.

(153 Ga. 43)

BARNETT v. STRAIN. (No. 2416.)

(Supreme Court of Georgia. Feb. 28, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 485(2)—Supersedeas suspends further proceedings on judgment or carrying it into effect.

The general rule is that a supersedeas suspends all further proceedings in the suit in which the judgment superseded is rendered, such as are based upon and relate to the carrying into effect of that judgment. Under the general rule the supersedeas deprives the trial court rendering the judgment of jurisdiction to take further proceeding towards its enforcement. 8 O. J. 1315, §§ 1446-1457; *Huson v. Martin*, 42 Ga. 85; *Western & Atlantic R. Co. v. State*, 69 Ga. 525, 533; *Howard v. Lowell Machine Co.*, 75 Ga. 325 (1a).

2. Appeal and error \S 473, 489—Filing of bill of exceptions with pauper affidavit held a supersedeas; court without jurisdiction to appoint receiver pending review of judgment in action for land.

A verdict and judgment for the land involved were rendered for the plaintiff in an action for land, but for no mesne profits, and no claim was in issue as to the rent for the current year. The defendant duly moved for a new trial, which was refused, and on the date of the refusal the plaintiff presented to the judge his petition, alleged to be ancillary to and in aid of his suit for the land. This petition, in effect, was an effort to amend plaintiff's suit in ejectment, and, as amended, set forth in substance that plaintiff obtained the verdict and judgment for the recovery of the land for which he sued, but no recovery was had for rent of the current year; that at the time of the recovery of the land certain crops were growing thereon, which were still unsevered; that the defendant was insolvent; that he would doubtless take the suit for the land to the Supreme Court on exceptions to the overruling of the motion for new trial; and that he was still in possession of the premises, and was removing rock, dirt, sand, gravel, and timber therefrom. Among others, there were prayers for the appointment of a receiver for the land and the crops thereon, and that the defendant be enjoined from interfering with the premises, and from removing the crops or anything of value therefrom. The judge granted a temporary restraining order, and a rule requiring defendant to show cause on a given date why the prayers of the petition should not be granted. The record does not show the date of the filing of a bill of exceptions by defendant in the action for the land. It does disclose, however, that he did file such a bill of exceptions prior to the date of hearing appointed by the judge on plaintiff's petition, and that there was filed therewith an affidavit in forma pauperis, made by defendant in accordance with Civil Code 1910, §§ 6165 (3), 6166, for obtaining a supersedeas. The judge, on evidence tending to sustain the allegations of the petition, rendered a judgment appointing a receiver "to take charge of the premises in dispute and rent the same to the best advantage pending

the litigation, * * * to take possession of any of the crops that are unsold and now upon the premises, and to preserve and hold the same until the further order of the court," and enjoining the defendant from interfering with the receiver's possession of the premises, and from removing anything of value therefrom until the further order of the court. *Held*, that the filing of the bill of exceptions in the suit for the land, assigning error upon the judgment refusing defendant a new trial therein, together with his pauper affidavit in accordance with the provisions of the Code, constituted a supersedeas staying all further proceedings based upon the judgment rendered in the action for the recovery of the land, or seeking to carry that judgment into effect, and that therefore the judge was without jurisdiction to render the judgment here complained of while the suit for the land was on writ of error pending in the Supreme Court.

Error from Superior Court, Whitfield County; M. C. Tarver, Judge.

Action by W. J. Strain against A. J. Barnett. Judgment appointing a receiver, and defendant brings error. Reversed.

See, also, 151 Ga. 553, 107 S. E. 530.

Geo. G. Glenn, of Dalton, and R. H. House, of Donaldsonville, for plaintiff in error.

J. G. B. Erwin, Jr., of Calhoun, and Maddox, McCamy & Shumate, of Dalton, for defendant in error.

FISH, O. J. Judgment reversed. All the Justices concur.

(153 Ga. 92)

BRANDENBURG et al. v. CITY OF COVINGTON et al. (No. 2595.)

(Supreme Court of Georgia. March 4, 1922.)

(Syllabus by the Court.)

1. Licenses \S 7(1)—Tax ordinance held not illegal, unreasonable, or void on its face.

A paragraph of a tax ordinance of a city is not illegal, unreasonable, or void upon its face, which provides: "Picture shows or electric theater per year, \$100.00. Permit required for use of gallery. Permit in discretion of mayor and council."

2. Appeal and error \S 954(3)—Refusal of interlocutory injunction not reversed, when not an abuse of discretion.

Under conflicting evidence upon the question as to whether the plaintiff in error had made application to the city authorities for the issuance of the permit to operate a gallery, it does not appear that the court abused his discretion in refusing an interlocutory injunction. The foregoing ruling necessarily disposes of the case, and it is unnecessary to pass upon the constitutional questions involved.

Error from Superior Court, Newton County; John B. Hutcheson, Judge.

Suit by W. L. Brandenburg and others against the City of Covington and others. Judgment denying interlocutory injunction, and plaintiffs bring error. Affirmed.

King & Johnson, of Covington, for plaintiffs in error.

A. D. Meador, of Covington, for defendants in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except GILBERT, J., absent.

FISH, C. J. I specially concur in the judgment refusing the grant of an interlocutory injunction for the reason that, in my opinion, the facts of the case bring it clearly within the general rule that equity will not enjoin the prosecution for the violation of a municipal ordinance which is attacked as being unconstitutional or void for other reasons.

(28 Ga. App. 305)

CENTER POINT GIN v. HATHCOCK.
(No. 12875.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(*Syllabus by the Court.*)

1. Instructions not erroneous.

The judge did not err in not giving to the jury such instructions as are set out in special grounds 1 and 2 of the motion for a new trial.

2. Appeal and error \Leftrightarrow 302(1,3)—Grounds in motion for new trial, complaining of admission of testimony of unnamed witness, cannot be considered; grounds of motion for new trial must be complete in themselves.

Grounds 3 and 4 of the amendment to the motion for a new trial cannot be considered by this court because: (a) Each ground complains of the admission of specified testimony of a witness, but fails to state the name of the witness. *Powell v. State*, 25 Ga. App. 329 (2), 103 S. E. 174; *Hunter v. State*, 148 Ga. 566 (1), 97 S. E. 523.

(b) "Under repeated decisions of this court and of the Supreme Court, each special ground of a motion for new trial must be complete within itself; and when so incomplete as to require a reference to the brief of evidence, or to some other portion of the record, in order to determine what was the alleged error and whether such error was material, the ground will not be considered by the reviewing court." *Stephens v. Blackwell*, 24 Ga. App. 796 (4), 102 S. E. 452; *Pound v. Smith*, 146 Ga. 431 (5), 91 S. E. 405.

3. Bailment \Leftrightarrow 31(1)—Burden on ginner of cotton for hire to show care and diligence.

"Where cotton is delivered by the owner to another to be ginned for a specific price, this is a bailment for hire. Therefore, where

the cotton is lost by the bailee, the onus is upon him to show due care and diligence in protecting and keeping it." *Concord Variety Works v. Beckham*, 112 Ga. 242, 37 S. E. 392. And see *McDonald v. Hardee*, 22 Ga. App. 96 (1), 95 S. E. 320.

4. Appeal and error \Leftrightarrow 1005(2)—Finding on question of negligence not disturbed when supported by evidence and approved by trial judge.

Negligence is peculiarly a question for the jury, and in this case the jury having passed upon the questions of care and diligence, and the trial judge having approved their verdict, which is supported by evidence, this court, in the absence of an error of law, is powerless to interfere.

Error from City Court of Carrollton; Leon Hood, Judge.

Action by W. S. Hathcock against the Center Point Gin. Judgment for plaintiff, and defendant brings error. Affirmed.

Smith & Millican and Willis Smith, all of Carrollton, for plaintiff in error.

S. Holderness, of Carrollton, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 428)

DANIEL v. I. A. THORNTON & CO.
(No. 12881.)

(Court of Appeals of Georgia, Division No. 2.
April 1, 1922.)

(*Syllabus by the Court.*)

1. Sales \Leftrightarrow 479(14)—Buyer requesting conditional seller to resell not entitled to complain of failure to comply with bill of sale.

A buyer of personal property, signing an instrument reserving title in the seller, cannot complain that the seller, in reselling the property, failed to comply with the exact terms of the bill of sale in reference to giving the buyer notice of the time and place of the resale, when the resale was made in pursuance of the buyer's request.

2. Sales \Leftrightarrow 479(11)—Conditional seller, reselling at buyer's request to itself and crediting proceeds on note, entitled to recover balance.

Thornton & Co. sold a mule to Daniel, and he signed a purchase-money note reserving title in them. The instrument provided that, in case of nonpayment of the debt at maturity, Thornton & Co. might take possession of the property and sell it at public outcry for cash, after 10 days' written notice to Daniel of the time and place of sale. Daniel was not able to pay the debt when due and returned the mule to Thornton & Co. to sell, but said that he did not want the sheriff to sell it, and did not want any advertisement or publicity about it. The sale

was advertised and the full 10 days' notice of the time and place of sale, as provided in the bill of sale, was not given Daniel. The undisputed evidence shows, however, that the mule was sold "in pursuance of [Daniel's] request," and Thornton & Co. bought the mule and subsequently resold it, crediting the note with the amount paid by Thornton & Co. for the mule on resale. Suit was instituted by Thornton & Co. against Daniel for the balance due on the note. The trial court did not err in directing a verdict for the plaintiffs. See *Pressley v. McLanahan*, 14 Ga. App. 366, 80 S. E. 902.

Error from Superior Court, Elbert County; W. L. Hodges, Judge.

Action by I. A. Thornton & Co. against P. N. Daniel. Judgment for plaintiffs, and defendant brings error. Affirmed.

Z. B. Rogers, of Elberton, for plaintiff in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 287)

HARVEY v. JOHNSON. (No. 12587.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922. Rehearing Denied
April 11, 1922.)

(Syllabus by the Court.)

1. Master and servant \S 82(5)—Entry of filing of replevy bond in lien foreclosure properly ordered *nunc pro tunc*.

Under the facts of this case the court properly ordered that the entry of filing be made on the replevy bond *nunc pro tunc*.

2. Master and servant \S 82(5)—Demurrer to affidavit to foreclose lien properly overruled.

As no counter affidavit had been filed as provided by law, there was no case in court to be tried, and the demurrer to the affidavit to foreclose the laborer's lien was properly overruled.

3. Master and servant \S 82(5)—Counter affidavit to lien foreclosure properly stricken.

The statute contemplates that the counter affidavit to the foreclosure of a laborer's lien should be filed with the levying officer as a condition precedent to his returning the case to court for trial. This not having been done in this case, the counter affidavit was properly stricken.

4. Master and servant \S 82(5) — Judgment properly rendered on replevy bond in lien foreclosure.

Judgment was properly rendered against the defendant and his securities on the replevy bond. Where a counter affidavit is not "made and filed with the proper officer and at the proper time, there is no suit or case to return for trial, and therefore in this case there was nothing to submit to the jury."

5. Costs \S 262—Damages denied, when court not convinced writ of error was for delay only.

The request that 10 per cent. damages be awarded is denied.

Error from Superior Court, Marion County; Geo. P. Munro, Judge.

Proceeding by Charlie Johnson against Mack Harvey. Judgment for plaintiff, and defendant brings error. Affirmed.

Johnson foreclosed a laborer's lien against Harvey, an execution was issued and levied, and the defendant gave a replevy bond. The affidavit made to foreclose the lien, the execution, and the replevy bond were sent by the sheriff to the office of the clerk of the superior court and left there, the clerk being out at the time. The clerk testified that—

"he found the replevy bond with the lien foreclosure along about the 2nd day of December, 1920, in his office, and that he inadvertently failed to file the same; that the counter affidavit was filed with him on the 25th day of April, 1921."

J. C. Butt, of counsel for the plaintiff, testified:

"That about the 2nd day of December, 1920, he found the bond with the lien foreclosure in the clerk's office, and that no counter affidavit was with the papers."

The sheriff testified:

"The day following the levy of the execution of Charlie Johnson against Mack Harvey, I went by Mr. Rainey's office and attested this bond. I was in a hurry and gave the same to Mr. Rainey, together with the lien affidavit and execution, to give to the clerk of the superior court. The bond has never been in my office, and to-day is the first time I have seen the same since that time. To-day is the first time I have seen the counter affidavit filed in the clerk's office on the 25th day of April, 1921. The counter affidavit has never been filed with me."

T. B. Rainey, counsel for the defendant, testified:

"That he carried the bond to the clerk's office, that the clerk was not in, and he left the bond and lien foreclosure on the clerk's desk, that the bond was never filed in the sheriff's office, and that to-day was the first time he had given the counter affidavit to the sheriff."

This was April 26, 1921. The bill of exceptions recites that—

"after hearing said evidence the court passed an order *nunc pro tunc* ordering said bond filed as of December 2, 1920."

While the case was on trial the defendant offered a special demurrer to the affidavit of foreclosure. This was overruled. Defendant then presented to the court a counter affidavit, which, upon motion of counsel for the

plaintiff, was stricken. The court, upon petition filed by the plaintiff, rendered judgment in his favor. The defendant excepted to the order allowing the entry of filing on the bond nunc pro tunc, to the overruling of the demurrer to the affidavit of foreclosure, to the order striking the counter affidavit, and to the judgment rendered against him and his securities.

T. B. Rainey, of Buena Vista, for plaintiff in error.

W. D. Crawford and John C. Butt, both of Buena Vista, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). [1] 1. The court did not err under the special facts of this case in ordering that the replevy bond be filed nunc pro tunc as of date December 2, 1920.

[2] 2. The demurrer to the affidavit of foreclosure was properly overruled. No counter affidavit had been filed as provided by section 3366 (6) of the Civil Code of 1910. In *Moultrie Lumber Co. v. Jenkins*, 121 Ga. 722, 49 S. E. 678, Justice Lamar said:

"Where a laborer's lien has been foreclosed under the Civil Code [of 1895], § 2816 [section 3366 (6), *supra*], the execution issued thereon operates as final process. The office of the counter affidavit is to convert this final process into mesne process and raise an issue which must there be passed upon by the proper tribunal. But until there is such an affidavit there is no case, nothing to be returned to a court, no pleading to be amended, and no issue to be tried. If, therefore, the counter affidavit was void, the defendant was not in a position, on this hearing to have a ruling as to the validity of the foreclosure or levy."

See *Wilson v. Griffin*, 22 Ga. App. 451, 452, 453, 96 S. E. 895, and cases cited.

[3] 3. The court did not err in striking the counter affidavit. It was never filed in the office of the sheriff nor did he ever see it until the day of the trial. It was filed in the office of the clerk of the superior court the day before the case was called and disposed of. In *Wilson v. Griffin*, *supra*, this court held as follows:

"The fact that the defendant offered to file a counter affidavit on the hearing did not save him. Civil Code, § 3366 (6), after reciting that any person, defendant, or creditor may file such an affidavit, provides that the 'affidavit shall form an issue to be returned [*italics ours*] to the court and tried as other cases.' It is

apparent that this language contemplates that the affidavit be filed with the levying officer as a condition precedent to his returning the case to court for trial."

See *Tipton v. Conrad*, 21 Ga. App. 593, 94 S. E. 815.

[4] 4. Judgment was properly entered against the defendant and his securities. In *Giddens v. Gaskins*, 7 Ga. App. 221, 66 S. E. 560, this court held:

"(1) The giving of the replevy bond did not convert the foreclosure proceedings into mesne process. It required the counter affidavit to do this; and until such counter affidavit was made and filed, there was no suit or case to return to the court, and no issue to be tried, the execution issued on the foreclosure of the lien being final process. *Moultrie Lumber Co. v. Jenkins*, 121 Ga. 721 (40 S. E. 678).

"(2) In the absence of the counter affidavit, the plaintiff was authorized, under section 2817 of the Civil Code, to enter up judgment on the replevy bond, against the defendant and his surety, in the same manner as in cases of appeal."

[5] 5. Not being fully convinced that this case was brought to this court for delay only, the request that 10 per cent. damages be awarded is denied.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

On Motion for Rehearing.

BLOODWORTH, J. In the first ground of the motion for rehearing it is alleged that—

"It appears from the decision rendered in this case that the court overlooked a material fact in the record as follows: The laborer's lien was sued out and execution issued for the sum of \$329.43, whereas judgment was entered up, on motion of the defendant in error, for the sum of \$399.43 against the plaintiff in error and security on the replevy bond, which judgment is excessive to the amount of \$70, and should have been ordered written off by the court."

The record before us shows that judgment was rendered for—

"the principal sum of \$329.43, the sum of \$23.59, interest to date, future interest at the rate of 7 per cent. per annum, and the further sum of \$—— cost."

Rehearing denied.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 422)

THOMASON v. DECATUR COUNTY BANK.
(No. 12783.)(Court of Appeals of Georgia, Division No. 2.
April 1, 1922.)*(Syllabus by the Court.)*

1. Chattel mortgages \S 49(2), 157(3)—Sufficiency of description is question of law, while identity of property is one of fact; description of live stock held sufficient.

"The question of the sufficiency of description of property in a mortgage is one of law, for the court; that of the identity of the property mortgaged is one of fact, to be decided by the jury." *First Nat. Bank v. Spicer*, 10 Ga. App. 508, 73 S. E. 753; *Reynolds v. Jones*, 7 Ga. App. 123, 125, 66 S. E. 395.

(a) A chattel mortgage, describing the property covered as "64 head of stock and fattening hogs, immune from cholera, marked split in right ear, some with registered tags and some without," is not void for want of a sufficient description. *Beaty v. Sears*, 132 Ga. 516(1), 64 S. E. 321; *Reynolds v. Tifton Guano Co.*, 20 Ga. App. 49, 50, 92 S. E. 389; *First Nat. Bank v. Spicer*, *supra* (1a).

2. Chattel mortgages \S 284—Entry of levy on execution held to show valid levy in connection with evidence of actual seizure.

The sheriff's entry of levy, reciting "I have this day levied the within mortgage foreclosure on the within described property," which was entered upon the mortgage execution, and which thus in effect described the property as that covered in the mortgage, coupled with his evidence of actual seizure or possession, was sufficient to show a valid levy.

3. Chattel mortgages \S 284—Evidence insufficient to show all property levied on was subject.

In the trial of the instant claim the plaintiff in *fi. fa.* specifically assumed the burden of proof. The burden was carried so far as it showed, without dispute, that the mortgagor had title to the mortgaged property at the time the mortgage was executed. *Morris v. Winkles*, 88 Ga. 717(1), 719, 15 S. E. 747; *Jones v. Hightower*, 117 Ga. 749(2), 751, 45 S. E. 60. As to the main issue, relative to whether or not the property levied on was that included and described in the mortgage, the plaintiff offered in evidence its mortgage, the execution, and the entry of levy thereon, which showed *prima facie* that the property levied upon was the same as that described in the mortgage. The plaintiff, however, by its own testimony, went further, and showed the actual incorrectness of the return. The levying officer testified for the plaintiff that "The levy specifies that the hogs were all marked with a split in the right ear, but some of the hogs levied on were not marked." The defendant in *fi. fa.*, also testifying for the plaintiff, swore that, while some of the original hogs included in the mortgage had died, "I wanted Mr. Jones [plaintiff in *fi. fa.*'s vice president and cashier] to have his money, and I picked out the best hogs I had, except three which belonged to my children, and I told Mr. Jones that I would include these hogs, hog for hog, of like kind and of the same breed." The

evidence for the claimant was to the same effect, but failed to show definitely which of the hogs were marked and which were not. The verdict finding all of the property subject to the *fi. fa.* was therefore without evidence to support it.

4. Other grounds of motion not passed on.

The remaining grounds of the motion, so far as not covered by the preceding rulings, relate to matters, not likely to recur in a subsequent trial, and need not be determined.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Proceedings on a claim by T. I. Thomason to property levied on under a *fi. fa.* in favor of the Decatur County Bank. Judgment for the plaintiff in *fi. fa.*, and the claimant brings error. Reversed.

Hartsfield & Conger, of Bainbridge, for plaintiff in error.

H. G. Bell, of Bainbridge, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 367)

WM. ALSBERG & CO., Inc., v. HARPER MFG. CO. (No. 13081.)(Court of Appeals of Georgia, Division No. 1.
March 9, 1922. Rehearing Denied
April 11, 1922.)*(Syllabus by the Court.)*

- Depositions \S 95—Trial \S 159—When part of deposition read by plaintiff, other parts properly admitted and treated as plaintiff's evidence; nonsuit proper, when plaintiff fails to prove material allegations of complaint.

This suit was brought, under section 4131 of the Civil Code of 1910, to recover the contract price of certain goods, and it was alleged that, under the provisions of this section, the goods were stored by the plaintiff for the defendant and held subject to the defendant's order. Upon the trial the plaintiff introduced in evidence certain parts of the depositions of a witness, and thereupon the court allowed the defendant, over the objections of the plaintiff, to read to the jury other parts of the depositions, and ruled that this testimony should be considered as evidence of the plaintiff. The court did not err in so ruling. *Reed v. Travelers' Ins. Co.*, 117 Ga. 116, 119 (2), 43 S. E. 433. The evidence introduced by the plaintiff failed to prove the material allegations of its petition. This being true, the court properly granted a nonsuit.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by Wm. Alsberg & Co., Inc., against the Harper Manufacturing Company. Judge-

ment for defendant, and plaintiff brings error. Affirmed.

Willingham, Wright & Covington, of Rome, for plaintiff in error.

Maddox, Lipscomb & Matthews, of Rome, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 423)

ROBINSON et al. v. BACON. (No. 12791.)

(Court of Appeals of Georgia, Division No. 2.
April 1, 1922.)

(Syllabus by the Court.)

Certiorari \S 70(8)—First grant of new trial on certiorari not disturbed when verdict not demanded.

Upon this writ of error, by which it is sought to review a judgment of the superior court sustaining a certiorari from a verdict and judgment in a justice's court, the judge certifies that he "sustained the certiorari generally, and not upon any particular ground." The evidence did not demand the verdict rendered in the justice's court, but would have amply authorized a verdict for the petitioner in certiorari. This being the only question involved, and the order sustaining the certiorari having the effect of a first grant of new trial, it will not be disturbed. *Walker v. Hughes*, 120 Ga. 1079, 48 S. E. 387; *Maner v. Clark-Stewart Co.*, 27 Ga. App. 553, 109 S. E. 178.

Error from Superior Court, Tattnall County; H. B. Strange, Judge.

Action brought in justice's court between W. I. Robinson and others and E. H. Bacon. Judgment for the former, certiorari sustained by the judge of the superior court, and they bring error. Affirmed.

J. T. Grice, of Glennville, and D. L. Standfield, of Reidsville, for plaintiffs in error.

G. L. Cowart, of Glennville, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 427)

LUCAS v. OGLESBY. (No. 12811.)

(Court of Appeals of Georgia, Division No. 2.
April 1, 1922.)

(Syllabus by the Court.)

Parent and child \S 14—Stepfather not entitled to value of minor's services without gift from mother.

A stepfather of minor children, who has not received from their mother a gift or transfer of

her parental rights, is not entitled to the value of their services or to prosecute a laborer's lien therefor; such right, in the absence of her transfer thereof, remaining solely in the mother. *Civ. Code* 1910, $\S\S$ 3022, 3032, 3037; *McElmurray v. Turner*, 86 Ga. 215, 219, 12 S. E. 359; *Brown v. Sockwell*, 26 Ga. 380, 386; *Cox v. Adams*, 5 Ga. App. 296, 63 S. E. 60; *City of Albany v. Lindsey*, 11 Ga. App. 573, 576, 75 S. E. 911.

(a) It appearing, from the instant foreclosure affidavit and the undisputed evidence, that the lien claimed by the stepfather included in part labor of his stepchildren, and that he failed to show any legal right thereto or what part of the total amount alleged to be due represented his own labor, the verdict for the full amount of the lien was unsupported by evidence, and it was error to overrule the defendant's certiorari.

Error from Superior Court, Tattnall County; H. B. Strange, Judge.

Suit by L. A. Oglesby against Jack Lucas. Judgment for plaintiff, certiorari overruled by the superior court, and defendant brings error. Reversed.

A. S. Way and S. B. McCall, both of Reidsville, for plaintiff in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 427)

MOORE v. COLEMAN. (No. 12814.)

(Court of Appeals of Georgia, Division No. 2.
April 1, 1922.)

(Syllabus by the Court.)

Justices of the peace \S 205(7), 206(1)—Assignments of error and recitals of fact in petition for certiorari not considered when not verified by answer; nothing for determination when answer does not show verdict or verify allegations of petition and is not excepted to. "Assignments of error and recitals of fact in a petition for certiorari not affirmatively verified in the answer cannot be considered." *Shirling v. Kennon*, 119 Ga. 501 (2), 46 S. E. 630. The answer of the justice of the peace to the petition for certiorari in this case showing merely that a trial had been had before a jury, and containing a brief of the evidence, but wholly failing to show the rendition of any verdict, or to verify the allegations of the petition, and no exception to the answer having been made by the petitioner, the petition presented no question for determination, and it was error for the judge of the superior court to overrule the motion to dismiss of the opposite party and to sustain the petition. *Manning v. Gainesville*, 125 Ga. 239, 53 S. E. 1002; *Southern Ry. Co. v. Chestnut Mountain Merchandise Co.*, 1 Ga. App. 781 (2, 3), 58 S. E. 247; *Humphries v. Nalley*, 14 Ga. App. 804 (2), 82 S. E. 357.

Error from Superior Court, Tattnall County; H. B. Strange, Judge.

Action between T. G. Moore and C. C. Coleman. Judgment for Moore, and petition for certiorari sustained by the superior court, and he brings error. Reversed.

A. S. Way and S. B. McCall, both of Reidsville, for plaintiff in error.

Kirkland & Kirkland, of Metter, for defendant in error.

JENKINS, P. J. Judgment reversed,

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 430)

AMERICAN RY. EXPRESS CO. v. WILLIS.
(No. 12929.)

(Court of Appeals of Georgia, Division No. 2.
April 1, 1922.)

(Syllabus by the Court.)

1. Trover and conversion \S 32(1)—Allegations sufficient to constitute cause of action stated.

"A petition, in an action of trover, which sets out a description of the property, and its value, title thereto in the plaintiff, possession in the defendant, and a refusal to deliver on demand, is good against general demurrer." Bank of Sparta v. Butts, 1 Ga. App. 771 (1), 57 S. E. 1061.

2. Bailment \S 21—Bailee may maintain action.

A bailee may maintain an action of trover. Mitchell v. Georgia, etc., Ry., 111 Ga. 760, 38 S. E. 971, 51 L. R. A. 622. See, also, in this connection, Harpes v. Harpes, 62 Ga. 395.

3. Carriers \S 76—Petition in trover against one to whom goods delivered by mistake held sufficient.

The petition as amended having described the property, and stated its value, and that the plaintiff was a common carrier, and that the goods described were regularly received into the possession of the plaintiff for transportation, and were delivered by mistake to the defendant, and that the defendant refused to deliver the goods on demand, the court erred in dismissing the petition on the ground that it was insufficient.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by the American Railway Express Company against E. J. Willis. Judgment for defendant, and plaintiff brings error. Reversed.

The original petition filed in this case was as follows:

"The petition of American Railway Express Company respectfully shows: (1) That E. J. Willis is a resident of said county. (2) That on the 27th day of February, 1920, the said E. J. Willis was doing business as Willis Drug

Company in the city of Bainbridge, said county. (3) Your petitioner delivered by mistake a package of cigars of the value of \$63.75 to said Willis Drug Company on the 27th day of February, 1920, which said package was marked and consigned to Mills Pharmacy. (4) Your petitioner shows that said Willis Drug Company fails and refuses to return said shipment to your petitioner for delivery to its true owner, all to the injury of your petitioner in the sum of \$63.75."

An amendment was offered and allowed as follows:

"(1) That it (the plaintiff) is a common carrier. (2) That on the 26th day of February, 1920, the package of cigars was regularly received into its possession for transportation to Mills Pharmacy. (3) That said package of cigars was of the value of \$63.75. (4) That said package of cigars was demanded of E. J. Willis on the 6th day of September, 1920. (5) That the right of possession of said property is in petitioner."

The allowance of the amendment was objected to by defendant, but no exceptions pendente were preserved, nor was there any cross-bill of exceptions filed in the case.

Robt. O. Alston, of Atlanta, and W. V. Custer, of Bainbridge, for plaintiff in error.

Hartsfield & Conger, of Bainbridge, for defendant in error.

HILL, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 431)

McKELLAR v. MOYNIHAN et al.
(No. 13201.)

(Court of Appeals of Georgia, Division No. 2.
April 1, 1922.)

(Syllabus by the Court.)

Process \S 168—"Abuse of process" defined; obtaining possession of leased premises from tenant by statutory procedure not abuse of process.

An abuse of legal process is where the party employs it for some unlawful object, not for the purpose which it is intended by law to effect; in other words, it is a perversion of the legal process to an unlawful purpose not contemplated by the action. Clement v. Orr, 4 Ga. App. 117, 60 S. E. 1017. It follows that, where a tenant is evicted by his landlord from rented premises after his tenancy expires, or for a failure to pay his rent when due, it cannot be an abuse of legal process for the landlord to obtain possession of his premises by the legal procedure provided by statute; for to obtain possession of the premises by ejecting the tenant was the very object of suing out the warrant. If the facts warrant the procedure, such proceeding might amount to a malicious use of legal process or malicious prosecution, but it

cannot be an abuse of legal process, as the fundamental condition of this procedure must be the perversion of the procedure to some unlawful purpose not intended by the action. The suit for damages because of the malicious abuse of legal process was properly dismissed on demurrer. *Porter v. Johnson*, 96 Ga. 145, 23 S. E. 123.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abuse of Process.]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by J. P. McKellar against P. Moynihan and others. Judgment dismissing the action on demurrer, and plaintiff brings error. Affirmed.

B. B. McCowen, of Augusta, for plaintiff in error.

D. G. Fogarty, of Augusta, for defendants in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 303)

McCLAIN v. DACUS. (No. 12866.)

(Court of Appeals of Georgia, Division No. 1. March 7, 1922.)

(Syllabus by the Court.)

Vendor and purchaser \S 265(1)—Plea in action on note for price of land held properly stricken.

The court did not err in striking the plea filed by the defendant, nor in thereafter directing a verdict for the plaintiff for the full amount sued for.

Error from Superior Court, Gordon County; M. C. Tarver, Judge.

Action by W. M. Dacus against D. C. McClain on a note given for the price of land. Judgment for plaintiff, and defendant brings error. Affirmed.

Defendant's plea denied that he was indebted to plaintiff, and alleged in paragraph 4 that, when the bond for title to the land was transferred to defendant, it was agreed that plaintiff would execute good and sufficient titles to enable defendant to secure a loan from the Federal Land Bank, and that plaintiff would accept whatever might be borrowed on the land as a credit on the note, and carry the balance on two notes; in paragraph 5 that defendant made application to the Federal Land Bank for a loan, but plaintiff never delivered to defendant a deed as

agreed to enable defendant to secure the loan, and defendant was unable because of conditions beyond his control to secure the loan; in paragraph 6 that it was understood and agreed that if the loan was not secured, plaintiff was to take the land back and the contract was to be canceled and defendant's notes returned, and that defendant had offered, and still offered, to surrender the land and cancel the trade; and in paragraph 7 that the bond for title was thereby attached as an exhibit, and that under its terms, plaintiff having failed to execute the deed and defendant being unable to secure the loan, the contract was of no effect and at an end. The bond for title was attached as an exhibit, together with an agreement, indorsed thereon and signed by plaintiff and defendant, whereby plaintiff assigned the bond to defendant and defendant agreed to execute a note, and it was agreed that plaintiff would execute a good and sufficient title to enable defendant to procure a loan from the Federal Land Bank, and would accept the loan giving credit therefor on the note and carry the balance in two equal notes. Plaintiff demurred to the plea as not setting up any good and valid defense; to the fifth paragraph on the ground that it was nowhere alleged that defendant ever requested plaintiff to execute a deed, or that defendant's failure to do so hindered defendant from procuring the loan, or that if plaintiff had executed the deed, it would have enabled defendant to procure the loan, and that the statement that defendant was unable because of conditions beyond his control to secure the loan was a mere conclusion, not based on any facts authorizing it, and because it was not shown that plaintiff contributed to such conditions, and because it set up no sufficient cause for defendant's failure to pay the note; and to the sixth paragraph because it appeared that such understanding, contract, or agreement was not reduced to writing or signed by plaintiff or any person authorized by him within the statute of frauds, as codified in Civ. Code 1910, § 3222, et seq., and that it appeared from the answer that the contract between the parties was reduced to writing and signed by the parties, and such allegations sought to add to and vary the terms of the written agreement.—Statement by editor.

Maddox, McCamy & Shumate, of Dalton, for plaintiff in error.

J. G. B. Erwin, Jr., of Calhoun, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 351)

PAYNE, Agent, v. WILSON. (No. 13062.)(Court of Appeals of Georgia, Division No. 1.
March 8, 1922.)*(Syllabus by the Court.)***Courts** \Leftarrow 190(8)—Petition for certiorari in passenger's action for loss of suit case held properly overruled.

Upon the petition for certiorari, and the answer thereto, it was not error for the court to overrule and deny the writ of certiorari.

Error from Superior Court, Effingham County; W. W. Sheppard, Judge.

Action brought in the city court of Springfield by Eunice Wilson, by her next friend, against J. B. Payne, Agent, etc. Judgment for plaintiff, and certiorari overruled by the superior court, and defendant brings error. Affirmed.

The petition for certiorari, the truth of which was admitted by the judge's answer, showed that the action was brought for the loss of a suit case while plaintiff was a passenger on defendant's train. At the close of plaintiff's evidence defendant's counsel moved for a nonsuit on the ground that plaintiff had failed to prove a conversation, and failed to show negligence on the part of defendant causing the loss of the suit case and its contents, which motion the court overruled. The jury found a verdict for plaintiff for \$307.20. The petition for certiorari alleged error in the denial of defendant's motion for a nonsuit, and alleged that the verdict was contrary to evidence, and without evidence to support it, decidedly and strongly against the weight of evidence, and contrary to law and the principles of justice and equity. The evidence as set out in the petition for certiorari showed that plaintiff placed her suit case in the aisle or at the end of the seat, and that the conductor moved it, and that subsequently it could not be found. Plaintiff testified that the suit case did not block the aisle, and that the conductor took it and said he would take charge of it, and was gone with it before she could object; that she inquired of the conductor about the suit case, and looked for it after he told her that it was where he put it, but that it was not there, and that she kept inquiring about it, but could not locate it, and apparently that the conductor kept insisting that it was where he put it. Another passenger testified that plaintiff put the suit case in the aisle and that the conductor picked it up and placed it in the front of the car; that plaintiff subsequently missed it, and notified the conductor that it was gone, and subsequently called his attention again, but could get no satisfaction other than that the suit case was in the front where he said he had put it, and that they thereafter watched for the suit case, but it could not be found.

There was also evidence as to the contents of the suit case, and their value. The conductor testified that plaintiff was sitting on the seat next to the partition cutting the water cooler from the coach, and that it was necessary to move a suit case from the seat in order for her to have a place to sit, and that, when he removed her suit case and placed it next to the water cooler it was not over a foot from her seat, and that plaintiff made no complaint at the time he removed it, but did make complaint subsequently.—Statement by editor.

Clarence T. Guyton, of Guyton, for plaintiff in error.

Don H. Clark, of Savannah, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 290)

LOWE et al. v. WOODSON. (No. 12727.)(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)*(Syllabus by the Court.)***Contracts** \Leftarrow 10(4)—Contract signed by seller, and bearing buyer's acceptance, held not unenforceable as unilateral, and wanting in mutuality.

The question raised in this case is settled in principle by the decision in the case of Southern Wood Preserving Co. v. Strain (Ga. App.) 108 S. E. p. 251. It was error to sustain the general demurrer to the petition.

Error from Superior Court, Upson County; W. E. H. Searcy, Jr., Judge.

Action by E. E. Lowe and another, partners doing business as the Pynetree Manufacturing Company of Atlanta, against J. J. Woodson. Judgment for defendant on demurrer, and plaintiffs bring error. Reversed.

The petition alleged in paragraph 2 that defendant was indebted to plaintiffs in the sum of \$2,387.98; that on May 14, 1917, plaintiffs made a contract with defendant therein set out whereby defendant agreed to sell plaintiffs certain lumber, the contract as set out being signed by defendant, and followed by the word "accepted" and plaintiffs' signature in their trade-name; in paragraph 3 that defendant delivered only one car, and was paid therefor; in paragraph 4 that, after delivering such car, defendant failed and refused to make any other or further deliveries, and thereby breached his contract and injured and damaged plaintiffs in the sum of \$2,387.98, being the difference in the contract price and the market price

for the amount of lumber which he failed to deliver; and in paragraph 5 that the market price of the lumber was \$20 a thousand feet, and that defendant was due plaintiff the difference between the contract price of \$10 a thousand feet and the market price of \$21 a thousand feet. Defendant demurred generally on the grounds: (1) That the petition stated no cause of action; (2) that the contract was unilateral and unenforceable; (3) that it was so wanting in mutuality as to be unenforceable against defendant, because there was no obligation on plaintiffs' part to purchase the lumber if offered to them; (4) that the contract was only an option to sell, and, in the absence of any allegation that plaintiffs elected to exercise it, and purchase the timber before it expired, they could not recover for defendant's failure to sell the lumber; (5) and that the contract as written was so indefinite and uncertain as to be unenforceable. He demurred specially to paragraph 3 because it did not allege when the car of lumber was delivered, and whether before or after the time in which all of the lumber was to be delivered according to the contract; to paragraph 4 because there was no allegation that the damages sustained were the difference between the market price at the time and place of delivery and the contract price at such time and place; and to paragraph 5 because there was no allegation that the difference in price sued for was the difference between the market price and contract price at the time and place of delivery. Plaintiffs amended paragraphs 4 and 5 of the petition by inserting the words "at the time and place of delivery."—Statement by editor.

Redding & Lester, of Barnesville, for plaintiffs in error.

Jas. R. Davis, of Thomaston, for defendant in error.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 351)

O'QUINN v. EDMONDSON. (No. 13061.)

(Court of Appeals of Georgia, Division No. 1.
March 8, 1922. Rehearing Denied April
11, 1922.)

(Syllabus by the Court.)

1. Trial \S 295(1)—Instructions to be considered in light of facts and entire charge.

The excerpts from the charge of the court, complained of in the motion for a new trial, do not, when considered in the light of the entire charge and the facts of the case, require a reversal of the judgment.

2. Error cured by writing off portion of verdict.

The error in the verdict (in favor of the plaintiff), pointed out in ground 5 of the motion for a new trial, was cured by the plaintiff in writing off from the verdict a certain portion of the amount found as attorney's fees, and inserting in the judgment that the judgment was to bear no interest whatever in the future.

3. Appeal and error \S 1033(9)—Defendant cannot complain that verdict for plaintiff less than it should have been.

The facts of the instant case distinguish it from the case of *Milner v. Tyler*, 9 Ga. App. 659, 71 S. E. 1123. Furthermore, while under the facts of this case the verdict in favor of the plaintiff was equivalent to a finding that no fraud had been practiced by the plaintiff, and while the jury should have returned a verdict for the plaintiff for the full amount sued for, the defendant will not be heard to complain that the plaintiff's recovery was less than it should have been, as such an error is harmful to the plaintiff only. *Groover v. Hardeman*, 21 Ga. App. 661, 94 S. E. 812, and citation.

4. Appeal and error \S 1005(2)—Approved verdict authorized by evidence not disturbed.

The verdict was authorized by the evidence, and, having been approved by the trial court and no material error of law appearing, this court is without authority to interfere.

Error from City Court of Valdosta; J. G. Crawford, Judge.

Action by J. J. Edmondson against E. D. O'Quinn. Judgment for plaintiff, and defendant brings error. Affirmed.

E. N. Wilcox, and J. J. Murray, both of Valdosta, for plaintiff in error.

A. T. Woodward and Dan R. Bruce, both of Valdosta, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 348)

MARTIN v. STATE. (No. 13203.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

Larceny \S 61—Circumstantial evidence held insufficient to support a conviction of larceny from the house.

The defendant was convicted of the offense of larceny from the house. He was convicted solely upon circumstantial testimony. The evidence, while raising a suspicion of his guilt, does not exclude every other reasonable hypothesis than that of guilt. For the reason that the verdict was not authorized by the evidence, it was error to overrule the motion for a new trial.

Error from City Court of Blackshear; R. G. Mitchell, Jr., Judge.

Norman Martin was convicted of larceny from the house, and he brings error. Reversed.

The prosecuting witness, W. A. Cleland, testified that he found that certain parts of his automobile had been stolen, and found two tracks, one being a barefooted, flat track like defendant's and one with shoes, leaving the place where the car was; that the day following the theft he followed the tracks to a point near the home of defendant's brother, where defendant lived; that he and one with him called out defendant and another brother, and took them back to the field where the tracks were, and had defendant put his foot in the track, and that defendant "tried to press it this way (indicating), and did not put it in straight down in the track," and it looked exactly like his track, and his foot fitted the track; that they found the wind shield and fender near defendant's brother's house close to the road where they tracked them, and the casings in a bunch of bushes back of the brother's barn, but not on his land, the barn being across the street from the house; that they did not find any of the property at the brother's home, or in his field, or on his premises, but found some of it about 40 or 50 yards from the barn, and some about 100 yards from the dwelling house; that they were in the house, and looked around, but did not find anything except some wet shoes and clothes; that the tracks came right up to the front gate of the house; that it had rained a good deal on the day before the theft, and was rainy weather; that defendant, his brother, and his brother's family, and another brother all lived in the house. Another witness testified that he was present when defendant put his foot in the track, and that it seemed to fit exactly. He further testified that defendant did not try to disfigure the track or distort his foot, but placed it straight down in the track in a careful manner. Defendant in his statement said that he knew nothing about who got the prosecutor's things; that he did not get them, but was at home at his brother's house on the night the prosecutor said they were missed; that on the day before he was hauling wood, and got very wet; that as he was crossing a branch the car of a man behind him stopped, apparently in the water, and that he walked back in and helped him through, and that this was how his clothes came to be wet; that the track where the prosecutor made him put his foot was in soft ground, and was sobbed, and the dirt had sunken in around it and the track was about the size of his track at the time, but from the way the damp ground and water had affected it it must have been much larger; and that it was not his track because he was not there, and did not make it, and had nothing to do with taking the goods. The prosecuting witness was recalled and on

cross-examination testified that the articles were found a few days after the following of the tracks, and that defendant was then in jail. The chief of police testified that he was at the home of defendant's brother the day after the goods were missed to see if he could find any of the goods, but they were not found for several days; that he saw a pair of overalls that were wet; that he could not say what wet them, and it might have been from wading in bushes or a branch. There was also evidence that the prosecutor had a gun at the time defendant was asked to put his foot in the track, and evidence claimed to show that defendant was acting under duress, but the court admitted the evidence as to the comparison of his foot with the track.—Statement by editor.

I. J. Bussell and H. L. Causey, both of Alma, for plaintiff in error.

S. Thomas Memory, Sol., of Blackshear, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(23 Ga. App. 497)

LIGGETT & MYERS TOBACCO CO. v. DA-VIS. (No. 12803.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1922. Rehearing Denied
April 18, 1922.)

(Syllabus by the Court.)

1. Master and servant \S 217(3) -- Injury to servant knowing defect not actionable.

No liability attaches to a master for personal injuries to a servant, caused by defects in a machine furnished by the master to the servant, where it appears that the servant knew or possessed equal means with the master of knowing of the defect, and could by the exercise of ordinary care have discovered it. Civil Code 1910, § 3131.

2. Master and servant \S 217(19)—Risk of injury by back-firing of automobile assumed.

This was a suit for damages for personal injuries received by an employee, caused by the "back-firing" of a Ford automobile, which had been furnished to the employee by the employer, to be used by the employee in his work as salesman for the employee, resulting in the crank handle striking the employee's arm and breaking it. The automobile had been turned over to the employee in good condition, with instructions that, if it needed repairs at any time, he was to take it to a shop and have it repaired. He had driven the automobile for several weeks, and had it repaired several times. The automobile had "back-fired" and "kicked" the employee several times while it was in his possession prior to the time when he was injured. Just prior to the time when he was injured, the employee had a short vacation, and during that

time the automobile had been placed by the employee in a shop for repairs. After it had been so repaired it was used for a day or so by another employee of the defendant, and by this employee returned to the shop in which it had been placed by the plaintiff. When the plaintiff got the automobile out of the shop, after his vacation, and had gone a short distance up the street, the automobile stopped, and when he endeavored to crank it the engine "back-fired" and injured him. It appearing from the evidence that the plaintiff knew or had equal means of knowing of the defect in the automobile, if any existed, and by the exercise of ordinary care could have known thereof, or that in attempting to "crank up" the engine he assumed an ordinary risk of his employment, and failed to exercise his own skill and diligence to protect himself, the court erred in not granting the defendant's motion for a new trial. *Thompson v. Ga. Ry. & Power Co.* (Ga. App., No. 1285) 110 S. E. 762; *Wing v. Savannah Guano Co.*, 17 Ga. App. 534 (1), 87 S. E. 827.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by D. B. Davis against the Liggett & Myers Tobacco Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. H. Davis, of Atlanta, for plaintiff in error.

Smith, Hammond & Smith, of Atlanta, for defendant in error.

HILL, J. Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 344)

FLETCHER v. STATE. (No. 13144.)

(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)

(Syllabus by the Court.)

Drunkards — Indictment for being at another's residence in an intoxicated condition not demurrable as vague and indefinite; evidence held sufficient to support conviction.

The defendant was convicted of having been and appearing within the curtilage of the private residence of another in a drunken and intoxicated condition, caused by the excessive use of intoxicating liquors, etc. The indictment in this case was not subject to the special demurrers urged against it. The evidence authorized the conviction, the verdict has the approval of the trial judge, and it was not error for any reason assigned to overrule the motion for a new trial.

Error from Superior Court, Long County; W. W. Sheppard, Judge.

M. M. Fletcher was convicted of an offense, and he brings error. Affirmed.

The indictment charged defendant with the offense of misdemeanor, for that he on a date named, unlawfully, etc., was and appeared in a drunken and intoxicated condition within the curtilage of the private residence occupied by Mrs. Agnes Hodges, and others named, said private residence not being in defendant's exclusive possession, and which drunken and intoxicated condition was caused by the excessive use of intoxicating wines, beers, liquors, and opiates, and made manifest by boisterousness, by indecent condition and acting, by vulgar, profane, and unbecoming language, and by violent discourse, contrary to the laws of the state, etc. Defendant demurred on the grounds that the indictment was too vague, indefinite, and uncertain to put him upon notice of the specific charge, and that it was defective in that it failed to allege the language alleged to have been used and alleged to have been vulgar, profane, and unbecoming, and failed to set forth what acts or conduct constituted the boisterousness alleged, or what acts or conduct constituted the indecent condition or acting alleged, and said indictment fails to allege what acts or conduct constituted the violent discourses alleged.

Mrs. Agnes Hodges, sworn for the state, testified:

"I live in the sixteenth G. M. district of Long county, Ga., and was living there on the 10th day of June, 1921. My husband was dead at that time, and me and my children named in the indictment occupied the house since my husband's death. On 10th day of June, 1921, M. M. Fletcher came to my home where I was living, came there in his car. Then I came to the front door. He was in my porch, and I realized when I walked out that he was drunk. He was leaning against a post in the front porch. He said he came to see about some lumber.

"He came into the house and stood up by the mantel piece, at one end of the mantel piece, and I was at the other end. He kept talking and wouldn't go, and finally commenced talking about my getting married again. He said I ought to get married again, and I told him I didn't want to get married again. He kept on about my getting married again, and he finally said, 'It's much better to be married.' He said, 'You know the difference in being married and being single.' I smelled liquor on his breath, I finally went into the kitchen to get away from him, and he followed me on in the kitchen and set down in the window and begun talking about fish bait, and my little girl said there was some out in a box in the yard, and he tried to get my little girl out of the kitchen by telling her to go out there and look see if there was any fish bait.

"He kept asking me if I was going to Ludowici, and I told him no. I finally went to the woodpile, and he followed me on out there and said to me in a very low tone of voice, 'How about me coming back over here to-night?' M. M. Fletcher is a married man. I ordered him

to leave, and he left. He came back to my house in about 30 minutes. I know he was drunk because he was driving his car back and to across the road recklessly. I do not know what he was drinking."

Defendant's statement was as follows:

"Gentlemen of the jury, I am not guilty of this charge. I went to Mrs. Hodges on the time testified about by her, but I positively was not drunk. I am not guilty."

—Statement by editor.

M. Price, of Ludowici, for plaintiff in error.

J. Saxton Daniel, Sol. Gen., of Claxton, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 424)

W. C. DUNHAM LUMBER CO. v. TUMLIN LUMBER CO. (No. 12800.)

(Court of Appeals of Georgia, Division No. 2. April 1, 1922.)

(Syllabus by the Court.)

Pleading ⚡234—Filing of paper without permission or allowance not an amendment.

This case is controlled by the ruling of the Supreme Court in *Clark v. Ganson*, 144 Ga. 544, 87 S. E. 870, wherein it was held that "the mere filing in the office of the clerk of the superior court of a paper called an amendment, but without any allowance by the judge or order permitting it to be filed, does not amount to amending the petition." No amendment to the petition having been "made," within the time allowed by the previous order of the judge, the judgment of the court below in dismissing the petition and in overruling the motion to reinstate must stand.

Error from Superior Court, Haralson County; F. A. Irwin, Judge.

Action by the W. C. Dunham Lumber Company against the Tumlin Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Milner & Farkas, of Albany, for plaintiff in error.

M. J. Head, of Tallapoosa, for defendant in error.

JENKINS, P. J. Affirmed.

STEPHENS and HILL, JJ., concur.

(90 W. Va. 646)

ROUSS v. ROUSS et al. (No. 4363.)

(Supreme Court of Appeals of West Virginia. March 28, 1922.)

(Syllabus by the Court.)

1. Deeds ⚡19—Deed cannot be set aside for mere failure to perform.

A deed, executed and delivered to the grantee therein, in consideration of a promise to perform an act beneficial to the grantor, cannot be set aside on the mere ground of failure of performance of the promise, in the absence of peculiar circumstances making the performance, rather than the promise itself, the real consideration, as in the case of a conveyance upon condition that the grantee shall support the grantor.

2. Wills ⚡796—Devise of remainder after conditional life estate cannot, after acceptance of devise, revoke acceptance and cancel his quitclaim deed to life tenant for misapprehension, failure of consideration, or fraud.

If a devisee in a devise of a remainder in fee in land, whether vested or contingent, after a conditional life estate therein, subject to a charge of legacies in favor of other persons, executes and delivers to the life tenant a quitclaim deed, by which the condition in the life estate is eliminated as to him, in consideration of a promise by the life tenant to obtain an agreement by the legatees, postponing payment of the legacies until termination of the life estate, which fails of performance, and then accepts the devise, he cannot revoke or withdraw his acceptance and cancel the deed, on the ground of acceptance under a misapprehension of his right, failure of consideration, or fraud in the transaction.

3. Remainders ⚡14—Contingent remainder may be alienated by deed or will.

By virtue of section 5 of chapter 71 (sec. 3743) of the Code, a contingent remainder in land is susceptible of alienation by deed or will.

4. Wills ⚡792(5)—Devise of remainder subject to legacies is presumed beneficial, and vests legatee with right superior to option or offer of conveyance in consideration of payment of legacies.

A devise of such a remainder made onerous by reason of a charge of legacies thereon, in consequence of which the devisee might deem it advisable not to accept it, is nevertheless presumed to be beneficial to him, and it vests a right in him superior to a mere option or offer of conveyance to him in consideration of his payment of the legacies.

5. Deeds ⚡80—Escrows ⚡3—Delivery by a grantor to grantee is absolute and cannot be so delivered in escrow.

Delivery of a deed to the grantee by the grantor is absolute. A deed cannot be so delivered in escrow.

Appeal from Circuit Court, Jefferson County.

Suit by Peter W. Rouss against Bettie A. Rouss and others, and from a decree sustain-

ing a demurrer to the bill and dismissing it, the plaintiff appeals. Affirmed.

James M. Mason, Jr., of Charlestown, for appellant.

Brown & Brown, of Charlestown, for appellees.

POFFENBARGER, P. The decree, under review on this appeal, sustained the demurrer to the bill filed by the appellant and dismissed it.

Cancellation of a deed executed for a peculiar purpose and under anomalous circumstances is the object of the bill. The opinion filed in *Page v. Rouss*, 86 W. Va. 305, 103 S. E. 289, 13 A. L. R. 933, reveals the situation of the parties, the nature of the subject of the deed, and facts that may indicate the motives impelling or inducing the parties to enter into the transaction in respect of which relief is sought.

The exact terms and provisions of the deed in question are not disclosed. It was not made an exhibit of the bill which purports to set forth only its legal effect, by allegation. It is described in the bill as being "a quitclaim deed for a life estate" in favor of Bettie A. Rouss, widow of Wm. W. Rouss, in the homestead farm of the deceased husband, known as Shannon Hill, executed and placed in her hands by Peter W. Rouss, the appellant. By the will of her husband the widow was given a conditional life estate in the property, and the appellant a contingent remainder. In fee therein, upon condition of his payment of six \$2,000 sums to other nephews and a niece of the testator, or to such of them as should be living at the termination of the widow's estate. Her life estate was conditioned upon her remaining unmarried. Evidently, desiring abrogation of this attempted restraint upon her liberty, she obtained the deed in question. The bill alleges that she personally applied for it in New York, the place of residence of the appellant, and obtained it by persuasion and upon her promise not to make any use of it, until she should have obtained a writing signed by the six legatees, binding them to a postponement of payment of the demonstrative legacies provided for them, by the will, until her death. Execution of the deed was not withheld, however, for procurement of such an agreement. It was prepared by her attorney, executed by the appellant, and placed in her hands, upon condition that she should make no use of it, in advance of procurement of the agreement. The agreement was prepared and executed by the nephew she later married, and an attempt was made to get others of them to execute it. Failing in her effort to obtain their signatures, she abandoned the attempt. She applied for the deed January 18, 1915, and obtained it February 6, 1915. Four days after she made the appli-

cation, she executed a renunciation of the will, but did not then record it. She put the deed on record March 16, 1915, recorded the renunciation March 18, 1915, and married Milton O. Rouss, one of the demonstrative legatees, August 18, 1916. The result is that she has her former husband's personal estate, a second husband, and a full and unconditional life estate in the whole of Shannon Hill, while the appellant has five of the \$2,000 legacies due on his hands now and must await her death to get possession of Shannon Hill, unless he can succeed in this attempt to nullify and cancel the deed.

Careful and mature inspection and analysis of the bill have failed to disclose allegations of fact sufficient, if proved, to establish any fraud in the transaction. Ignorance of the renunciation of the will, on the part of the appellant, at the date of execution of the deed, did not operate in any way to his prejudice. He knew the widow had absolute right to renounce it at any time within a year from the date of the probate thereof, and, in the execution of the deed, he did not bind her by a collateral agreement, or otherwise, not to renounce it. The time of renunciation, with respect to execution of the deed, is not in any sense material. Subsequent renunciation would have had exactly the same effect as prior renunciation. The application for the deed cannot be deemed to have been a representation or promise either not to renounce or not to marry. The bill makes no such claim. Nor is there any allegation of a promise to obtain the agreement respecting the time of payment of the legacies, with intent at the time thereof, not to perform, or of any false representation that such an agreement had been arranged for in advance, or was possible of procurement.

[1] If the transaction the bill seeks to abrogate, involved no more than a conveyance of real estate, in consideration of a promise on the part of the grantee to do something beneficial for the grantor, and failure, after the conveyance, to perform the promise there could be no relief on the ground of failure of consideration, in the absence of peculiar circumstances. Except in the instance of a conveyance in consideration of support of the grantor by the grantee, no authority has been found for rescission or forfeiture for nonperformance of the promise constituting the consideration of a conveyance, whether it be one to pay money or to do some other act, in the absence of a forfeiture clause in the deed. On the contrary, there is much authority against right to such relief. *McGraw Oil Co. v. Kennedy*, 65 W. Va. 595, 64 S. E. 1027, 28 L. R. A. (N. S.) 959; *Core v. Petroleum Co.*, 52 W. Va. 276, 43 S. E. 128; *Thompson v. Jackson*, 3 Rand. (24 Va.) 504, 15 Am. Dec. 721; *Kellar v. Craig*, 126 Fed. 630, 61 C. C. A. 366; *Lawrence v. Gayetty*, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; *Rhein-*

gans v Smith, 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1913B, 1140.

[2] However, as this transaction may have included an election to accept the devise and therefore may have been more than an ordinary conveyance of real estate, in consideration of a promise, it may not fall within the rule to which reference has just been made. The election, if made by execution of the deed, subjected the grantor to a heavy collateral obligation without any reciprocal or corresponding benefit. The widow could marry and thus mature the legacies, without surrendering to the appellant the possession of the property. This result she promised to provide against by procurement of the postponement agreement. Upon that promise the election was made, if made at all at that time. Failure of performance of that promise might be good ground of revocation of the election made in advance of expiration of the period allowed by the will, in which to elect. The appellant was not bound to elect until after the marriage or death of the widow, whichever should first happen. If, under these circumstances, he could have revoked his election or withdrawn from it, on failure of the inducement to the premature making thereof, it may be that the deed could have been canceled, it being only a part of an entire transaction, a substantial part of which had failed or was voidable. But this avenue of escape, if any, was effectually closed by an unequivocal, deliberate, written election made about a year after the execution of the deed, recordation thereof and of the renunciation of the will and failure of the promise. The bill specifically admits this, saying:

"Plaintiff did not decide to accept the devise until February 10, 1916, when he so wrote the said widow."

This election made after failure of the inducement, or ratification of the previous election, if any, cannot be deemed to have been made in ignorance of any material fact or right, or upon any failing inducement, wherefore it is impossible to perceive any ground upon which it can now be revoked. Moreover, the bill does not seek revocation thereof. Its theory is that there was no election until February 10, 1916, and that, because there had been none at the date of the deed, and the contingent remainder had not become vested, the deed neither passed nor relinquished any estate or right, and, being voluntary, there is no element of estoppel, and it can be canceled.

[3,4] But for section 5 of chapter 71 (sec. 3743) of the Code, changing the doctrine of the common law, as to the subject of conveyance, this theory might be tenable. At common law, a contingent remainder, assuming the right of the appellant to be one, was

not a subject of alienation. The statute provides that any interest in or claim to real estate may be disposed of by will or deed, and it is admitted that a contingent remainder is an interest in or claim to real estate within the meaning of the statutory terms. An attempt is made, however, to avoid the effect of the conveyance under the statute, by the contention that the devise to the appellant was the legal equivalent of an option in him to purchase the property, at the marriage or death of the widow, at the price of \$12,000. Of course, he was not bound to accept the devise, but the law presumes an advantage in it to him and also his acceptance, in the absence of a disclaimer or conduct signifying intent to do so. *Jarman*, Wills, 556; *Shepp. Touch*, 284, 285; *Stacey v. Elph*, 1 Myl. & K. 195; *In re Birchall*, 40 Ch. D. 436. The will itself vests an interest in or claim to the land, although it is conditional, and the statute makes it a subject of alienation by deed. It is in no legal sense a mere option to buy the property. The will carves out of the entire estate, a life estate, leaving a remainder in fee, and disposes of both, giving an estate in possession to the life tenant and the remainder in fee, conditionally, to the remainderman. The estate in remainder, whether vested or contingent, is created by the will. And it may be vested. See 2 Min. Inst. (2d Ed.) 337. If not, it is a right in land. Id. 362. If a contingent remainder, the devisee has an estate in expectancy. Though contingent, that right in him did not await the happening of the contingency which will vest the remainder and give him right of possession. It sprang into existence by virtue of the will, on the death of the testator. Alienation of such a right by deed was not allowed by the common law, but that infirmity did not rest on lack of interest or right. The inhibition was based upon other reasons. By the deed in question, it has been conveyed, and, if the right of disclaimer in the devisee was not waived at the date of execution of that instrument, it was later, and before this suit was instituted, as has been demonstrated.

[5] Nor was there any lack of delivery of the deed, forbidding its recall. The allegation of an agreement, not to make use of it until the contemplated stipulation for postponement of the legacies should have been obtained, amounts to nothing. Delivery of a deed by the grantor to the grantee is absolute. Legally, a deed cannot be so delivered in escrow. *Heck v. Morgan*, 88 W. Va. 102, 106 S. E. 413; *Dorr v. Middelburg*, 65 W. Va. 778, 65 S. E. 97, 23 L. R. A. (N. S.) 967.

Upon these principles and conclusions, the decree complained of will have to be affirmed.

(90 W. Va. 687)

ALDERSON v. HORSE CREEK COAL LAND CO. et al. (No. 4337.)(Supreme Court of Appeals of West Virginia.
March 28, 1922.)*(Syllabus by the Court.)*

1. Partition \S 94(3)—Affidavits are admissible in support of objection to confirmation of report in partition.

Affidavits are admissible in support of an objection to confirmation of a report of a partition of real estate, in kind, based upon exceptions to the report, since the partition, making up, and filing of the report and confirmation are proceedings by way of execution of the decree adjudicating the merits of the cause; and the evidence relied upon to sustain the objection need not be in the form of depositions.

2. Partition \S 30—An interlock between a tract in suit held by tenancy in common and another tract purchased by one of the tenants may be included in the partition suit.

An interlock between a tract of land constituting the subject-matter of a suit for partition, as to which tenancy in common between the parties thereto is admitted and asserted, and another tract purchased by one of them, while such relation subsisted, may properly be included in the partition, with the consent of the other party, express or implied, coupled with willingness on his part to pay his proportionate share of the purchase money of the land included in the interlock, as indicated by his conduct in the suit.

3. Partition \S 9.3)—Commissioners are not bound to report the facts showing the equity and fairness of the partition, which matter is presumed in the absence of contrary showing.

A partition of land, shown by a report made by commissioners appointed for the purpose is presumed, in the absence of anything in the record or on the face of the report disclosing the contrary, to be equitable, just, and fair in all respects, and the burden rests upon a party thereto objecting to confirmation of the report, to establish the contrary by a clear and decided preponderance of evidence in the form of affidavits, oral evidence taken at the bar of the court, and reduced to writing, or in such other form as the court may direct. The commissioners are not bound to report the facts showing the fairness and equity of the partition.

4. Partition \S 94(3)—Affidavits held insufficient to sustain objection to report of partition on the ground of unfairness of division of coal lands.

Affidavits filed in support of an objection to the confirmation of a report of partition of lands containing coal, on the ground of relative inequality of value and division of the coal in the land of the exceptor by a ravine or small stream, so as to render the mining thereof less convenient than it otherwise would be, showing nothing more than an allotment to the exceptor of a relatively large portion of the front land, somewhat cut up by ravines, and in which the coal crops out, and a small branch running through it, are insufficient to overcome the presumption of fairness in the partition.

5. Partition \S 94(3)—The court will sustain, in its decree of partition, rights of way for mining and timbering over lots as a necessity in the absence of contrary proof.

In a partition in which rights of way for mining and timbering over the lots assigned and allotted are created in favor of both parties to the division, there is a presumption of necessity therefor, which the court will sustain in its decree, in the absence of proof of the contrary.

6. Tenancy in common \S 20(2)—In an accounting on partition, it is proper to exclude a claim for purchase money for tax title in excess of amount purchaser paid at the tax sale and statutory allowances.

In an accounting between tenants in common, on partition of the land, for taxes and the costs of redemption of the land of one of them from an invalid tax sale, directly and indirectly paid by the other, it is proper to exclude a claim for purchase money of the tax title from a third party, in excess of the amount paid by the purchaser at the tax sale and such additional sums as the statute secures to such purchaser, with interest thereon.

7. Tenancy in common \S 19(5)—Where tenant in common refused to disclose amount paid for hostile title he may not complain of amount allowed.

A tenant in common entitled to reimbursement as to a portion of the purchase money paid by him for a hostile title covering the common property, or a part thereof, and unavailingly called upon, in an accounting, to disclose the amount so paid, cannot complain of an allowance made to him by a commissioner in chancery, on account thereof, based upon the purchase price recited in the deed for the land so purchased.

8. Tenancy in common \S 24—Allowance of compensation for timber taken from land, upon assumption that all the land bore timber, held erroneous.

An allowance in a settlement between tenants in common, by way of compensation to one of them for timber taken from the land by the other, upon the assumption that all of the land bore timber, notwithstanding strong probability of lack of timber on some of it, disclosed by the evidence, is erroneous.

9. Evidence \S 601(4)—The actual amount of money for which timber was sold is better evidence of its per acre value than a calculation based upon estimates and quantities.

The actual amount of money for which the timber on a tract of land was sold by the thousand feet is better evidence of its value per acre than a calculation at proved prices per thousand feet, based upon a mere estimate of the quantities of the several kinds of timber.

Appeal from Circuit Court, Boone County.

Suit by George P. Alderson against the Horse Creek Coal Land Company and others. Decree for plaintiff and the Coal Land Company appeals. Modified, corrected, and affirmed.

J. Blackburn Watts and J. W. Kennedy, both of Charleston, for appellant.

Murphy & Wade, of Madison, and W. E. R. Byrne, of Charleston, for appellee.

POFFENBARGER, P. The assignments of error on this appeal are predicated upon exceptions to two reports filed in the cause, one of which conditionally allots in partition two-thirds of each of two tracts of land to the appellee and one-third to the appellant, and the other settles certain accounts between them. The governing principles are stated in *Alderson v. Horse Creek Coal Land Co.*, 81 W. Va. 411, 94 S. E. 716. The decree complained of now purports to apply them, and accord the parties their respective rights, in conformity therewith.

[1] To the report of the partition made by the five commissioners appointed for the purpose, three very general exceptions were filed by the appellant, owner of one-third of each of the two tracts of land, one containing 650.43 acres and the other 616.23. They charge assignment of more than two-thirds in value to the appellee and less than one-third to the appellant, and wrongful allowance of rights of way over the parts assigned to the latter. Two affidavits were filed in support of the first two of the exceptions. The facts stated in them seem to relate, for the most part, to the partition of the 650.43-acre tract. One is that the allotment to the appellant includes part of an alleged interlock between the deed, under which *Alderson* and *McClagherty* held, and a tract of land known as the Hill land, acquired by the appellant, June 1, 1901, under a different title. Under the impression that the division line between the two tracts, known as the "James Line," was straight, contrary to the fact, William Thompson, commissioner of school lands, conveyed to *Alderson* and *McClagherty*, by a straight line from one point to another, and thus included about 42 acres of the Hill tract. The commissioners in this cause, in making the partition, included this strip, awarding approximately one-half of it to each of the parties, as constituting a part of the 650.43-acre tract. This is disclosed by the report as well as by an affidavit. Another interlock of 5 acres, included in the 616.23-acre tract and assigned to *Alderson*, occupies a like status. It is included in the Thompson deed. The affidavits, filed in support of the exceptions, charge that the coal in the land allotted to the appellant is relatively less in quantity than that in the land allotted to the appellee, because the former gets the coal outcrop and land fronting on streams and cut up by ravines, while the latter gets land in which the coal is comparatively free from loss by such means. Another fact relied upon is the division of the coal in the land assigned to the appellant out of the 650.43-acre tract,

by Sugar Camp Branch, constituting an obstacle to convenient mining of the tract.

Alleged inadmissibility of the affidavits is relied upon by the appellee. The exceptions to the report form the basis of a mere motion for an interlocutory order, similar to a motion for a continuance, an order of sale in an attachment proceeding, a temporary injunction, the appointment of a receiver, and a new trial. It affects the merits of the cause only incidentally. Directly, it pertains to mere execution of a decree by which every legally important issue in the cause has been determined. Upon this conception of the proceeding, our knowledge of uniform practice and the text in 30 Cyc. 284, we are clearly of the opinion that the affidavits are admissible.

[2] As to the interlocks, the commissioners and the court below held that the appellant is precluded from exclusive right to them, under conveyances conflicting with the Thompson deed, by former adjudication on the original bill, as was held in respect of its claim under the *Levassor* title, on the appeal disposed of in 81 W. Va. 411, 94 S. E. 716. These interlocks are both included in purchases made by *Wingfield*, trustee, while he was a cotenant with *Alderson* in the lands conveyed by the Thompson deed, wherefore they inured to the benefit of both parties. The appellant cannot hold them exclusively against its cotenant, in the absence of unwillingness on the part of the latter to reimburse the former as to his proportionate part of the purchase money. The status of these two interlocks is the same as that created by the *Levassor* title. No effort has been made to differentiate them. We deem it unnecessary to say whether the appellant is precluded as to them by a former adjudication.

[3] In connection with the affidavits setting up the matters relied upon as ground of impeachment, failure of the report to show, by a recital of facts, the equity and fairness of the division, is invoked. Lack of disclosure of such facts on the face of the report, or otherwise, constitutes no ground of impeachment. The commissioners were under no duty to report them. *Wamsley v. Mill Creek Coal Co.*, 56 W. Va. 296, 306, 49 S. E. 141; *Ransom v. High*, 37 W. Va. 838, 17 S. E. 413, 38 Am. St. Rep. 67; *McClanahan v. Hockman*, 96 Va. 392, 31 S. E. 516. In the absence of evidence to the contrary, there is a presumption of the correctness of the report. It is the right of the parties to attend the commissioners in their work, and have their suggestions and claims considered and passed upon, and, if unsuccessful in their efforts to obtain a fair division, to produce evidence to the court, showing how, if at all, they have been wronged. A party who has allowed a division to be made and reported, without any effort on his part to have it correctly made, and to show

in what respect it is incorrect, is in no situation to complain, and he is not permitted to do so, unless the wrong done him appears on the face of the report or is disclosed in some way by the record of the cause.

[4] Insufficiency of the affidavits to overthrow the report, on the ground of inequality of value, all pertinent elements and matters being considered, is obvious. They contain no data of any kind, from which such inequality can be inferred. The relative quantities of coal are not given, and the advantages of location are not set forth. Full compensation for loss of coal cut out by the creek and ravines may be afforded in the values of the creek bottom lands, giving space for dwellings, stores, shops, and other structures and enterprises, and the greater accessibility of the coal, reducing the expense of operation and facilitating production. Neither the exceptions nor the evidence adduced in support of them can be said to do more, on the ground of inequality, than to charge it in very general and indefinite terms. A report of partition cannot be impeached in that way. The presumption in favor of its correctness is so strong that it must be permitted to stand, in the absence of clear proof of substantial infirmity in it. *Carper v. Chenoweth*, 69 W. Va. 729, 72 S. E. 1031; *Ransom v. High*, 37 W. Va. 838, 17 S. E. 413, 38 Am. St. Rep. 67; *Henrie v. Johnson*, 28 W. Va. 190; *Cross v. Cross*, 56 W. Va. 185, 49 S. E. 129; *Smith v. Smith*, 77 W. Va. 260, 87 S. E. 355; *Soleberry v. Virginian Ry. Co.*, 73 W. Va. 642, 81 S. E. 985. Nor is any data given as to inconvenience of mining.

[5] The presumption of correctness, in favor of the report, prevails over the third exception taken on the ground of allowance of easements over the lands allotted to the appellant, in the form of rights of way for getting out the timber, coal, and other minerals from the parts assigned to the appellee. Like easements were imposed upon the lands of the appellee in favor of the appellant. Such easements can be imposed only upon considerations of reasonable necessity. *Sharp v. Kline*, 82 W. Va. 13, 95 S. E. 441; *Gwinn v. Gwinn*, 77 W. Va. 281, 87 S. E. 371. But, in case of such necessity, a court of equity, in awarding partition, may provide for or create the easements. They are as clearly subject-matter of the work of the commissioners as the land, buildings, and other elements of value. Hence, when they are provided for in the report, that instrument is evidence of necessity therefor. It is not incumbent upon the commissioners to state the facts calling for such provision. To repel the presumption of necessity, the exceptor must prove lack thereof, as in the case of impeachment of the report upon any other ground.

[6] One item of the account stated by Commissioner Fulton to whom the cause was

referred for ascertainment of facts essential to a settlement, is made up of the amount necessary to redeem the Alderson interest from Leftwich and Bradley, deemed to have been paid them by the appellant in its alleged purchase of that interest and the taxes paid on it, from the date of redemption to December, 1920, by the appellant, aggregating \$4,112.09, as ascertained by the commissioner. No error is perceived in the calculation thereof. It seems to have been carefully and intelligently made and is founded upon the most reliable evidence found in the record. Neither the exception nor the briefs filed for the appellant point out any error in it. It is claimed that the full amount paid by the appellant to Leftwich and Bradley, as for purchase of the land from them, \$2,535.88 should be allowed as cost of redemption. It is scarcely necessary to say nothing can be allowed for the purchase of a void tax title. By its purchase, the appellant placed itself in the shoes of its vendors and can claim no more than they had right to under the statute, as purchasers at a tax sale.

[7] Nor is there any error in the allowance of \$131.87, made to the appellant on account of purchase money of the Levassor title, procured by J. R. Wingfield, trustee, and conveyed to the appellant, they being in law successive cotenants of the appellee, wherefore the purchase inured to the benefit of the appellee, subject to his payment of his pro rata share of the purchase money by way of reimbursement. The Levassor purchase, consisting of eight tracts, ranging in quantity from 25 acres to 1,806 acres, contained in the aggregate 4,121.5 acres, treated by the commissioner as fully covering the two tracts here involved. The purchase money, as recited in the deed to Wingfield, trustee, was \$300, but an affidavit of Wingfield, admitted in evidence by agreement, is relied upon as showing falseness of the recital and payment of a much larger amount. It says 404 acres of the land cost \$5 per acre, and 147 acres \$2 per acre, aggregating \$2,814. This affidavit is altogether uncertain as to whether these two tracts are parts of the 4,121.5 acres conveyed to Wingfield by the deed of November, 1901. It says the lands to which it refers consisted of 551 acres. There may have been two purchases, and the recital of the deed may be correct. If it is, no fault is found with the apportionment, and no error is perceived in it. The appellant no doubt knows whether the 4,121.5 acres cost more than the recited \$300, and the burden was upon it to prove the real consideration, if it was different from that recited in the deed. It has not done so in any definite or certain way. Nor has it asserted any claim of compensation in respect of the other two interlocks, although repeatedly called upon to appear before the com-

missioner and assert its rights and produce evidence in support of its claims.

[8, 9] Although the appellant has not successfully assailed any of the findings in its favor, on the ground of inadequacy, we are of the opinion that too much was found against it, on account of the timber sold, cut, and removed from the common land. This timber was sold as part of a large area of about 8,000 acres, all of which was claimed by the appellant. The award was made on the basis of \$20 per acre on all of the land allotted to the appellee, 844½ acres, and amounts to \$16,888.80, on which interest was allowed from January 1, 1914, making a total of \$23,897.65. In the entire area from which the timber was sold, there were at least 200 acres of cleared land. Whether any of such land was within the two tracts here involved does not clearly appear. It is not located otherwise than by the statement that it was composed of the creek bottoms. As the two tracts of land border to some extent on streams, it is highly probable that some of the cleared land was on them. At any rate, the appellee can recover only such damages as he has proved, and he has not proved that all of the land in which he was interested was uncleared. In this state of the evidence, equity and fairness require an apportionment of the value of the timber, on the basis of a charge of the 200 acres of cleared land against the entire timber area, which will make the appellee bear his proportion of it. Then, again, the evidence of the value of \$20 per acre is uncertain and inconclusive. The timber was sold at certain prices per thousand feet board measure and not by the acre, and a witness claims it was estimated by the purchasers, that the prices stipulated would produce about \$20 per acre. But he furnishes no data for this estimate. The prices were \$6 for the hard woods and \$2.50 for the soft woods, and the relative quantities are not stated. An affidavit of Wingfield, who collected and accounted for all of the purchase money, as trustee of the appellant, admitted under an agreement, shows it all amounted to \$131,151.08, which would make the rate per acre considerably less than \$20. The affidavit was admitted, subject to objections for irrelevancy and immateriality. In so far as it relates to the value of the timber, it is both relevant and material. What the timber actually sold for is better evidence of its value than a calculation based upon a mere estimate of quantities. The entire area, as indicated by the tax assessments, at the dates of the sales, was about 7,940 acres, from which 200 acres is to be deducted for cleared land, leaving 7,740 acres of timber. On this basis, the value of the timber was slightly less than \$17 per acre, and the appellee is entitled to \$14,465.12, and the interest thereon from January 1, 1914, to December 1, 1920, \$6,

003.06, making the total \$20,468.15. No error is perceived in the basis on which the interest was calculated, except as to the amount of the principal sum. The commissioner adopted a date which allows interest for the average time as nearly as it can be ascertained from the evidence.

The decree will be corrected, in respect of the amount due the appellee for timber taken from the land and the interest thereon, as above indicated, and so as to make the balance adjudged in his favor and required to be paid to him \$16,225.19, instead of \$19,653.89, and, as so modified and corrected, it will be affirmed.

(90 W. Va. 607)

LILLY et al. v. RALEIGH HARDWARE CO.
(No. 4370.)

(Supreme Court of Appeals of West Virginia.
March 28, 1922.)

(Syllabus by the Court.)

1. Landlord and tenant \S 25(5)—Lease signed only by lessor and carried out by lessee deemed accepted by lessee, and binding on both parties and purchaser with notice.

Where the negotiations of the parties for the lease of real estate are reduced to writing in the form of a written deed or lease, which contemplates the signature of both parties thereto, but which is only signed by the lessor, and is delivered to the lessee and retained by it, and the lessee moves into the premises and occupies the same in accordance with the terms of said lease for a considerable length of time, and the lessor recognizes the validity thereof in a deed made by him to one who subsequently purchases the property from him, such acts and conduct will be construed to be an acceptance of the lease upon the part of the lessee, binding both parties to the terms thereof, notwithstanding nonexecution of the paper upon the part of the lessee, and a purchaser of the property from the lessor, with notice of such lease, will be bound by its terms.

2. Deeds \S 36—No particular formal words of grant are necessary to validity.

No particular formal words of grant are necessary to the validity of a deed. If the intention to grant or convey the real estate, or an interest therein, clearly appears from the deed of conveyance, it will be as effective as though formal words of grant were used.

Error to Circuit Court, Raleigh County.

Action by C. M. Lilly and others against the Raleigh Hardware Company. Directed verdict and judgment in favor of the defendant, and the plaintiffs bring error. Affirmed.

Ashton File and W. W. Goldsmith, both of Beckley, for plaintiffs in error.

McGinnis & McGinnis and Ashworth & Ashworth, all of Beckley, for defendant in error.

RITZ, J. Plaintiffs by this writ of error seek reversal of a judgment in favor of the defendant in an action of unlawful entry and detainer brought by them to recover the possession of a business house situate in the city of Beckley.

In the summer of 1914 A. A. Lilly was erecting a business building upon a lot owned by him in the city of Beckley. The defendant desired to secure this building for the conduct of its business, and entered into negotiations with Mr. Lilly to that end. These negotiations resulted, on July 1, 1914, in Mr. Lilly preparing a lease of the premises to the defendant for the term of ten years, at a rental of \$150 per month, payable monthly. This lease was duly executed by Mr. Lilly under seal and duly acknowledged by him, and sent to the defendant with the expectation upon his part that the defendant would also execute and acknowledge it. The term of the lease was to begin as soon as the building was completed, which was then in course of erection, and which was expected to be ready for occupancy by the 1st of November following. The defendant did not execute the lease sent to it by Mr. Lilly, but desired, if possible, to secure a modification of one of the conditions contained in it in regard to liability for explosives stored upon the premises. The lease, as prepared and executed by Mr. Lilly, made the defendant liable for any injuries to the building caused by explosions upon the premises, while the defendant desired to have its liability limited to injuries caused by explosives stored in excess of the amount allowed by law, or from its negligence. It had its counsel prepare a lease in identical terms with the one signed and acknowledged by Mr. Lilly, with the exception that the condition in regard to explosives was changed as above indicated. It forwarded this paper to Mr. Lilly, calling his attention to the change, and, in a letter, expressed the hope that he would accept the lease in the form prepared by it. It did not, however, return the lease executed by Mr. Lilly and sent to it. Mr. Lilly declined to accede to the change suggested by the defendant, and, early in October, 1914, upon his attention being called to the fact that he had done nothing in regard to the matter, he wrote a letter to the defendant advising it that he had gone over the lease which he had prepared and executed, and also the one that the defendant had submitted to him containing the change, and that he had prepared a third paper which he believed was about right, and which he forwarded with the request that, if it was acceptable to the defendant, it execute it and return it to him, and he would thereupon execute it. It does not appear what this third paper contained. Neither of the parties ever executed it, and it does not appear that there were any further negotiations in regard to the matter. When the building was completed, about the

1st of November, the defendant moved in, and it has occupied the building ever since.

On the 1st of July, 1919, A. A. Lilly, by deed of that date, conveyed the property to George H. Spaulding, Fred Faulkner, and John Faulkner, in which deed there is contained the following stipulation:

"This conveyance is made subject to lease contract, bearing date the 1st day of July, 1914, made between the said A. A. Lilly and Raleigh Hardware Company, a corporation, reference to which contract is here made."

After Spaulding and his associates got the property from Lilly, the defendant continued to occupy it without its right to do so being questioned, until Spaulding and his associates sold it to C. M. Lilly and W. I. Smith, the plaintiffs in this suit, and conveyed the same to them on the 27th of July, 1920. Soon after the plaintiffs got their deed from Spaulding and others, they notified the defendant that it had no lease entitling it to occupy the premises, and that it must vacate or make some arrangement with them in regard thereto. The defendant received this letter on the 1st of September, and, in answer thereto, transmitted the rent for one month which was due on that day, and insisted upon its right to hold the property for the full term of ten years, as provided by the lease above referred to. Plaintiffs declined to receive the rent, and since that time it has been regularly deposited in a bank in Beckley to their credit. Notice was given the defendant to vacate the premises upon the theory that it was a tenant from month to month, and, upon its refusal to do so in accordance with the command in the notice, this action of unlawful entry and detainer was instituted, and, upon the facts being shown, as above indicated, the court, on motion of the defendant, directed the jury to return a verdict in its favor, upon which verdict the judgment complained of was rendered.

The plaintiffs insist that the judgment cannot stand, for the reason that there never existed any binding and valid contract between A. A. Lilly and the defendant for the lease of the premises, and that the holding thereof by the defendant, and the payment of rent therefor by the month, simply made it a tenant from month to month; while the defendant contends that its occupancy of the premises under the circumstances showed a clear intention and determination upon its part to accept the lease of July 1, 1914, and that it has a right to rely upon the terms of that lease and to occupy the premises thereunder. The plaintiffs insist that the facts disclosed by the record show that the defendant never accepted the lease signed and acknowledged by Mr. Lilly dated the 1st day of July, 1914, but, instead of accepting it, prepared another form of lease making a change in one of the conditions which Mr. Lilly refused to accede to, and that there never was any agreement of the parties upon

the terms of the lease. The defendant's contention is that it did accept the lease first sent to it by Mr. Lilly, and that this acceptance upon its part is shown by the fact that it retained this lease at all times after the same had been signed and acknowledged and sent to it, and did not return it with the form of lease it sent to Mr. Lilly, to be executed evidencing the change; that its purpose at all times was to accept the lease as prepared if it was unable to secure the changes it desired, and that, when it did not succeed in securing the changes desired by it, the negotiations were discontinued, and it moved into the premises under the lease then in its possession. It is very significant that the defendant was permitted to move into the leased premises if, as contended for by the plaintiffs, it had no contract therefor. It sufficiently appears, we think, that for nearly six years the defendant occupied these premises upon the terms prescribed by the lease upon which it relies, and it also sufficiently appears that the rental value of the building had increased enormously during a considerable part of this time, notwithstanding which no demand was made upon the defendant for increased rent; and not only that, but, when Mr. A. A. Lilly sold the premises, he inserted in his deed to the purchaser the stipulation above quoted, clearly recognizing the rights of the defendant in the premises, under the lease dated July 1, 1914. That could refer to no other paper than the one now relied upon by the defendant. Lilly had executed no other lease. It was the only paper by which he could be bound.

[1] It is insisted that, because the lease executed by A. A. Lilly, dated the 1st day of July, 1914, contemplated execution upon the part of the defendant, and was never formally executed by it, it cannot be relied upon as a binding contract, and the cases of *Herndon v. Meadows*, 86 W. Va. 499, 103 S. E. 404; *Hoon v. Hyman*, 87 W. Va. 659, 105 S. E. 925; and *Ely v. Phillips*, 89 W. Va. 580, 109 S. E. 808, are relied upon as supporting this contention. In the case of *Herndon v. Meadows* the contract sued upon was not executed by one of the lessees, it being a contract for the lease of a tract of land for mining purposes. No act had been done under the contract by any of the parties, and the opinion very distinctly states that, if the parties had entered upon the performance of the contract in accordance with its terms, notwithstanding it had not been signed by one of the parties, the results would likely have been very different. In the case of *Hoon v. Hyman* the contract was made by an agent, and provided on its face for approval by the principal, the owner of the property, which approval the principal declined to give when he was asked to do so on the day after the contract was made. Nothing was done under the contract in that case in the way of executing it, and we held that, the paper disclosing on its face that it was necessary to have the approval

of the principal before the acts of the agent were binding, there was no valid contract between the parties. In *Ely v. Phillips* the contract was one for the sale of a tract of timber, which one of the grantors had not signed, and refused to sign. The contract contemplated the sale of the whole tract. No acts were done by either party in execution of the contract, but suit was brought to compel the joint owners who had signed to specifically execute so far as their interests were concerned, and this relief was denied upon the ground that the parties never contemplated a sale of anything but the entire interest, and, inasmuch as one of the joint owners refused to sell upon the terms stipulated in the contract, there was no enforceable engagement. A careful reading of these cases, instead of supporting the plaintiffs' contention will rather overthrow it, for the reason that, in all of them, it is recognized that, if the parties acted under the contract, and in accordance with its terms in their dealings with the subject-matter of it, such acts would be treated as an acceptance of the terms proposed. In this case, as before stated, the defendant moved into the building as soon as it was completed, as provided by the contract, and has occupied the same ever since. This was an unequivocal act upon its part, signifying its acceptance of the terms of the lease, and was sufficient to bind it to the performance of those terms without anything further. The lessor was bound because he had executed under seal the contract of lease and delivered it to the defendant. The stipulation in the deed from A. A. Lilly to Spaulding is, to say the least of it, a clear, unambiguous declaration upon the part of the lessor as to the interpretation placed by him upon the conduct of the parties. It shows, if it does nothing more, that he recognized the rights of the defendant in the premises.

[2] The plaintiffs, however, insist that the lease of July 1, 1914, is not sufficient because it contains no words of grant, and, being for a term in excess of five years, it must be by deed in order to be valid. This contention is based upon the fact that the lease makes the defendant in this suit, the Raleigh Hardware Company, the party of the first part, and A. A. Lilly, the party of the second part, and then provides that the party of the first part leases from the party of the second part the premises in question for the term of ten years. It has been repeatedly held that no particular formal words of grant are necessary to the validity of a deed. If the intention to grant or convey appears clearly from the paper, the deed will be held sufficient for the purpose, no matter how informal it may be. *Roberts v. Huntington Development & Gas Co.*, 89 W. Va. 384, 109 S. E. 348. There is no trouble in this case about the intention of the parties. The lessor clearly expressed his intent by signing the lease under seal and acknowledging the same, and this

intent is likewise clearly gathered from the paper itself, which contains the mutual covenants of the parties and their agreements in regard to the premises, showing the clear intent upon the part of the lessor to lease the premises to the defendant. We do not think there is anything in this contention.

Our conclusion is that the action of the circuit court in directing a verdict in favor of the defendant was entirely justified by the evidence, and the judgment complained of is affirmed.

(90 W. Va. 600)

STATE v. COOK. (No. 4396.)

(Supreme Court of Appeals of West Virginia.
March 28, 1922.)

*(Syllabus by the Court.)***1. Intoxicating Liquors §236(5)—Finding of apparatus in garden held not to warrant presumption that it was a moonshine still.**

Where parts of an apparatus used for the distillation of spirituous liquors are found hidden in the weeds of a garden, near the owner's residence and at a short distance from, and in full view of, both a public highway and a publicly traveled private way, and it does not appear where such apparatus has been used for such purpose, it cannot be presumed that such apparatus is a "moonshine still" as defined in section 37, c. 108, Acts 1919.

2. Intoxicating Liquors §137—"Moonshine still" defined.

A "moonshine still," within the terms and meaning of that section, is any mechanism, apparatus, or device kept or maintained in any desert, secluded, hidden, secret, or solitary place, away from the observation of the general public, for the purpose of distilling such liquors in such place.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Still.]

3. Intoxicating Liquors §137—Whether apparatus is a moonshine still and owner a moonshiner depends upon where device is operated.

Whether an apparatus or device used for the purpose of distilling intoxicants is a "moonshine still" and the owner or operator thereof a "moonshiner," under chapter 108, Acts 1919, depends upon the place in which such apparatus or device is used and operated.

4. Intoxicating Liquors §137—An open garden is not a "desert, secluded, hidden, secret, or solitary place" within the statute prohibiting moonshine stills.

A garden, within a few feet of a dwelling house with cleared fields surrounding it, and in full view of a public road and traveled public passway, the former within 100 yards and the latter within 50 yards, is not a desert, secluded, hidden, secret, or solitary place away from the observation of the general public, within the meaning of section 37, c. 108, Acts

1919, which prohibits the manufacture of spirituous liquors by moonshine still.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Place.]

*(Additional Syllabus by Editorial Staff.)***5. Indictment and Information §125(4)—Misdemeanor of possessing moonshine still may be charged in same indictment with felony of operating it.**

Under Acts 1919, c. 108, § 37, the possession of a moonshine still is a misdemeanor and may be charged with the felony of operating it, in the same indictment without making it duplicitous both being of the same nature and the lesser necessarily included in the greater.

Error to Circuit Court, Boone County.

Burton Cook was convicted of owning, operating, maintaining, and having in his possession a moonshine still, and he brings error. Judgment reversed, verdict set aside, and defendant granted a new trial.

Leftwich & Shaffer, of Madison, for plaintiff in error.

E. T. England, Atty. Gen., and R. A. Blessing, Asst. Atty. Gen., for the State.

LIVELY, J. Defendant was convicted of owning, operating, maintaining, and having in his possession a moonshine still, and, on May 24, 1921, was sentenced to confinement in the penitentiary for two years; and he prosecutes this writ of error.

Defendant lived on a farm, formerly owned by his father lying near the divide between the West fork and Pond fork of Little Coal river. A public road ran about 100 yards from the house along a ridge, from which the house and farm could be plainly seen. A public passway, commonly traveled, led up to defendant's premises from the hollow below and passed near the house, between it and an orchard, and beyond to the ridge road. The land around the house was cleared, the closest woodland being about 75 yards from the house. The land had been cleared and farmed for many years. Early on the morning of September 20, 1920, R. M. Cook, J. W. Jeffrey, and Landon White went to defendant's house and secreted themselves nearby. They saw him go into his garden about 30 feet from the house, where he took a drink out of some vessel. Afterwards a boy brought a saddled mule from the barn, and defendant's wife went into the garden and filled a bottle out of a "half-gallon self-sealer," which bottle she handed to defendant, who then mounted the mule and, while riding away, was arrested by these persons. They found a pop bottle full of apple brandy in his hip pocket. Two of the officers searched the premises and found the half-gallon self sealer in the garden, with some of the apple brandy in it. A coiled copper pipe in a coffee sack, and two big copper kettles

were also found covered with weeds in the garden. The rim had been removed from one of the kettles and there was a small hole in its bottom. There was evidence of dough around the rimless kettle, and the smell of apples emanated from one of them. The cap piece, which we understand is used to connect the kettle with the coil or worm, was not found. Near the barn were found two barrels, with "mash" in one of them. Just on the outside of the garden was found "cooked apple stuff" poured out along the path. The apparatus was not complete for distilling intoxicants in that it lacked the cap piece and another piece of pipe to extend from the top of the kettle to the "cooling tub." There was some evidence that defendant said the kettles belonged to his wife, and that he (defendant) would not be in the trouble if Cook's brother, a mail carrier, had not brought the worm up from Madison. A boy, Clyde Peters, testified that some time previous to defendant's arrest he went to his home for seed corn and saw him in an out-building where there was a brass or copper kettle over a fire. He saw the fire and kettle through the cracks in the outhouse, but did not go in, and could not say what was in the kettle. The kettle had nothing over the top, and he smelled nothing. The outhouse was about 100 feet from the dwelling and just below the orchard and in the woodyard on the opposite side of the dwelling house from the garden. On this evidence defendant was convicted of owning, operating, maintaining, having in his possession, and having an interest in a "moonshine still."

The court gave two instructions for the state, refused those offered by defendant, and, after argument, the jury returned the following verdict: "We, the jury, find the defendant guilty of owning and maintaining an apparatus for making intoxicating liquor."

The judge informed the jury that their verdict was not responsive to the issue and instructed them that, under the law, the operating of an ordinary still was a different offense from that of owning, operating, maintaining, or having in possession, or having an interest in, an apparatus for the manufacturing of intoxicating liquors commonly known as a "moonshine still," and directed them to return to their room and find a verdict as to whether or not the defendant owned, operated, etc., a moonshine still, to which the defendant objected and excepted. After the jury retired, they were again brought into the courtroom when the court gave the defendant's instruction No. 3, with modification. The jury again retired and sometime afterwards brought in this verdict: "We, the jurors, find the defendant guilty as charged in the indictment." Defendant's motion to set aside the verdict and grant a new trial was overruled.

[1-3] It is insisted that the evidence is not

sufficient to sustain the verdict of operating, owning, etc., a moonshine still, and that the court improperly instructed the jury.

It will be seen by inspection of sections 3 and 37 of chapter 108, Acts 1919, that there are different punishments for one who engages in the manufacture of intoxicants, depending upon whether he manufactures by moonshine still or otherwise. The former is punishable as for a felony, under section 37, the latter as a misdemeanor, under section 3. This was pointed out in *State v. Knosky*, 87 W. Va. 558, 106 S. E. 642. Section 37 defines a moonshine still as one that is "kept or maintained in any desert, secluded, hidden, secret, or solitary place, away from the observation of the general public, for the purpose of distilling" etc. The place where the process of manufacturing is carried on is a most potential factor in determining the degree of the crime. If in a desert, secluded, hidden, secret, or solitary place, away from the observation of the general public, then it is a felony. Elsewhere, it is a misdemeanor. The character or kind of mechanism or apparatus does not fix the degree of crime. The two copper kettles and worm, if set up and operated in defendant's front yard, orchard, or kitchen, would not be a moonshine still, within the meaning of section 37; whereas, if they were set up and operated in the fastnesses of some secret mountain cove, or in a secret cave, or any desert, secluded, secret, or solitary place, they would constitute a moonshine still, and the operator or owner would be a "moonshiner." The distinction is illustrated in the *Knosky* Case. *Knosky* had a still on his kitchen stove in full operation, when the officers came and made the arrest. If the same still had been put in operation by him in some secret or desolate place, and found by the officers, his crime would have been felonious.

Viewing the uncontradicted evidence in the case under consideration, is it possible for court or jury to designate, with the slightest degree of certainty, the spot where defendant operated the apparatus found in the garden? Possibly the cooked "apple stuff" found in the path just outside the garden might indicate the near presence of the operation; possibly it was carried on in the dwelling, the kitchen, or in the outhouse, through the crack of which Clyde Peters saw a copper kettle with a fire under it, and defendant standing nearby. If the place where the apparatus was found is the place where it was operated, it could not be seriously contended that it was in a secret, secluded, or hidden place. The garden house and outhouses were in full view of the ridge road as well as in full view of the public passway leading between the dwelling and the orchard. The necessary element of the felony charge in the indictment, namely the operation of the apparatus in a secret place, is not proven beyond a reasonable doubt. On the contrary,

it is very doubtfully shown, if at all. The finding of the apple brandy in the self-sealer, the discovery of the worm and kettles in the weeds in the garden, and the intimate connection of defendant therewith, without satisfactory explanation on his part, is reasonably conclusive of the fact of his possession and control of the apparatus and the illicit distilling of the liquor by him. But it does not establish that the apparatus is a "moonshine still" within the meaning and definition of said section 37. It must be remembered that defendant is indicted for feloniously owning, operating, maintaining, and having in his possession, and having an interest in a "moonshine still."

[4] As above stated, the possession or ownership of apparatus which may be used to manufacture intoxicants, and which may have been so used, is not punishable under section 37, unless such apparatus has been so used and operated in a "secret, desert, hidden," etc., place. It follows that instruction No. 1, which tells the jury that, if they believe beyond reasonable doubt that defendant either owned, operated, maintained, or had an interest in an apparatus used, or capable of being used, in the manufacture of intoxicating liquors, commonly known as a moonshine still or any device of like kind or character, they should find defendant guilty, was erroneous. Under this instruction, if the kettles and worm had been found on defendant's front porch or in his kitchen without satisfactory explanation, he would be guilty of a felony. Instruction No. 2, which tells the jury that, if the apparatus was kept by defendant for making intoxicating liquors, or capable of such use, and that the same was in a secluded, hidden, secret, or solitary place, away from the observation of the general public, they should find him guilty, is likewise erroneous. The felony offense charged in section 37 is the keeping or maintaining such apparatus in a secret, secluded, hidden, desert, or solitary place for the purpose of making, or capable of making, intoxicating liquors in such place. The undisputed evidence is that the kettles and worm were found in the garden in the weeds within 30 feet of the house and in full view of the ridge road, 100 yards away, and in full view from the public passway, about 50 yards nearer. As was said in the *Knosky Case* the word "place" is used more in the sense of the immediate neighborhood, region, or vicinity than of the particular room or apartment in which the operations are conducted.

"We know as a matter of fact, and the Legislature was not without the same knowledge, that what was ordinarily termed moonshine was such liquors as were manufactured in the fastnesses of the mountains and other secret and hidden places where there was great difficulty of detecting it, and this was the popular meaning of the term. The language used by the Legislature in defining it indicates to our mind that this was the sense in which the Legislature intended it should be used." *Knosky Case*, supra, p. 563.

Can we say that because this apparatus was found in the garden, covered by the weeds, it was to be or had been kept or maintained as a moonshine still within the meaning of the act? Under the 1921 amendment to section 37 (chapter 115, Acts 1921), any such apparatus that is kept or maintained "in any building, dwelling house, or other place, for the purpose of distilling," etc., makes the owner, operator, or possessor or person having any interest therein, liable to conviction for a felony. But defendant was indicted under the act of 1919, which act we have heretofore construed, and that act, as we have construed it, governs here.

We do not think the evidence sufficient to sustain the felony charge in the indictment, under section 37, c. 108, Acts 1919.

[5] The other point raised by counsel as to the uncertainty of the verdict, that is, whether the jury intended to find defendant guilty of owning, operating, or having an interest in the apparatus, or guilty of having possession of it only, is immaterial, in view of our disposition of the case. Under said section 37, Acts 1919, the possession only of a moonshine still is a misdemeanor, and may be charged with the greater offense in the same indictment. *State v. Tomlin*, 86 W. Va. 300, 103 S. E. 110. A joinder of two or more offenses of the same general nature in an indictment does not make it bad for duplicity. *State v. Miller*, 89 W. Va. 84, 108 S. E. 487. Where a higher offense necessarily includes a lower offense and both are charged in the same indictment, or in the same count in the indictment, a general verdict of guilty as charged in the indictment is taken to mean that defendant is guilty of the higher offense. *State v. McClung*, 35 W. Va. 280, 13 S. E. 654; *Bishop's New Crim. Proced.* (2d Ed.) vol. 2, § 1331; *Estes v. State*, 55 Ga. 181; 27 R. C. L. p. 862, § 34.

We reverse the judgment, set aside the verdict, and award defendant a new trial.

Judgment reversed, verdict set aside, new trial awarded.

(90 W. Va. 533)

GEORGE v. STANSBURY et al. (No. 4389.)(Supreme Court of Appeals of West Virginia.
March 28, 1922.)*(Syllabus by the Court.)*

1. Principal and agent ⇨177(6)—Vendor and purchaser ⇨228(3).—Notice that land has been sold, given purchaser's agent while negotiating sale, is notice to purchaser; deed with notice will not take priority over unrecorded deed.

Where a subsequent purchaser for value obtains a deed for land through an agent, and the agent, while negotiating therefor, is informed that the land has already been sold and conveyed to another, such notice to the agent is notice to his principal, and, though the subsequent purchaser's deed be first recorded, it will not take priority over the deed first made, and it may be canceled and set aside by a court of equity in a proper proceeding for that purpose.

2. Vendor and purchaser ⇨232(2).—Purchaser's knowledge that occupant controls city lot held to have put him on inquiry as to occupant's title.

Knowledge that a party has a city lot under his control, coupled with the fact that he cultivated a garden on it in one year and the next year had from 300 to 500 loads of dirt placed on it, from excavation on a lot near by, is sufficient notice to a purchaser of such city lot to put him on inquiry as to the occupant's title, and, if he takes a conveyance from a former owner thereof, he will be charged in favor of such occupant with all information such inquiry would have given him.

Appeal from Circuit Court, Raleigh County.

Suit by F. C. George against Herbert Stansbury and others. Decree in favor of plaintiff, and defendant Herbert Stansbury appeals. Decree affirmed.

W. H. File, of Beckley, and Price, Smith, Spilman & Clay, of Charleston, for appellant.

A. P. Farley and Hugh A. Dunn, both of Beckley, for appellee.

MEREDITH, J. In October, 1918, E. D. George departed this life, leaving a will by which he devised considerable property, consisting of personal estate and certain lots located in Beckley, Raleigh county. Lot No. 38, known as the "Blacksmith Shop Lot," was given to his two grandchildren, Lawrence K. Spencer and Willie Spencer Foster. They lived in Ohio. The half devised to Lawrence is the matter in controversy in this suit. Fred C. George, a son of the testator, qualified as administrator with the will annexed, and as such has been administering the personal estate; but under the terms of the will no control over the testator's real estate was given his personal representative.

In the spring of 1919 the plaintiff, through some arrangements with Lawrence K. Spencer and Willie Spencer Foster, was permitted

to cultivate their lot, and he planted a garden on it. There were no buildings on it, the blacksmith shop having decayed or been carried away, but the lot was under fence.

On July 21, 1919, Lawrence K. Spencer and Willie Spencer Foster executed a deed for the lot to plaintiff for \$3,500; of the purchase money \$1,000 was paid in cash to each of them, and plaintiff also gave each a note for \$750 payable at six months. Plaintiff neglected to record his deed. He did not cultivate the garden the next year, for the reason, as he says, that he was planning to construct a building on it. He did permit an owner of a nearby lot, who was excavating for the foundation for a building, to haul from 300 to 500 loads of the dirt from the excavation and place it on his lot so as to fill a low place. In the building operations on the adjoining lot the fence on that side was broken down.

About August 9, 1920, Lawrence K. Spencer mailed to E. C. Scott, an attorney at Beckley, the note executed by plaintiff for the balance of the purchase money on the Spencer half of the lot, and instructed him to collect it. It appears that Scott was informed, either then or shortly thereafter, that the plaintiff had paid Spencer \$1,000 on his half of the property and that this note represented the deferred payment, but it is not clear whether Scott knew Spencer had executed a deed to the plaintiff or whether plaintiff held his rights under a contract, Scott claiming that he thought then that no deed had been made but that Spencer had merely executed a contract of sale. Scott made repeated requests of the plaintiff for payment of the note, and plaintiff made promises to pay when he got a deal closed for another parcel of land the sale of which he was negotiating. Scott examined the records and found plaintiff had no deed recorded and got a description of the lot by number and dimensions.

He was a member of the state Legislature, and it was called in extra session in September, 1920; just a few minutes before leaving for Charleston to attend this session, he advised the defendant Stansbury that he represented Lawrence Spencer and would sell him Spencer's half interest in the lot for \$1,750; that he was going from Charleston to Columbus, Ohio, where Spencer lived, and Stansbury told Scott "if it was a trade to draw on" him for that amount at the Bank of Raleigh. Scott came to Charleston in time to attend the session, which began September 14th and adjourned on the 17th. He went from Charleston to Columbus as planned, and saw Mr. and Mrs. Spencer and told them about the proposed deal. Spencer claimed that the plaintiff had only a contract of purchase, but Mrs. Spencer asserted that they had executed to him a deed for the one-half interest in the lot. It finally ended by their acquiescing in Scott's plan, whereby they

would get the \$750 immediately, and the \$1,000 which the plaintiff had paid Spencer was to be refunded out of the money Stansbury was to pay. At the Deshler Hotel, Scott dictated a deed, dated it September 11, 1920, and the Spencers signed and acknowledged it, conveying to the defendant Stansbury the half interest in the lot. The deed was acknowledged September 20th; Scott gave Spencer his check for \$750, the purchase money coming to him, and mailed the deed to Stansbury, which was recorded September 23d. He did not draw on Stansbury, as he had been told to do, but came home and, on September 24th, saw Stansbury, who paid him the \$1,750. He then kept \$750 to reimburse himself for the money advanced Spencer. The plaintiff had gone to Roanoke, Va., and Scott, not finding him on his return, placed \$1,000 to his credit in the Bank of Raleigh, with the \$750 note plaintiff had given Spencer for his original deferred payment. The bank notified plaintiff by postcard of the deposit, stating it was made by Lawrence K. Spencer, though Spencer was not in Beckley and did not in fact make it. It doubtless did this at Scott's direction.

On the next Monday, the 27th, the plaintiff, being informed of the situation, mailed his check to Spencer for \$1,000, which it appears Spencer never used. Plaintiff refused to take the \$750 note from the bank, but went on checking on his account, he having previously had an account at that bank. On September 27th he recorded his deed and on September 29th brought this suit to cancel defendant Stansbury's deed as a cloud on his title. It is unnecessary to discuss the bill and amended bill and answers thereto. The court, on final hearing, decreed that plaintiff was entitled to have Stansbury's deed canceled; that, before doing so, he should pay to Stansbury the sum of \$1,750 with interest from September 22, 1920, and which sum was tendered him by plaintiff. He refused to accept it and the amount, \$1,815.62, was paid to the general receiver of the court. The court further decreed that plaintiff pay the costs of suit. The court found that Scott was the agent of Stansbury in the purchase of Spencer's half interest in the lot, but found there was no collusion between Scott and Stansbury and that Stansbury had no knowledge of Spencer's deed to plaintiff at the time of his purchase, but that Scott had such knowledge and that notice thereof to Scott was notice to Stansbury.

[1] We deem it unnecessary to discuss defendant's claim that the plaintiff has not shown such actual possession of the land as entitles him to maintain the suit to remove a cloud from his title, or that he is estopped by his conduct in checking out the \$1,000 placed to his credit in the bank, as the real question in the case is whether Stansbury had notice of plaintiff's claim to the half

interest of Spencer at the time he acquired his deed and paid the purchase money.

Was Scott agent for the defendant in making the purchase? We think he was. It is stated in the brief of defendant's counsel that "before Scott went to Columbus, Spencer had told him to sell the lot," but this could have meant no more than that, as his attorney, he should institute suit and sell it in a judicial proceeding, and thus enforce payment of the note sent him for collection. He was employed by Spencer to collect the note, not to sell the property at private sale, because Spencer knew he did not own it. All Spencer was interested in was obtaining his money. It was on Scott's initiative that he found a purchaser at private sale.

From the moment negotiations with Stansbury began to the final delivery of the deed, who looked after Stansbury's interests? Agent Scott. He negotiated the deal with the Spencers, persuaded them to make the deed, though they and he knew they had no title to the premises. He dictated the deed and paid them the \$750 out of his own money, expecting to be and was reimbursed by Stansbury. Stansbury permitted Scott to pass on the sufficiency of the deed, its form, contents, and whether it was properly executed. Another significant fact is that, so far as the record shows, Spencer did not pay Scott anything for his services, not even his expenses on the trip to Columbus. Scott paid Spencer the \$750 owing him from the plaintiff. The note does not appear to have borne interest until after maturity, as appears from the deed, though the note itself is not in the record. At any rate no interest was collected. Scott was certainly not acting gratuitously. If he was not paid by Spencer, and the record indicates he was not, who paid him? Who paid his expenses to Columbus, and while there, and his fare from Columbus to his home? Who paid him for preparing the deed and for passing on its sufficiency? Did he go to all this expense and trouble, using time, money, and energy for naught? It may be so; but in the absence of anything showing why, we can hardly believe he did. We think it sufficiently appears that Spencer did not pay him. Whether Stansbury paid him, the record does not disclose. It simply shows that Scott did not take any interest in the lot as a silent partner, but it does not negative the strong implication that Stansbury may have paid him for his services, or if he has not paid him, that he is to pay him at the end of this litigation. Notwithstanding the denial of both Scott and Stansbury that Scott was Stansbury's agent we think their conduct clearly shows he was, and the circuit court did not err in so finding.

But counsel for Stansbury strenuously insist that, even if Scott were Stansbury's agent, notice to him of plaintiff's unrecorded deed was not notice to Stansbury, on the

ground that Scott acted adversely to his principal's interests in concealing from him the fact that Spencer had already conveyed his property to the plaintiff, and cite us to *Bank v. Black*, 108 Va. 59, 60 S. E. 743; *Baker v. Berry Hill Mineral Springs Co.*, 112 Va. 280, 71 S. E. 626, L. R. A. 1917F, 303; and *Culpeper National Bank v. Tidewater Improvement Co.*, 119 Va. 73, 89 S. E. 118. We do not think these authorities are applicable to the facts in this case. While Scott took a wrong course to acquire the property for his principal, yet we cannot say he acted adversely to his principal's interests. He says the reason he did not tell him of the prior sale was because he wanted to make Stansbury an innocent purchaser, and thus enable him to acquire a good title. We believe he acted in good faith toward Stansbury; considering the course pursued, he has certainly shown he was loyal to his principal. Nor can we say from the record that he had any personal ends to gain by concealment. The only possible way Scott could have gained any personal advantage by the transaction was by his becoming a silent partner of Stansbury's in the purchase or by being compensated by him; both swear he was not a silent partner, but say nothing about his compensation for his services. Assuming Stansbury paid him or is to pay him, this alone, under the circumstances shown, would not be sufficient to show that Scott acted adversely to Stansbury's interests, so as to relieve Stansbury from the rule that notice to the agent is notice to the principal. And after full information of the prior conveyance, though this had been concealed from him at the time he paid his money and acquired his deed, he refused to accept the amount paid by him and to cancel his deed. He elected to keep the benefits of his agent's act, and thereby ratified what he had done after full knowledge.

But counsel for defendant cite us to *McCormick v. Wheeler, Mellick & Co.*, 36 Ill. 114, 85 Am. Dec. 888, which holds that—

"A party is not chargeable with notice of facts within the knowledge of his attorney, where the latter acquired knowledge thereof while acting as the attorney of another party."

If this be a correct statement of the law, yet it does not apply here. Stansbury testifies that, when Scott told him how much Spencer's half interest would cost, he told Scott to make the deal and draw on him for the amount, and Scott, while acting for Stansbury in negotiating with Spencer for

the deed, learned about Spencer's conveyance to the plaintiff. He got this notice while acting for Stansbury, and this, under the law, was constructive notice to his principal. In giving the several instances of constructive notice, 2 Minor on Real Property, § 1413, says:

"Where the counsel, attorney, or agent of the subsequent purchaser, whether for the whole or a part of the transaction, or one closely followed by or connected with it, has notice of the prior incumbrance or claim, whilst concerned for his principal. In such case the notice of the agent is notice to the principal."

To the same effect, see 2 Minor's Inst. p. 980; 3 Sugden on Vendors, 318; *Merchants' Bank v. Ballou*, 98 Va. 112, 82 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715.

[2] But notice to Stansbury on the record before us could be imputed wholly aside from any agency of Scott. The lot was in the possession of the plaintiff. Stansbury says the plaintiff had charge of it, but he thought he was merely representing the owners, Spencer and Mrs. Foster. Plaintiff had farmed it the year before, and, during the year of Stansbury's purchase, he had permitted from 300 to 500 loads of material to be placed on it. This, in view of Stansbury's information of plaintiff's control of the lot, was sufficient to put him on inquiry. Why did he not inquire of the plaintiff about the title? He lived in the same city and saw him frequently. It was his duty, under the circumstances, to inquire. He could not close his eyes to obvious facts and say he did not know. He had the means of knowledge and there before him was the fact, admitted by him, that plaintiff had control of the premises, cultivated the lot, and made a very considerable ill on it.

"Actual possession of land is notice to purchasers of the occupant's right to the land, though his title paper is not recorded, whether the subsequent purchaser actually knows of such occupant's right or not." *Weekly v. Hardesty*, 48 W. Va. 39, 35 S. E. 880. "Possession of land is sufficient notice to a purchaser, contracting with a claimant thereof not in possession, to put him on inquiry; and if he takes a conveyance from such claimant he will be charged in favor of the person so in possession with all information such inquiry would have given him if diligently pursued." *Smith v. Owens*, 63 W. Va. 60, 59 S. E. 762.

Upon a careful consideration of the record, we find no error, and therefore affirm the decree.

(90 W. Va. 632)

STATE v. TALIP et al. (No. 4400.)

(Supreme Court of Appeals of West Virginia.
March 28, 1922.)

(Syllabus by the Court.)

Forgery ⇨ 7(1)—Indictment for forging shipper's receipt, after delivery of goods, quashed.

The receipt of an express company given a shipper for goods to be transported, in which the shipper, after delivery of the goods, raises the declared value thereof, for the purpose of using the same to establish the value of the goods, subsequently destroyed by fire, and in proof of his loss, does not constitute legal evidence on the question of such value, to the prejudice of the rights of the insurance company; and an indictment charging the shipper with the forgery of such receipt, with innuendo for the purpose alleged, is bad on demurrer and should be quashed.

Error to Circuit Court, Logan County.

John Talip and Harry Homad were convicted of forgery, and they bring error. Judgment reversed, verdict set aside, indictment quashed, and defendants discharged.

Minter & McNemar, of Logan, and E. L. Hogsett, of Huntington, for plaintiffs in error.

F. T. England, Atty. Gen., and R. A. Blessing, Asst. Atty. Gen., for the State.

MILLER, J. The indictment contains four counts. The *first count* charges defendants with the forgery, on the ——— day of January, 1920, of a certain receipt of the American Railway Express Company, issued to the defendants at Clarksdale, Mississippi, December 8, 1919, by raising the value of the shipment as therein declared by the shippers, from \$770.00 to \$3,770.00, for the purpose of establishing the value of the merchandise contained in their store building at Omar, in Logan County, West Virginia, and their claim for loss of said goods by fire under the several insurance policies then existing upon said goods, and to defraud the underwriters thereby. The *second count* charges defendants with uttering or attempting to utter as true said express company's receipt in the various ways set out therein, and for the purposes aforesaid. The *third count* charges defendants with the forgery, at the same time and place, of another receipt of said express company, issued to them at Clarksdale, Mississippi, dated December 10, 1919, by raising the declared value of the shipment receipted for, from \$175.00 to \$1750.00, for the same purposes alleged with respect to the receipt described in the first and second counts. The *fourth count* charges defendants with uttering or attempting to utter as true the receipt described in the third count, with like purpose and by like means as charged in the

second count with respect to the receipt therein described.

There was a demurrer to the indictment and to each count thereof, which was overruled; and this action of the trial court is the first point of error assigned and relied on to reverse the judgment upon the verdict of guilty as charged in the first count, a verdict tantamount to an acquittal on the other counts of the indictment.

The extrinsic facts and circumstances alleged in the first count, on which defendants were found guilty, to show a reasonable possibility that the alleged forged instrument might cause injury to another, are that at the time of delivery by defendants of the receipt book containing said receipts to their trustee Bland, they knew the said receipts were to be used by him to establish the amount of the merchandise contained in their store at Omar, West Virginia, and in making claim for the loss thereof under the several policies of insurance thereon, the particular receipt alleged in the indictment covering a certain shipment recited therein of December 8, 1919. Stripped of immaterial words, blanks and figures, said receipt as alleged is as follows:

"American Railway Express Co., at Clarksdale, Miss. Received from Talip & Homad, the shipments hereinafter listed, subject to the Classification and Tariffs in effect at the date hereof, which shipments the Company agrees to carry upon the terms and conditions of the Uniform Express Receipt in effect on 12/8, D. G. Value \$3,700, Consigned to Talip & Homad, Omar, W. Va.

"[Signed] Hines, for the Company."

The proposition in support of the demurrer is that the instrument, the subject of the alleged forgery, shows on its face that it is one which could not have been the subject of forgery to the prejudice of the rights of any one alleged in the indictment. It is argued that, if raised as alleged, it could not have prejudiced or affected injuriously the rights of the express company that issued it, for it was not, and could not under any circumstances have been bound by the declaration of value by the shipper; and that the insurance companies, not parties thereto, could not have been injured or deceived thereby; wherefore, no offense under the law was committed. As it is not alleged that the express company was or could have been injuriously affected thereby, we need not consider that phase of the proposition.

Our statute, section 5, chapter 146, Barnes' Code 1918 (Code 1913, c. 146, § 5242), provides:

"If a person forge any writing, * * * to the prejudice of another's right, or utter or attempt to employ as true, such forged writing, knowing it to be forged, he shall be con-

fined in the penitentiary not less than two nor more than ten years."

Forgery as defined by a text writer is:

"The false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of legal liability." 1 Bishop's New Criminal Law, sec. 572.

As already indicated, we are not called upon in this case to say whether or not the raising of the receipt in question, at the time it is alleged to have been forged, could have been made the subject of forgery to the prejudice of the rights of the express company. That question has not been presented by the averments in the indictment. On the question actually presented by the indictment with reference to the insurance companies, the law as generally stated is, that in order to constitute forgery, the writing or instrument must be such, that if genuine, it would have some efficacy as affecting some one's legal right. 12 R. C. L. 148, sec. 11 et seq., and cases cited.

The gravamen of the offense at common law, and by our statute, is that the instrument alleged to have been forged must have been to the prejudice of another's rights. 4 Blackstone's Commentaries, 246. The statute predicates the offense only on such writings as are, or may be, to the prejudice of another's rights, or by which another may be defrauded, and it must sufficiently appear from the description given of the writing alleged to have been forged, that the forgery thereof was to the prejudice of another's rights; if not such, it is not within the statute, and the offense can not be punished as forgery. *Powell v. Com.*, 11 Grat. (Va.) 822; *Terry v. Com.*, 87 Va. 672, 13 S. E. 104; *State v. Cotts*, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176. In *State v. Boasso*, 38 La. Ann. 202, the court said:

"It is not essential that the forged instrument be one that, if genuine, an action might be brought on it. If it could be used as proof in a suit, either against him whose name is forged, or in a suit against any other, whether to sustain a claim made or in defense of one, it is susceptible of forgery."

In *Arnold v. Cost*, 3 Gill & J. 219, 22 Am. Dec. 302, the Maryland court held that it was not essential to the crime of forgery that actual injury should have resulted, that it was sufficient that any one might be or have been injured by the instrument. So held in *State v. Johnson*, 26 Iowa, 407, 96 Am. Dec. 158. In Virginia, it was decided that an instrument is one of legal efficacy, within the rules relating to forgery, where by any possibility it may operate to the in-

jury of another. In that case the words "in full of account to date" had been inserted in a cancelled and surrendered bank check. *Gordon v. Com.*, 100 Va. 825, 41 S. E. 746, 57 L. R. A. 744. In Ohio it was held that the altering of a settlement of a book account so as to include a claim which accrued after the settlement, with intent to defraud, amounted to forgery. *Barnum v. State*, 15 Ohio, 717, 45 Am. Dec. 601.

The manifest purpose of the indictment in this case, according to the extrinsic facts and circumstances alleged, was to bring the case within the rule of some of the authorities cited, on the theory that the object of the alleged forgery of the receipt was to do injury to the insurance companies. The question is, whether the forged receipt, if genuine, could by any possibility have been used to affect the rights of those companies. The indictment avers that it was to be used in proof of and to establish the claim of defendants against the insurance companies for losses by fire of defendant's stock of goods. Would it have been competent and efficient for this purpose? It has been held that the amount of an insurance policy is not evidence of the value of the property destroyed; that it is necessary for the insured to prove the extent of the loss. 5 Joyce on Insurance (2d Ed.) p. 6164, sec. 3769, citing *Standard Fire Ins. Co. v. Wren*, 11 Ill. App. 242. In the case of *Com. v. Butler* (Ky.) 37 S. W. 840, the court held that an indictment charging defendant with forgery committed by changing the figures in a receipt issued to him by an express company, for charges advanced by him on goods shipped for another, by increasing the amount named therein for the purpose of defrauding the shipper of the difference, does not state facts establishing a forgery, but which on the facts alleged might constitute an offense different from forgery. In *Ex parte Fischl*, 51 Tex. Cr. R. 63, 100 S. W. 773, it was decided that a way bill or invoice showing that fifty cases of eggs had been shipped from T. to G. over a certain railroad, and thence to New York over a steamship line, might be the subject of forgery, though it might require an innuendo or explanatory averments. As the value of the goods declared is the only way in which it is averred the insurance companies were to be affected by the receipt, if it would not be evidence, the raising of the value would not constitute proof to the prejudice of the insurance companies' rights, wherefore the crime of forgery is not made out by the averments, and the indictment should be quashed.

Our order will be to reverse the judgment below, set aside the verdict and discharge the prisoners from further prosecution.

(90 W. Va. 613)

MOTT v. DAVIS, Agent. (No. 4417.)(Supreme Court of Appeals of West Virginia.
March 28, 1922.)*(Syllabus by the Court.)*

1. Evidence \S 143—It is not error to reject evidence having no substantial probative value.

On the trial of an issue before a jury it is not error to reject evidence having no substantial probative value thereon.

2. Negligence \S 132(3)—Evidence of railroad employee's intoxication competent on contributory negligence in mitigation of damages.

In an action under the Federal Employer's Liability Act (U. S. Comp. St. §§ 8657-8665), for damages for personal injuries sustained by an employee while employed in interstate commerce, evidence tending to show his intoxication when injured is competent to go to the jury on the question of his contributory negligence, not as constituting a complete defense, but in mitigation of damages.

3. Trial \S 260(1)—Refusing instructions on matter covered by other instructions not error.

Instructions to the jury on only one of the main issues of fact, as to which the evidence is in any appreciable degree conflicting, and covered by other instructions given and embracing the entire concrete case, may properly be rejected.

4. Master and servant \S 213(4)—Ordinary risks of riding freight trains assumed.

Where the duties of a railway employee require him to mount and ride moving freight trains, such employee assumes all the ordinary and usual risks pertaining to his employment, including the mounting and riding of such trains, but not extraordinary risks unknown to or not plainly discernible by him, and the rights and liabilities of the parties must generally be measured by the rules and principles pertaining to master and servant and not by those applicable to passenger and carrier.

5. Master and servant \S 265(5)—Negligence must be proved.

In such an action for personal injuries by an employee against his employer the fact of the injury does not render the employer presumptively negligent; generally the negligence of the master must be proven, and the rule *res ipsa loquitur* does not apply.

6. Master and servant \S 295(7)—Instructions on assumption of risks held misleading.

If from the circumstances of the injuries to an employee of a railway company he could not have seen and appreciated the extraordinary movement of a train and the danger to which he was thereby subjected and which resulted in his injuries, instructions to the jury on the theory of assumption of risk from known and apparent dangers should be rejected as misleading and improper.

7. Master and servant \S 265(4)—Negligence within federal act not presumed.

In an action for personal injuries under the Federal Employer's Liability Act (U. S. Comp. St. §§ 8657-8665), the alleged negligence of a railway company complained of must be proven by plaintiff by a preponderance of the evidence, and can not be presumed.

8. Trial \S 233(3)—Court should not by his charge refer to declaration to determine acts of negligence charged.

In an action by an employee against a railway company under the Federal Employer's Liability Act (U. S. Comp. St. §§ 8657-8665), for personal injuries sustained, due to the alleged negligence of the defendant, the court should not by instructions on the subject of such negligence refer the jury to the declaration to determine what the acts of negligence charged against the defendant are. Such acts should be covered by, or recited in, the instructions.

9. Trial \S 253(9)—Instruction permitting exclusion of evidence erroneous.

An instruction to the jury from which they might infer that plaintiff in establishing the fact of defendant's negligence was limited to his own evidence to the exclusion of defendant's evidence, is misleading and erroneous.

10. Master and servant \S 222(4)—Risk of dangerous method directed not assumed.

While, as a general rule, if two ways are presented to an employee for the performance of his duties, one a safe way, the other dangerous, and he chooses the dangerous way, he thereby assumes the risk of the latter, yet if he has been directed by his employer to perform his duties in the dangerous way, the master becomes liable for the injuries sustained by the servant due to any extraordinary or unusual dangers unknown to him and to which he is subjected in the performance of his duties in the dangerous way.

11. Master and servant \S 88(1)—Railway employee required to mount moving trains not a passenger.

The relationship of a railway company to its employee required to mount its moving trains in the performance of his duties, is that of master and servant, not that of passenger and carrier, and their respective rights and liabilities are to be determined by the law applicable to them in their proper relationship.

12. Master and servant \S 296(1)—Instruction on intoxication of employee falling under train improperly refused.

If the proximate cause of the injuries sustained by a railway employee was his use of intoxicating liquors, the railway company is not liable therefor; and an instruction to the jury so advising them, if there is appreciable evidence of the fact, is proper; but if the fact is controverted and such instruction is given on behalf of the railway company, it is error to reject an instruction proposed by the plaintiff, based on such conflicting evidence, telling them that though they may find the employee had taken a drink or so of liquor before mounting the moving train that injured him, they

could not take that fact into consideration unless they believed that he would not have fallen under the train had he not drunk the liquor.

13. Master and servant \S 89(4)—Railway employee riding according to custom entitled to protection.

Although an employee of a railway company may have given an unreasonable and improper construction of the orders of a superior officer in reference to mounting and riding moving trains in the discharge of his duties, and because thereof rides from the place of his employment to an intermediate point or station, breaking the journey, and there resumes his journey on another train according to the custom of employees, he is entitled to protection from unnecessary and unusual movements of the train due to employees generally because of such established custom known to the railway company.

Error to Circuit Court, Mineral County.

Action by Mary R. Harness, administratrix of the estate of C. E. Harness, deceased, against the Baltimore & Ohio Railroad Company and Walker D. Hines, Director General of Railroads, in which L. O. Mott, as administrator, was substituted for the plaintiff and James Davis, Agent, etc., was substituted for the defendant Walker D. Hines and for the Railroad Company. Verdict of not guilty and judgment of nil capiat against the plaintiff and the plaintiff brings error. Judgment reversed, verdict set aside, and plaintiff awarded a new trial.

Harry G. Fisher, of Keyser, for plaintiff in error.

Emory Tyler, of Keyser, and Wm. G. Conley, of Charleston, for defendant in error.

MILLER, J. The case, on the present hearing is substantially the same as to pleadings and proofs as when presented on a former writ of error, then styled Mary R. Harness, Adm'x, v. Baltimore & Ohio Railroad Co. et al., reported in 86 W. Va. 284, 103 S. E. 866. On the last trial in the circuit court the name of the present plaintiff was substituted for that of Mary R. Harness, administratrix, and the name of the present defendant for that of Baltimore & Ohio Railroad Company et al., due to the change in the director general or agent designated by the President pursuant to the Transportation Act of 1920 (41 Stat. 456). The rules and principles enunciated on the former hearing, and in the written opinion and mandate of the court must therefore be regarded and applied as the law of the present case.

The result of the new trial awarded the plaintiff on the former hearing was the same as on the first trial, except that, on the first trial the court directed a verdict for the defendant, while on the second trial the case was submitted to the jury on instructions by the court, resulting in a verdict of not guilty

and the judgment of nil capiat against the plaintiff, the subject of the present writ of error.

Counsel for plaintiff, in his original brief, points out several particulars in which he thinks the case for the plaintiff was greatly strengthened by the evidence adduced on the last trial. For example, he says that the custom of employees riding trains between Piedmont and Keyser established on the former trial was admitted by the agents and officers of the railroad company on the second trial and was shown to have existed practically since the railroad was constructed and operated. And further that it was shown that this custom extended to others than railroad employees. That it was also shown that nearly all the members of the crew of the train that killed Harness knew of the existence of this custom at Piedmont. Still another point on which counsel concedes his case was improved on the second trial, was that it was shown that the passes issued to Harness and his fellow workmen were good only on passenger trains, while their orders from their superior officers were to ride freight trains, or anything they could get in on, so as to save the time of service, an act of negligence in itself justifying recovery, as they were entitled to a safe means and method of transportation in going to and from their work as car inspectors at Bond.

In our opinion it will be unnecessary to regard these points of supposed vantage except as they may be involved incidentally in disposing of the several other points of error relied on for reversing the judgment. These relate in the main to the admission and rejection of evidence, and to the giving and refusing of instructions to the jury.

[1] The evidence said to have been erroneously rejected, and covered by plaintiff's bill of exceptions No. 2, was that of O. L. Bosley, C. N. Brown and Tom F. Kenney, to the effect that they had seen other persons than employees on many occasions boarding and riding moving freight trains at Piedmont and Keyser. We do not think the rejected evidence of these witnesses was sufficient to establish a custom imposing any liability upon the railroad company to the general public, except to not wantonly and willfully do such persons any injury. Unless received as passengers for hire, such persons would be mere trespassers; and we can not conceive of a custom of a railroad company receiving passengers on freight trains at any station or intermediate point. At all events the plaintiff could not have been prejudiced in any way, for he was allowed to and did introduce all evidence offered bearing on the question of the custom of employees of the railroad company to mount and ride moving freight trains at and between the designated stations. The right to introduce such evidence and to have the jury pass upon the

fact of such custom was one of the questions adjudicated upon the former hearing, and the admission of such evidence served all the requirements of the plaintiff. We find no prejudicial error in the rejection of this evidence. No authority is cited by counsel in support of this exception. His argument is, that as the court would not declare as a matter of law that there was a custom at Piedmont for employees to ride moving freight trains between that point and Keyser, the testimony relating to the custom of others than employees should have been admitted in order that the jury might have had the opportunity to pass upon all the facts. But what weight or relevancy such evidence could have had on the issue is not pointed out.

[2, 3] Covered by the same bill of exceptions is the motion of the plaintiff to exclude all evidence theretofore introduced by the defendant relative to the question of the drinking by Harness on the day he was killed. We see no error in this ruling of the court, and no argument was submitted in briefs or in oral argument in support of this part of the exception. As one of the questions involved and submitted to the jury was that of contributory negligence due to Harness' alleged drinking of intoxicants, not as affecting recovery, but going to the reduction of damages under the federal employer's liability law, the evidence was quite pertinent, and we think was clearly admissible on that question.

Plaintiff's bill of exceptions No. 3 presents two questions. The first relates to the ruling of the trial court in sustaining defendant's objection to the answer of engineer Riley to a question propounded by plaintiff's counsel on cross examination, to the effect that he had seen persons getting on other parts of the train at Piedmont, but he could not tell whether they were employees or not; and to the action of the court in overruling plaintiff's objection to another question propounded to the same witness on re-direct examination, and his answer thereto, as follows:

"Q. 7. Suppose you add to that two or three drinks of liquor, would that make it more dangerous? (referring to the danger of boarding moving trains). A. That just depends upon who took it."

Of course this evidence had reference to the alleged drinking of Harness, and bore to some extent on the question of his contributory negligence in riding or attempting to mount the moving train. On this question the evidence was somewhat relevant and pertinent, and we see no error in the ruling of the court admitting it.

As already indicated, the main points of error relied on involve the several rulings of the court on the giving and refusing of instructions, and we may observe, before disposing of these rulings, that they all should have conformed to the rules and principles

laid down in the opinion delivered on the former hearing, for they constitute the law of the case and are controlling here.

The plaintiff proposed some thirty-two instructions. Those given were numbered 3, 5, 6, 9, 12, 18, 21, 22, 25, 28, and 31. The remainder were rejected, and were numbered 1, 2, 4, 7, 8, 10, 11, 13, 15, 16, 17, 19, 20, 24, 26, 29, and 32. But numbers 14, 23, 27, and 30 are not in the record and can not be considered.

The defendant proposed some twenty-four instructions, of which numbers 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 22, and 23 were given; the others were rejected.

Plaintiff's rejected instruction No. 1 was a direction to the jury to find for plaintiff and assess his damages according to the rule stated in his given instruction No. 18. His rejected instruction No. 2 likewise assumed that custom justifying Harness in boarding the moving train at Piedmont with notice to defendant had been established by the evidence and that as matter of law plaintiff was entitled to a verdict in some amount, and would have told the jury that if after Harness was so lawfully on the train, the defendant was negligent in causing the train to jerk and lurch and Harness thereby to be thrown under the train, they should find a verdict for the plaintiff. So with respect to plaintiff's instruction No. 32, it is predicated on the supposed uncontradicted evidence of the custom at Piedmont of employees to mount moving freight trains. Upon the former hearing, we held upon the same evidence of such custom by employees, that the question whether defendant in view of such custom owed its employees a duty to operate its trains through such station so as to avoid unreasonable and extraordinary risks endangering their life and safety, and whether such duty was breached in the particular instance, were questions of fact for the jury. In our opinion these instructions, particularly No. 1, were beyond the rule laid down on the former hearing and were properly denied. It is the contention of plaintiff's counsel that in view of the holdings of the Supreme Court of the United States in *C. & O. Ry. Co. v. Proffitt*, 241 U. S. 462, 36 Sup. Ct. 620, 60 L. Ed. 1102, 1106, there is no good reason why instruction No. 2, and also instruction No. 4, should not have been given. Assuming those instructions and instruction No. 32 to have correctly stated legal propositions, they were fully covered by instruction No. 31, which, as we view the case, substantially covers the concrete case presented by the pleadings and proofs, which alone would have justified rejection of instructions 2, 4 and 32. In the case relied on as justifying instructions 2 and 4, the controlling question was whether the method employed in that particular case of making up the train which did the injury was the usual and orderly method, and was

known to plaintiff when accepting employment, and whether the method was one which a reasonably careful employer would have adopted, and was known to plaintiff, and was one of the risks assumed by him when accepting employment. It was decided that the defendant had no right to complain of modification by the trial court of this instruction so as to present these questions.

[4] Plaintiff's rejected instruction No. 7 assumed, as established by the uncontroverted evidence, the custom of employees boarding moving trains at Piedmont, and submitted to the jury that if they believed from the evidence that the deceased got upon the train that killed him, from the brick platform in front of the station at Piedmont used by passengers, then he chose a safe place from which to board said train, and that if said platform was wet, and he had his lunch basket on his arm, and either of these interfered with his getting on the train, then the defendant was obliged to so run and manage its train that he might not thereby be prevented from getting on with safety. The vice of this instruction, as well as that of No. 13, also rejected, is that it assumes that defendant owed the same duty to deceased and other employees that it owed to passengers at that point. The deceased was not a passenger at Piedmont when he undertook to board the train. Instructions Nos. 13 and 17 would have made it an act of negligence on the part of defendant justifying recovery under the pleadings and proofs for not having issued passes to the deceased and orders to the train crews of the trains Harness would ride upon to accept him as a passenger. No. 16 would have rendered defendant liable if the jury found Harness got aboard the train and was killed by the method of operating it, and made the duty of the defendant to him the same as that owed a passenger. Harness assumed all the ordinary risks of riding the moving train he undertook to board, and the railroad company owed him no duty except to not subject him to extraordinary risks of which he had no notice or should not have observed. Such we consider to be the law of the case as laid down in the opinion on the former hearing. Moreover, the rights of the plaintiff in these particulars were fully covered by plaintiff's instruction No. 31.

So also with regard to plaintiff's rejected instructions numbered 10, 11, 15, 19, 20, and 29, we think they were fully covered by instruction No. 31, and there was no error in rejecting them. Instruction No. 31 substantially covered plaintiff's whole case. It was as follows:

"The Court instructs the jury that if they believe from the evidence that the defendant railroad company was engaged in interstate commerce on the 12th day of September, 1918, and that Charles E. Harness was employed by it as a car inspector in such commerce at

Bond, and was in such employment on said day; and shall further believe that the said Harness lived in Keyser and had instructions from his superiors to return to Keyser on the first thing he could get in on, after his day's work was completed, in order to save the defendant company from paying any more overtime than was necessary; and shall further believe from the evidence that a custom, habit or usage existed of employees of said railroad company to get on and off of moving freight trains at Piedmont, in going to and returning from Keyser, and that such custom, habit, usage or practice was of such notoriety and continuity that defendant's managing agents and officers must have known of it; and shall further believe from the evidence that said Harness was not forbidden to use freight trains in order to return home, as quickly as possible, and that in obedience to such instructions, as to save overtime, the said Harness and his co-inspectors believing they were authorized to do so, in order to save the defendant from paying more overtime than was necessary, after their day's work was completed on said 12th day of September, 1918, went to Piedmont on a helper engine of the defendant company with the purpose and intention of completing the trip on it to Keyser 'on the first thing they could get in on' and went immediately to the tower operator and inquired what was the next train to Keyser and were informed it was an east-bound freight, running ahead of the accommodation train, and which would reach Keyser ahead of it; and that when said freight train came along it was proceeding at a rate of speed reasonably safe for railroad men, accustomed to such work to mount it, and the two Bosley boys mounted it from the platform in front of the station, and the said Harness attempted to, but failed and fell under it and was killed; and they shall further believe from the evidence that because of its knowledge of the practice and custom of its employees to get on and off moving freight trains at Piedmont, coupled with the instructions and directions given to the said Harness to return from work on the first thing he could get in on, that it was the duty of the defendant, under the circumstances, to use due care in the operation of its trains through Piedmont so as to avoid unreasonable or extraordinary risks which might endanger the life and safety of an employee lawfully on its property at that point, and bent on mounting the train in accordance with the recognized custom, and that the defendant, through its servants and employees, violated such duty by a sudden and unnecessary jerk or bump of the train which threw the said Harness under the train as he was in the act of boarding it, and after said Bosleys had safely mounted said train, and that such jerk, bump or forward movement of the train, was such that the said Harness could not have anticipated it, then the plaintiff is entitled to recover in this case, even though the jury further believe from the evidence that the said Harness was guilty of some negligence which contributed to his death. Because if the jury find that the defendant owed said Harness a duty, under the circumstances of this case, to operate its freight trains through Piedmont with due and reasonable care and safety so as to avoid unreasonable or extraordinary risks which might endanger the

life and safety of its employees lawfully on its property at Piedmont and bent on mounting the train in accordance with the recognized custom, and that injury resulted therefrom, the violation of such duty would be negligence, and contributory negligence on the part of the injured person would not defeat his right to recovery but would only go to the question of damages."

[5] Instruction No. 26 was rightly rejected. It would have told the jury that if the death of Harness was other than accidental, the burden was upon the defendant to prove by a preponderance of the evidence that his death resulted from a cause beyond defendant's control, thereby involving the rule of *res ipsa loquitur*, not generally applicable as between master and servant, or employer and employee.

[6] It remains to consider and dispose of plaintiff's exceptions to the instructions given for defendant. Of these we think numbers 2, 5, 7 and 10 were clearly bad and not in accordance with the principles laid down on the former hearing. Each, in different forms, would have told the jury in substance that though defendant was found guilty of negligence in operating the train that killed Harness as alleged, yet if in the face of danger so apparent and obvious that an ordinarily prudent person under similar circumstances should have observed and appreciated them, he attempted to board the moving train that killed him, then he assumed the risk and danger, and they should find for defendant. Manifestly the case was lastly tried on the theory of these instructions. Under the Federal Employer's Liability Act (U. S. Comp. St. §§ 8657-8685), an employee of a railroad company does not assume extraordinary risks and dangers not known to him, and if the employer is guilty of subjecting him to such dangers, his contributory negligence will not excuse the railway company for its negligence, but will go in mitigation of damages only. As said by the authorities, assumption of risk applying to the ordinary and apparent dangers, and contributory negligence, constitute two separate and distinct defenses, the one going to the entire defense of the action, and the other to the mitigation of the damages only; and this distinction should always be kept in mind in cases in which they are involved. In the present case, from the very nature of the case, Harness could not have been aware nor have seen and appreciated the dangers of a sudden and unusual movement of the train doing him the injury, and this being so, instructions that would have excused defendant wholly, if the deceased was found guilty of contributing to his injury, should have been refused. *Harness v. B. & O. R. R. Co.*, supra, and cases cited; *Cincinnati, N. O. & T. P. Ry. Co. v. Thompson*, 236 Fed., 1, 149 C. C. A. 211; *Ches. & Ohio Ry. Co. v. Proffitt*, supra.

Instructions Nos. 4 and 20, given for the de-

fendant, were apparently bad for limiting the right of plaintiff to a showing that defendant's engineer *unnecessarily* caused the train to give the unexpected jerk or bump complained of. We do not think this is the law. If the jerk or bump was an unexpected and extraordinary one, it could not have been known to decedent beforehand, and was not one of the risks assumed by him. Moreover, the positive testimony of the engineer was that, if such a jerk or bump was given, it was unnecessary, and there is no evidence that such an extraordinary movement of the train was necessary, wherefore also erroneous. According to the plaintiff's evidence, Harness had orders from his superior officer which in effect required him to board moving freight trains, and though in his employment he assumed the ordinary and apparent risks, and those known to him, he did not assume the extraordinary ones. He had the right to obey those orders, and thereby assumed only the apparent and obvious risks incident to a proper and careful operation of the train. *Coal & Coke Ry. Co. v. Deal*, 231 Fed. 604, 145 C. C. A. 490.

[7-9] Instructions Nos. 8 and 9, though abstract, we think good in stating correctly general propositions of law. No. 8 simply told the jury that the negligence of the defendant could not be presumed, but should be established by plaintiff, by a preponderance of the evidence. No. 9 is a definition of negligence in law. Certainly these two instructions, though abstract and not referable to the specific facts in the case, contain correct legal propositions.

Instruction No. 11 is good in law, in telling the jury that if they find from the evidence that Harness lost his life wholly through his own negligence, want of care and misconduct, and without proof of any negligence on the part of defendant, under the act of Congress on which the suit was brought, they should find for defendant. But it was not the proper practice for the court to refer the jury, as this instruction does, to acts of negligence charged in the declaration, leaving it to the jury to determine therefrom what such acts of negligence were.

Instruction No. 12, though substantially good, is subject to the criticism that it apparently limits the plaintiff to his own evidence on the question of the preponderance of the evidence in his favor on the question of defendant's negligence. He was entitled to anything appearing in the defendant's evidence tending to show its negligence. *State v. Manns*, 48 W. Va. 480, 37 S. E. 613; *State v. Clerk*, 51 W. Va. 457, 462, 41 S. E. 204; *State v. Snider*, 81 W. Va. 522, 528, 94 S. E. 981.

Instructions Nos. 13 and 14 we think are erroneous in limiting plaintiff's right of recovery to "specific orders" or "positive directions" of Harness' superior officer to board

moving freight trains, and telling the jury that if without such orders he chose to board moving trains in place of the safer method of using trains stopping at Bond where he was employed, he assumed the risk incident to the unsafe course and the jury should find for the defendant, thus ignoring the general orders given by Harness' superior officer to come on the first train he could get in on, and interpreted by him and others as requiring them to use any train passenger or freight that would enable them to get in. He had the right to obey such orders without being negligent. *Alabama Consolidated Coal & Iron Co. v. Heald*, 171 Ala. 263, 55 South. 181; *Holsey v. Macon, D & S. R. Co.*, 6 Ga. App. 637, 65 S. E. 690, 691.

[10-13] Instruction No. 15 was properly submitted, as there was some evidence of a conflicting nature on the fact of a custom among the employees at Piedmont to board moving trains in going to and from their places of employment.

Instruction No. 16 was good, and properly propounded to the jury that Harness was not a passenger, but an employee whose duties contemplated his riding freight trains. It told the jury that if the jerk or bump, if it occurred, which caused Harness to fall from the train, and which caused his death, was ordinary and not an unusual and extraordinary movement of the train, Harness assumed the risk, and if he thereby lost his life, the jury should find for defendant. Plaintiff's counsel says that defendant owed decedent the duty to safely carry him to Keyser, his destination. This would put him in the position of a passenger, which he was not, and relieve him of the assumption of the ordinary risks assumed in his employment.

Instruction No. 22 is good and was properly given to the jury. In substance it told the jury that, if after riding the helper engine from Bond to Piedmont on the day of his death, Harness left the defendant's premises and crossed the Potomac River into Westernport, Maryland, where he purchased and drank some intoxicating liquors, and that when he afterwards attempted to board the train that killed him, he was under the

influence of such intoxicating drinks, then the jury should consider these facts along with all the other facts and circumstances, in determining whether he lost his life through the negligence in whole or in part of the defendant, or wholly through his own negligence, and if the latter they should find for the defendant. But this instruction having been given in charge to the jury, the plaintiff was entitled to have had submitted to the jury his instruction No. 8, rejected, which properly would have advised the jury, that although they might believe that before Harness mounted the train he had taken a drink or so of liquor, they could not take that fact into consideration unless they believed that he would not have fallen under the train had he not drunk such liquors.

The remaining instruction given on behalf of defendant and covered by plaintiff's bill of exceptions is No. 23. We think it is clearly bad, if for no other reason than that it ignores plaintiff's theory of an established custom at Piedmont of mounting and riding moving trains. It may have properly submitted to the jury the question whether Harness and his fellow workmen gave a reasonable and proper construction of the order of Burk, their superior officer, regarding the use of engines and trains to get to and from their place of employment; but if so, and there was a custom at Piedmont for employees to mount and ride moving freight or other trains, Harness was entitled to the protection to which that custom entitled employees. It was not the ride from Bond to Piedmont that did him the injury; he reached Piedmont in safety, and once there, he was entitled, according to the custom, to use any train for the rest of his journey that other employees were accustomed to make use of, to get to his destination, and to have all the protection which by reason of that custom the defendant owed him. *Simpson v. Carter Coal Co.*, 79 W. Va. 365, 91 S. E. 1085.

For the errors so found in the conduct of the trial below, we reverse the judgment, set aside the verdict and award the plaintiff a new trial.

(123 N. C. 332)

CLEMMONS v. JACKSON et al. (No. 298.)

(Supreme Court of North Carolina. April 19, 1922.)

Costs ¶47, 48—Cannot be taxed against defendant disclaiming title after plaintiff abandons issue of trespass.

Where a case had once been tried by the jury, and the verdict had been set aside, after which plaintiff announced she would not ask that an issue as to trespass or damages be submitted to the jury, and moved for judgment on the pleadings, based on defendants' disclaimer to the land described in the complaint, the defendant cannot be taxed with one-half of the costs, whether plaintiff be regarded as having abandoned the suit and submitted to a voluntary nonsuit or as having a decree to quiet title rendered on defendants' disclaimer, in which event G. S. § 1743, expressly provides that the defendant shall not be subjected to costs.

Appeal from Superior Court, Brunswick County; Connor, Judge.

Action by Annie Clemmons against Malissa Jackson and others. Judgment decreeing plaintiff to be owner of the land described in the complaint as to which defendant disclaimed, and ordering one-half of the costs to be paid by each party, and defendants appeal. Error.

The court entered judgment as follows:

"This cause coming on to be heard before Geo. W. Connor, judge presiding, and plaintiff having in open court announced that she would not ask that an issue as to trespass upon the lands described in the complaint, nor as to damages, be submitted to the jury, and having moved for judgment upon the pleadings that she be decreed the owner of the land described in the complaint, and the court being of the opinion that the allegation of ownership is not denied in the answer, it is therefore, upon motion of Emmett Bellamy, Esq., and Lorenzo Medlin, Esq., attorneys for plaintiff, ordered, considered, adjudged, and decreed that the plaintiff is the owner and is in possession of the land described in the complaint.

"The court further finds that the action as now presented is one for removal of cloud on title, and that defendant now disclaims title to the land described in the complaint; that at a former term of court an order of survey was made without objection, and that said survey was made; that at a subsequent term this cause was tried by a jury, a verdict rendered, and same was set aside by the judge presiding, and a new trial ordered.

"It is now ordered by the court that the costs of this action be paid, one-half by plaintiff and one-half by defendant."

Defendant excepts and appeals.

Robert W. Davis and S. L. Doshier, both of Southport, for appellants.

Emmett Bellamy, of Wilmington, and Lorenzo Medlin, of Southport, for appellee.

HOKE, J. We are unable to find anything in this record to uphold a judgment against defendant for the costs or any part of it. It appears from a perusal of the pleadings that plaintiff filed his complaint alleging ownership of a specified tract of land, describing same by metes and bounds; that defendants had wrongfully entered on same, and cut and removed therefrom timber and timber trees, and were wrongfully attempting to farm said lands to plaintiff's damage \$50; that defendants were insolvent, and unless restrained plaintiff's loss would be irreparable; and asked judgment that plaintiff be declared the owner, for \$50 damages, and that the defendants be restrained.

Defendants answered, admitting that plaintiff had a deed for certain lands from one J. W. Brooks, and denying each and all allegations of wrong and trespass alleged against them, and denying that defendants are insolvent. Defendants further answered and alleged ownership and occupation under claim of right for 30 years, of certain described lands, and that defendants lay no claim to any part of the land alleged to belong to plaintiff except so much thereof as may be included in the deeds under which defendants claim and occupy as stated.

Upon the issues thus made, and apparently at a former term, a survey was had by order of court, and, the issues arising on the pleadings having been submitted to and determined by the jury, the verdict was set aside by the court and a new trial ordered. In this condition of the record, the cause coming on for further hearing at the present term, and plaintiff, as appears from his honor's judgment, having stated that she would not insist on an issue as to trespass or damages, upon such statement his honor, treating the action as one to remove a cloud from plaintiff's title, entered judgment of ownership in her favor, and that "each party pay one-half of the costs."

Having thus far presented and maintained the position that defendants had wrongfully trespassed upon her property, and caused the accrual of the incidental costs in investigation and trial of these litigated issues, plaintiff should not now be allowed to abandon this position, and tax the cost incurred to defendants' prejudice, without having it in some way properly determined that these defendants have wrongfully resisted her claim. *Starr v. O'Quinn*, 180 N. C. 92, 104 S. E. 66; *Brown v. Chemical Co.*, 165 N. C. 421, 81 S. E. 463.

It would seem to be a fair interpretation of these pleadings as a whole that defendant avers, and intends to aver, ownership of so much of plaintiff's claim as may be included in the deeds and occupation of defendants, and disclaims as to the remainder, and on that interpretation an issue is raised as to

whether the lands contained in plaintiff's deed cover any of the lands claimed and owned by defendant as set up and described in the answer. If plaintiff desires to suffer a nonsuit on such an issue, she may do so, but in that case she must submit to a judgment of the costs incurred in the action.

Even on the theory that the action may now be properly construed as one to remove a cloud from title, if defendants' answer is to be dealt with as a disclaimer of ownership—and the judgment of his honor so treats it—in that case the statute applicable (Consolidated Statutes, § 1743) expressly provides that the defendant shall not be subjected to costs.

There is error, and this will be certified that the judgment be set aside, and the cause further considered.

Error.

(183 N. C. 779)

STATE v. MURDOCK. (No. 324.)

(Supreme Court of North Carolina. April 19, 1922.)

1. Criminal law \S 722(2)—Comment by solicitor on defendant's personal appearance is improper.

The comment of the solicitor upon the personal appearance and the characteristics of accused was clearly improper, if not a serious breach of his privilege in arguing the case.

2. Criminal law \S 719(1), 723(1)—Counsel should not state facts extraneous to evidence calculated to prejudice accused.

Counsel have no right to state as a fact anything extraneous to the evidence, and which is calculated unjustly to prejudice accused, or to bring him into ridicule or contempt, or to humiliate or degrade him in the minds of the jury and bystanders.

3. Criminal law \S 699—Control of trial rests in discretion of trial judge.

The abuse of privilege by counsel is subject to the control by the judge in his discretion, but he should exercise great care to see that no party is improperly subjected to abuse not based on the evidence, and to remedy such abuse as in his discretion seems proper under the circumstances.

4. Criminal law \S 730(1)—Reference to misconduct of solicitor may be left until charge.

The trial judge may defer his reference to misconduct by the solicitor to which defendant objected until the charge to the jury.

5. Criminal law \S 730(12), 1144(10) — Instructions presumed to have cured improper argument; charge held sufficient to cure misconduct of solicitor in referring to appearance of accused.

Where defendant had objected to the reference by the solicitor to his personal appearance, and the court had promised to correct the matter in his charge, a statement in the charge that the jury should not consider the physical appearance or personal peculiarities

of the defendant observed by them was evidently directed to the improper comments of the solicitor, where the record states that instruction was given in compliance with the judge's promise to defendant's counsel, and is presumed to have been sufficient under the circumstances, as they were known to the trial judge, to have removed the prejudicial effect of the argument.

Appeal from Superior Court, Durham County; Daniels, Judge.

Bud Murdock was convicted of manufacturing liquor, and he appeals. No error.

Brawley & Gantt, of Durham, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. The defendant was convicted at the December term, 1921, of the superior court of Durham county, Judge Daniels presiding, of manufacturing liquor, and from the judgment upon such conviction, appealed to this court.

On the 23d of December, 1920, three officers of Durham county, Belvin, Morgan, and Hall, went into Patterson's township in Durham county and discovered three men manufacturing liquor at a still. The officers went within 40 yards of the still, and observed the men for about 20 minutes. All of them recognized the defendant, Murdock, as one of the operators of the still. The defendant attempted to prove an alibi by two witnesses named Lowe, who were relatives.

One of the alleged errors was a remark made by the solicitor as he was closing his address to the jury, which was as follows:

"I do not know when I have seen a more typical blockader. Look at him, his red nose, his red face, his red hair and moustache. They are the sure signs. He has the earmarks of a blockader."

The judge was occupied at the time, and did not notice the remark, but, the matter having been called to his attention, he stated that he would cure it in his charge, and the record further states as follows:

"The judge, in compliance with his intimation to counsel for the defendant and the solicitor, and for the purpose of complying with the objection or exception of defendant's counsel, and removing from the minds of the jury any unfavorable impression which may have been made by the comments of the solicitor upon the personal appearance of the defendant, charged the jury, as follows: The defendant did not go upon the stand to testify in the case. A statute passed by the Legislature, I think in 1879, gives the defendant the right to testify in his own behalf in a criminal case. Before that time he had no such right, but that same statute provides that, if he does not avail himself of this privilege, the jury is not to consider his failure to testify in any manner to his detriment. Nor are they to consider the physical

appearance of the defendant in court nor any personal peculiarities of him observed by them. You are to pass on the case purely upon the evidence of the witnesses."

[1] The comment of the solicitor upon the personal appearance and characteristics of the defendant was clearly improper, if not a serious breach of his privilege in discussing the case before the jury, but the judge attempted to correct, and we think he did correct, any wrong or injurious impressions made upon the jury, or we must take it that he did, as abuses of this sort, we have said in many cases, must be left largely to his sound discretion as to the method or manner he will adopt in protecting the rights of the defendant. We held in *State v. Davenport*, 156 N. C. 596, at page 597, 72 S. E. 7:

"Improper remarks made by counsel to the jury are not reversible error when it appears that the court has instructed the jury not to consider them, but to confine themselves in their consideration to the facts bearing upon the issues; and exception to the instructions not being more specific or full, must be taken by way of prayers for special instruction thereon. The trial judges are cautioned to immediately and fully correct abuses of this character."

See, also, *State v. Tyson*, 133 N. C. 692, 45 S. E. 838. It appears that in *State v. Davenport*, supra, the remark of the solicitor was quite as unjustifiable and as prejudicial to the defendant as the invective of the solicitor in this case, and there it was stated:

"In his address to the jury, one of the prosecuting attorneys used this language: 'The jury should find the defendants guilty, as their fines will be paid by the Richmond Cedar Works, a foreign corporation with headquarters in Virginia, a foreign state, where its officers sit back with slippers on their feet and direct this thing to be done.' The defendants objected to these remarks at the time they were made, and the judge fully cautioned the jury, not at that time, but in his charge, to disregard them and to confine their inquiry to the single question as to the forcible entry. We think the caution was sufficient, but if not, the defendant should have requested the judge to make it so. This they did not do"—citing *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225.

[2, 3] The "abuse of privilege" by counsel is not to be regarded as is the language of a judge, which reflects upon a party or a witness. *State v. Rogers*, 168 N. C. 112, 83 S. E. 161; *Morris v. Kramer*, 182 N. C. 87, 108 S. E. 381. The judge should be permitted in the former case, to direct the course of the trial, but he should exercise great care to see that no party is improperly subjected to abuse or to unjust criticism; that is, such as is not based upon the evidence. Counsel have no right to state as a fact anything extraneous to the evidence, and which is calculated to unjustly prejudice a party, or to bring him into ridicule or contempt, or to humiliate or degrade him in the minds of the

jury and bystanders, but we must leave the remedy for this evil for the judge to apply as in his discretion and good judgment seems to be proper under the circumstances.

[4, 5] The judge in this case acted with reasonable promptness, and it was sufficient to defer his reference to the incident until he charged the jury. He told the jury, and cautioned them, in effect, that they should decide the case solely upon the evidence and be governed only by it. He also cautioned the jury that they should not consider the "physical appearance or personal peculiarities of the defendant observed by them." It must have been evident to the jury that he was directing their attention to the improper comments of the solicitor, and it is stated in the record that he gave this instruction in compliance with his promise to defendant's counsel, and to remove any unfavorable impression which had been made upon the jurors by the comments of the solicitor. He might have said more, under the circumstances, but we cannot hold that he was obliged to do so. He might have been convinced, in the presence of the situation, that what he said was quite sufficient for the protection of the defendant. It must not be understood that we approve at all of what was said by the solicitor, we merely trust to the presiding judge to administer the proper corrective, and to see that no wrong is done. He has the discretion to set aside the verdict, and to order a new trial, if he is satisfied that the verdict was the result of prejudice engendered by the severe language of the solicitor, and we must presume that he did not so conclude, as he took no such action.

This is not like *State v. Evans*, 183 N. C. —, 111 S. E. 526, at this term, because there the solicitor referred entirely to evidence of facts not in the case, and, when the judge had properly cautioned the jury not to consider what the solicitor had said, the latter repeated his remark, and for this reason we ordered a new trial, while in this case there was no repetition by the solicitor after the judge had cautioned the jury to confine themselves strictly to the evidence, and not to be influenced by the personal or physical appearance of the defendant. He was manifestly referring to and attempting to remove any wrong or prejudice caused by the solicitor's remarks, although he may not have expressly mentioned them. He could not have intended his instructions to apply to anything else, because what the solicitor had said was the only reference to the defendant's personal appearance.

The other exception is without any merit, as the judge gave to the jury the proper caution, and one which this court has repeatedly approved.

There is no reversible error in the case.
No error.

(183 N. C. 338)

JONES v. UNION GUANO CO., Inc.
(No. 357.)

(Supreme Court of North Carolina. April 19, 1922.)

Agriculture ⇐1—**Constitutional law** ⇐170
—Statute requiring analysis of fertilizer as condition precedent to suit for breach of warranty is reasonable, and does not impair contract right.

O. S. § 4697, providing that no suit for damages to crops resulting from the use of fertilizer shall be brought except after chemical analysis showing deficiency of ingredients, is not unreasonable and impossible of fulfillment, and does not impair the right of contract, but is constitutional, and a plaintiff not showing compliance therewith in an action for breach of warranty of fertilizer was properly nonsuited.

Appeal from Superior Court, Rockingham County; Long, Judge.

Action by R. M. Jones against the Union Guano Company, Inc. Judgment of nonsuit at the close of plaintiff's evidence, and plaintiff appeals. Affirmed.

Civil action to recover damages for an alleged breach of warranty in the sale of certain fertilizers; plaintiff alleging that his crop of tobacco was injured by reason of some deleterious or harmful substance contained in the fertilizer sold by the defendant. At the close of plaintiff's evidence there was a judgment as of nonsuit, from which this appeal is prosecuted.

J. M. Sharp, of Reidsville, and Fentress & Jerome, of Greensboro, for appellant.

O. O. Efrd, of Winston-Salem, Glidewell & Mayberry, of Reidsville, and Manly, Henderson & Womble and Swink & Hutchins, all of Winston-Salem, for appellee.

STACY, J. This is one of 19 suits brought by resident farmers of Rockingham county against the Union Guano Company for alleged crop damage or shortage occasioned by reason of the use of certain fertilizer manufactured and sold by the defendant. See same case reported in 180 N. C. 319, 104 S. E. 653.

The plaintiff in this particular case bought 51 sacks of the fertilizer in question, and upon trial there was evidence tending to show its inferior quality, deficiency of stated ingredients, injury to the crop of tobacco, etc. But his honor dismissed the action and entered judgment as of nonsuit upon the ground that there had been no compliance with section 4697 of the Consolidated Statutes with respect to having the fertilizer tested by chemical analysis, as required by said section as a condition precedent to plaintiff's right to maintain this suit. Upon the record, it must be conceded that plain-

tiff has failed to meet the requirements of the law, which clearly provides that no suit for shortage, or damages to crops, resulting from the use of fertilizers, shall be brought except after chemical analysis showing deficiency of ingredients, unless the dealer has been selling goods that are outlawed by the statute, or has offered for sale in this state during the season dishonest or fraudulent goods. *Fertilizer Works v. Aiken*, 175 N. C. 402, 95 S. E. 657.

In order to surmount the barrier, and to obviate the difficulty thus presented, plaintiff attacks this section of the law relating to agriculture as unconstitutional and void. He says its provisions are unreasonable and impossible of fulfillment. But we are unable to agree with the plaintiff in this position. The reasons underlying the passage of the statute in question are fully stated with approval and supported by the citation of several authorities in *Fertilizer Works v. Aiken*, 175 N. C. 398, 95 S. E. 657. We need not repeat here what has so recently been said in that opinion. There is nothing in the act which impairs the right of contract, and we think it is constitutional. *Fertilizing Co. v. Thomas*, 181 N. C. 274, 106 S. E. 835.

Affirmed.

(183 N. C. 373)

LACY, State Treasurer, v. FIDELITY BANK OF DURHAM. (No. 261.)

(Supreme Court of North Carolina. April 19, 1922.)

1. Schools and school districts ⇐10—**Constitutional requirements for the encouragement of education and the establishment of a general and uniform system of public schools held mandatory.**

The requirements of Const. art. 9, §§ 1-3, that education shall be encouraged, that the General Assembly shall provide by taxation and otherwise for a general and uniform system of public schools, and that each county shall be divided into a convenient number of districts, in each of which public schools shall be maintained at least six months in every year, are mandatory and imperative.

2. States ⇐119—**Law for state bond issue to provide counties with necessary school buildings held not a lending of credit in violation of Constitution.**

Laws 1921, c. 147, authorizing a state bond issue from the proceeds of which money shall be advanced to the several counties to enable them to build school buildings necessary to comply with Const. art. 9, §§ 2, 3, providing the maintenance of free schools therein for all the children in the state at least six months in each and every year, does not violate article 5, § 4, prohibiting the lending of the credit of the state in aid of any person, association, or corporation, unless by a vote of the people.

3. Counties \Leftrightarrow 150(2)—State loans to county for maintaining required schools are not subject to debt restriction.

The amount advanced by the state to counties under Laws 1921, c. 147, to enable them to erect the buildings necessary to maintain the six-month school required by the Constitution is not subject to Const. art. 7, § 7, prohibiting municipal corporations from contracting debts except for necessary expenses, unless approved by a majority of the qualified voters, since that section, when liberally construed as a part of the entire Constitution, cannot be held to apply to a state-wide measure undertaken in obedience to the mandate of another provision in the Constitution.

4. Schools and school districts \Leftrightarrow 9—School authorities have not unlimited discretion in establishing additional schools.

Though the school authorities are given discretion in the exercise of their powers to comply with the requirement of the Constitution that they shall maintain one or more school terms at least six months in every year, the number of schools established must be in reasonable proportion to the need, and an extravagant expenditure by such authorities might become the subject of judicial control.

Appeal from Superior Court, Wake County; Devin, Judge.

Controversy without action by B. R. Lacy, State Treasurer, against the Fidelity Bank of Durham. Judgment for the plaintiff, and defendant excepts and appeals. Affirmed.

From the facts submitted, it appears that the General Assembly, with a view of providing a special building fund to enable the counties of the state to properly maintain a six-month school term, as required by the Constitution, passed an act (chapter 147, Laws of 1921) in which the state Treasurer was authorized and directed to issue \$5,000,000 coupon bonds of the state, sell the same, and from the proceeds advance to the several counties of the state a proportionate amount from time to time for the purpose of enabling such counties to acquire sites and to provide for building, equipping, repairing, the public school buildings, etc., adequate and necessary to properly maintain a six-month school, as contemplated and required by article 9 of the Constitution. The reasons and purpose of said enactment being set forth in the preamble as follows:

"Whereas, the enrollment of children in the public schools of North Carolina has so greatly increased within the past two years that the entire school plant in a large majority of the counties must be greatly enlarged or rebuilt altogether, and in all counties school buildings are inadequate to provide accommodations for the children now attending; in many cases large numbers of children being crowded into small rooms, too unsanitary for right living, and too small to afford an opportunity for the teachers to give proper instruction to those anxious for an education; and

"Whereas, the larger type of community school for the rural districts should be constructed of a more permanent nature, and planned for a larger service in order that the school may serve the community more effectively, the construction of a more permanent type of school building depending in most cases absolutely upon the state's opening a way for the counties to secure funds at a reasonable rate of interest for erecting school buildings sufficient to accommodate the children of school age, and to provide for the normal annual increase; and

"Whereas, the smaller towns and consolidated rural districts must pay a high rate of interest on bonds they issue, and often experience much difficulty in disposing of them at par, and often are without adequate machinery for properly handling sinking funds, interest, and retiring the bonds."

The act then provides that the proceeds realized from sale of the bonds in question shall for the purposes indicated be loaned from time to time to the different counties in proportionate amounts, on application of county boards of education, such loans to be made only when approved by the board of county commissioners, and with ultimate approval also of the state board of education. Said loans shall be indorsed and secured by the vote or votes of the respective county boards of education, payable in 20 equal annual installments, with interest, and at the same rate at which the money is secured by the state on the bond issue provided for. And said board of education shall provide in its May budget for a special tax denominated the Special Building Fund Tax, sufficient to meet the annual installments payable upon the loans so made, and it is further provided that these loans to the counties shall constitute a lien on any and all school moneys due said counties from any special state appropriation, and on all school moneys raised by taxation in the respective counties or school districts which may have borrowed of this fund from the county commissioners. Under the regulations established by the state board of education pursuant to powers conferred by the Constitution and statutes applicable, before any loan is made from the fund in question, the county board of education and the board of county commissioners are required to make affidavit that the loan applied for is necessary, and required to provide a six months school, etc.

There are various other provisions of the statute, looking to the integrity and preservation of this fund and its fair and equitable distribution to the several counties according to their needs, but this seems to be a sufficient statement to a proper apprehension of the questions presented in the record.

Pursuant to the requirements of the law, the state treasurer has had the bonds in question prepared, and has contracted to sell

the same to defendant at a satisfactory price, the rate of interest being $4\frac{1}{2}$ per cent., and defendant resists payment on the ground that the act is invalid as in violation of article 5, § 4, of the Constitution, which prohibits the General Assembly from lending the state's credit in aid of any association, person, or corporation except in aid of unfinished roads or of roads in which the state has a direct pecuniary interest, unless the subject shall be submitted to a direct vote of the people and approved "by a majority of those who shall vote thereon"; and, second, as in violation of article 7, section 7, of the Constitution, which prohibits municipal corporations from contracting debts and levying taxes except for necessary expenses, unless approved by a majority of the qualified voters therein.

The court being of opinion that the proposed bond issue would constitute valid obligations of the state, entered judgment that defendant comply with its contract of purchase, and defendant excepted and appealed.

Fuller, Reade & Fuller, of Durham, for appellant.

Attorney General J. S. Manning, and Assistant Attorney General Frank Nash, for appellee.

HOKE, J. (after stating the facts as above). Sections 1, 2, and 3, of article 9 of the Constitution, this being the article on Education, are as follows:

"Section 1. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

"Sec. 2. The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the state between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race.

"Sec. 3. Each county of the state shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment."

And after making various other provisions in furtherance of the general purpose, the article closes with the following, designated as section 15:

"The General Assembly is hereby empowered to enact that every child, of sufficient mental and physical ability, shall attend the public schools during the period between the ages of six and eighteen years, for a term of not less

than sixteen months, unless educated by other means."

[1] A proper consideration of the article will clearly disclose that its provisions are mandatory, imposing on the Legislature the duty of providing "by taxation and otherwise for a general and uniform system of public education, free of charge, to all the children of the state from six to twenty-one years," that the school term in the various districts shall continue for at least six months in each and every year, and that the counties of the state are recognized and designated as the governmental agencies through which the Legislature may act in the performance of this duty and in making its measures effective. In various decisions of the court the importance and imperative nature of these constitutional provisions have been upheld and emphasized. Board of Education of Alamance County v. Board of Com'rs, 178 N. C. 305, 100 S. E. 698; Board of Education of Granville County v. Board of Com'rs, 174 N. C. 469, 93 S. E. 1001; Collier v. Com'rs of Franklin County, 145 N. C. 170, 59 S. E. 44.

Speaking to the subject in the Granville County Case, where it was held that high schools could well be made a part of the public school system, the court said:

"We find nothing in this article of our Constitution, or elsewhere, which in terms restricts the public schools of the state to the elementary grades, or which establishes any fixed and universal standard as to form, equipment, or curriculum. On the contrary, in view of the prominent placing of the subject in our organic law, the large powers of regulation and control conferred upon our state board, extending at times even to legislation of the subject, the inclusive nature of the terms employed, 'to all the children of the state, between the ages of six and twenty-one years of age,' together with the steadfast adherence to this patriotic, beneficent purpose, throughout our entire history, it is manifest that these constitutional provisions were intended to establish a system of public education adequate to the needs of a great and progressive people, affording school facilities of recognized and ever increasing merit to all the children of the state, and to the full extent that our means could afford and intelligent direction accomplish."

And in Collier v. Com'rs, supra, wherein it was held that this obligation to maintain a six-month school (then four) should prevail notwithstanding it required a tax levy over and above the limitations on amount of taxation elsewhere appearing in the Constitution, Associate Justice Brown, delivering the principal opinion, said among other things:

"The reasons which induced the people to adopt article 9 are set forth in its first section, and they are so exalted and forcible in their nature that we must assume that there is no article in our organic law which the people regarded as more important to their welfare and prosperity. This conviction is greatly strengthened when we find that the only crimi-

nal offense defined and made indictable by the instrument is one created especially to enforce obedience to its specific commands in respect to the establishment of four-months schools. In commenting upon this Mr. Justice Avery well says: 'It is difficult to understand why this wide departure from the usual course was made, unless we interpret it as emphasizing the intent of the framers of the Constitution that the officers held subject to this unusual liability should have power coextensive with their accountability.'

And in the concurring opinion, Walker, Judge, said:

"It is not for me to say, in construing that instrument, whether its provisions make for the best interest of the people. I must ascertain the will of the people from what they have said—and not from what I think they should have said—not meaning at all to imply that they have not spoken wisely, and truly expressed their intention. If there is a deliberately conceived and carefully stated principle in their Constitution, and one which it is perfectly evident they desired to be clearly understood and rigidly enforced, it is that embraced in sections 1, 2 and 3 of article 9, in regard to the schooling of the children of the state. They intended that the state should no longer be debased or retarded in its progress by the ignorance of its people. It is plain that those who wrote these sections knew, as any intelligent citizen knows, that the surest way to obtain good government, and to enjoy it, is to know how to appreciate its blessings and to be able to perpetuate it by a proper and intelligent use of it. When it was, therefore, declared that the people must be educated, it was just as binding an injunction that the means to that end must be supplied by taxation as it was that the counties or even the state government should be supported."

And these comments are further strengthened by the fact that a recent amendment to our Constitution, providing that the total of the state and county tax on property shall not exceed 15 cents on the \$100 value, except when the county property tax is levied for a special purpose, and with the special approval of the General Assembly, contains the exception that the restriction shall not apply to taxes levied for the maintenance of the public schools for the term required by article 9 of the Constitution.

[2] This being the law applicable, we can see no reason against the validity of this proposed bond issue, the purpose being to procure funds to construct the necessary school buildings for the proper maintenance of the six-month school term in the various counties of the state. And we are not impressed with the objection that the measure is in violation of section 4, article 5, of the Constitution, whereby the General Assembly is prohibited from lending "the credit of the state in aid of any person, association, or corporation, except to aid the completion of the railroads unfinished at the time of the adoption of this Constitution, or in which

the state has a direct pecuniary interest, unless" by a vote of the people. That, as its terms import, is an inhibition on giving or lending the credit of the state to third persons, individual or corporate, and of the kind contemplated in the provision, and can have no proper application to a bond issue necessary to the lawful maintenance of a state-wide school system required of the state government and imposed as a primary duty on the state itself by express provision of the Constitution.

[3] Nor can the second objection of appellant be allowed to prevail, that the statute will impose upon the counties of the state an obligation to repay the amount of money loaned to them, without a vote of the people therein, as required by article 7, section 7, of the Constitution. It is said by a writer of approved merit that a constitution shall be construed on broad and liberal lines, and so as to give effect to the intention of the people who adopted it. Black on Interpretation (3d Ed.) pp. 75, 76. And to that end it is held that the instrument should be considered as a whole, and construed so as to allow significance to each and every part of it if this can be done by any fair and reasonable intendment.

Applying the principle, the restrictions contained in this article 7, section 7, which prohibits counties, cities, and towns, or other municipal corporations from contracting debts or levying taxes except for necessary expenses unless approved by a majority of the qualified votes therein, must be understood to refer to debts and taxes in furtherance of local measures, and do not extend to a state-wide measure of the instant kind, undertaken in obedience to a separate provision of the Constitution and in which the counties are as stated expressly recognized as the governmental units through which the general purpose may be made effective.

The position is presented and clearly approved in principle in the Collie Case, supra. There and at that time there was in article 5, section 1, of the Constitution a limitation on the rate of taxation for general state and county purposes, which at times and in that instance operated to prevent the maintenance of the public schools for the constitutional term of four months (since changed to six), and the court held that in order to harmonize the two provisions and to allow each its proper significance the general limitation must yield so as to permit a sufficient tax levy to maintain a school for the specified school term expressly required by article 9 of the Constitution. In the various decisions of the court in which it was held that the incurring of debts, levying of taxes by counties or other municipal corporations were not to be regarded as necessary expenses within the meaning of article 7, section 7, of the Constitution, they were either cases of cities or towns or special

districts, or the purpose was to provide means for maintaining schools longer than the constitutional term, or they were cases of some school in a special locality enacted without any reference to maintaining a state-wide school system for any specified term, and in which the constitutional requirement in question was in no way presented or considered. The distinction between local measures of the kind presented in the decisions referred to and that in the instant case was foreshadowed in *Commissioners v. State Treasurer*, 174 N. C. 141, 93 S. E. 482, 2 A. L. R. 726. That was a case in which it was sought to impose upon the counties of the state the expenses of a strictly localized road system, under the exclusive governance and control of the local authorities. And in answer to the position that the school authorities of the state were advancing aid to local effort, the court said:

"The suggestion that the state extends its aid in offering educational advantages to the people throughout its territory, and that it is at times made effective in certain designated localities, to our minds, is not apposite to the question decided in this appeal and not helpful to its proper solution. That is recognized and dealt with as a state-wide system under the control of general state officers, made imperative by special constitutional provision; and while aid is at times extended to certain localities where need is pressing, and through the agency of local officials, they are acting, as stated, in promotion of the general system and are in fact and truth performing official duties to that end."

And in *Hollowell v. Borden*, 148 N. C. 255, 61 S. E. 638, a case where the levy of a school tax of the city of Goldsboro graded school without a popular vote was disapproved, Associate Justice Brown, distinguishing the decision from *Collie's Case*, supra, said:

"There is nothing in the recent decision of the court in *Collie v. Commissioners*, 145 N. C. 170, which sustains the idea that our public school system is a necessary municipal expense. On the contrary, the opinion regards the public school system as a state institution, founded in the Constitution and governed and controlled by the General Assembly. In order to reconcile clauses of the Constitution apparently conflicting, we held in that case that the

provision for four-month school terms was mandatory, and that in order to give effect to it the General Assembly could compel the counties of the state, when necessary, to disregard the limitation upon taxation contained in article 5, section 1."

[4] While we thus uphold the proposed bond issue as being in the reasonable exercise of the powers conferred by the Constitution, it must not be understood that the exercise of these powers is in all cases arbitrary and without limit as to amount. "They shall maintain one or more school terms at least six months in every year" is the requirement of the Constitution, showing that this number must be in reasonable proportion to the need. And if the school authorities, departing from any and all sense of proportion, should enter on a system of extravagant expenditure, clearly amounting to manifest abuse of the powers conferred, their action may well become the subject of judicial scrutiny and control.

But no such condition is presented in this record. On the contrary, there is every reason to believe and know that the preamble of the present statute is well within the facts, and in no way exaggerates the need, a position that is emphasized by the fact that our Legislature, under section 15 of article 9, has in specified instances made it indictable, where there is a willful failure to attend the public schools. Consolidated Statutes, § 5758 et seq.

It would present indeed an incongruous and most deplorable condition if the General Assembly, having thus provided for a compulsory attendance on the public schools, were not allowed to make provision also for adequate and suitable housing for the purpose. And we are of opinion that the proposed bond issue, with the requirement that the loans made to the counties be repaid to the state, is throughout a constitutional enactment, and in the reasonable exercise of the powers conferred on the authorities to enable them to properly maintain the public schools of the state.

There is no error, and the judgment of the court holding this a valid indebtedness is affirmed.

Affirmed.

(183 N. C. 678)

TEAL et al. v. LILES. (No. 412.)

(Supreme Court of North Carolina. April 26, 1922.)

Appeal and error ¶78(3)—No appeal lies from order sustaining demurrer to counterclaim.

The Supreme Court will not entertain an appeal from an order sustaining a demurrer to a counterclaim where no verdict or judgment was rendered on plaintiff's cause of action or as to the costs.

Appeal from Superior Court, Anson County; Lane, Judge.

Action by W. D. Teal and another against J. S. Liles, receiver of the Polkton Lumber Company. From a judgment sustaining a demurrer to defendant's counterclaim, defendant appeals. Appeal dismissed.

This is an action to recover for 43,187 feet of lumber at \$22 per 1,000 feet, delivered by plaintiffs to defendant and accepted by them. To the complaint the defendants set up a counterclaim for breach of contract in failing to manufacture lumber of certain timber, and asking judgment for \$13,938.66 damages. The court sustained the demurrer of plaintiffs to the counterclaim, and the defendant appealed.

B. V. Henry and McLendon & Covington, all of Wadesboro, for appellants.

A. A. Tarlton and Robinson, Caudle & Pruette, all of Wadesboro, for appellees.

PER CURIAM. The court having sustained a demurrer to the counterclaim, the defendant appealed, and asks this court to reverse the judgment sustaining the demurrer on the counterclaim, and that a jury trial may then be had on the counterclaim. There was no verdict or judgment upon the plaintiffs' cause of action, and no judgment as to the costs. This court has uniformly adhered to its ruling that it will not entertain a fragmentary appeal.

The whole subject was recently fully discussed with the fullest citation of authorities, and upon the reason of the thing at last term in *Cement Co. v. Phillips*, 182 N. C. 439, 109 S. E. 257, citing very numerous authorities. That decision was cited with approval at last term by Adams, J., in *Farr v. Lumber Co.*, 182 N. C. 727, 109 S. E. 833, and also in *Leroy v. Saliba*, 182 N. C. 757, 108 S. E. 303.

The rules of practice are well settled and well known to the profession, and are based upon the soundest reasons in the dispatch of the public business by the courts, and a slight attention to them would avoid such inadvertences as in this instance.

Appeal dismissed.

(183 N. C. 733)

STATE v. SHEFFIELD. (No. 404.)

(Supreme Court of North Carolina. April 26, 1922.)

1. Intoxicating liquors ¶238(4)—Evidence of possession for sale held sufficient for jury. Evidence of illegal possession of whisky for purpose of sale held sufficient for the jury.

2. Intoxicating liquors ¶238(4)—Whether defendant had liquor in possession for delivery as seller's agent properly submitted to jury.

In a prosecution for possessing whisky for sale, where defendant stated he had procured some for another to whom he was carrying it when arrested, that he had the liquor, which was not the first time, and would have more soon, and threatened the man who reported him, the court properly left to the jury the question whether he had the liquor as the seller's agent for the purpose of delivery to the buyer.

3. Intoxicating liquors ¶167—One who aids another to sell is equally guilty.

One who aids another to sell intoxicating liquor is as guilty as if he sold it himself.

4. Criminal law ¶822(1)—Reference in charge to defendant's waiver of preliminary examination held harmless.

A part of a charge which merely stated a contention by the state as to defendant's alleged waiver of preliminary examination before a justice was rendered harmless where the judge gave an immediate and conclusive reply which fully protected defendant's rights.

Appeal from Superior Court, Moore County; Ferguson, Judge.

Ernest Sheffield was convicted of illegal possession of whisky for the purpose of sale, and he appeals. No error.

H. R. Ihrle and H. F. Seawell, both of Carthage, for appellants.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. The defendant was convicted under an indictment which in a single count charged him with having the illegal possession of whisky for the purpose of sale, and from the judgment upon conviction appealed to this court.

There was no evidence in the record except that of the state, and it contends that, being capable of two inferences, it was argued upon those inferences and submitted to the jury, who found the defendant guilty. Stated briefly, the state's evidence was as follows: Deputy Sheriff Brown arrested the defendant in the town of Hemp, October 1, 1921, found a rifle in his automobile, and, under the cushion of the back seat, a half gallon of whisky in two quart packages. At the time the defendant was arrested he was under bond in another whisky case. Sheriff

Brown immediately carried him before a justice of the peace, and on the way defendant told him there was no use of having a trial, that he would just waive examination. He said that he had got a quart for himself and another quart for somebody else, but refused to tell who the other person was. He further said that the man who reported him had better never tell it or he would fix him and fix him good. The justice of the peace was present when the defendant was arrested, and at the trial told him he could move the case. Thereupon the defendant replied that he had the liquor and it was not the first time he had had liquor, and he would have some more pretty soon. The justice of the peace testified that as a revenue officer he had searched defendant's premises a number of times, but found nothing to arrest him for, but he did find where a still had been operated about 150 yards from his house.

[1] This is substantially the state's evidence. At its conclusion, defendant demurred to the evidence, and excepted to the judge's overruling the motion to dismiss. The above statement shows evidence sufficient to carry the case to the jury.

[2, 3] The court left it to the jury to determine upon all the evidence whether the defendant had possession of the liquor innocently, or for the purpose of selling or assisting in selling it to another. The defendant, upon his own statement, had procured the liquor, one quart for himself and the other quart for the person to whom he was carrying it at the time the officer arrested him. The jury could fairly and reasonably draw the inference that he had purchased the liquor from some one else for himself and the other person. He did not state that it had been given to him, but said rather defiantly, in answer to the justice of the peace who had agreed to remove the case from him, that "He had the liquor and it was not the first time he had had liquor, and that he would have some more pretty soon," and also threatened the man who had reported him, adding that he had better never let him know who it was, for, if he did, "he would fix him, and fix him good." The liquor was found in the car under the cushion of the rear seat. Upon this evidence there was no *prima facie* case that the law had been violated, and the court did not so instruct the jury, but left it to the jury, upon all the evidence, and as an open question of fact, to find whether the defendant had the liquor in his possession for the purpose of unlawfully delivering it as agent for the seller, to the person for whom, he had testified, it was intended. If he was participating in effecting the sale of the liquor from one person to another, he was just as guilty as if he had sold it himself, as the principal, and was not

merely aiding a third party to make the sale. *State v. Burchfield*, 149 N. C. 537, 63 S. E. 89, which seems to answer fully all the contentions of the defendant in this respect.

[4] The part of the charge relating to the defendant's waiver of a preliminary examination before a justice of the peace was only the statement of a contention or argument by the state to which the judge gave an immediate and conclusive reply, which fully protected the rights of the defendant, and rendered harmless any reference to the alleged waiver.

No error.

(183 N. C. 421)

GIBBON v. LAMM. (No. 415.)

(Supreme Court of North Carolina.
April 28, 1922.)

Negligence \S 136(17, 25)—Questions of negligence and proximate cause of damage by fire held for jury.

In an action for negligently setting out a fire and permitting it to spread to plaintiff's premises, *held*, on the evidence, that the questions of negligence and proximate cause were for the jury.

Appeal from Superior Court, Moore County; Lane, Judge.

Action by N. L. Gibbon against Cynthia E. Lamm. To a judgment allowing a motion to dismiss the action, plaintiff excepts. New trial.

This action was brought to recover damages for the negligent setting out of fire by the defendant, the plaintiff alleging that the fire spread to his premises and burned his property, and that he was thereby damaged.

At the close of the plaintiff's evidence, the defendant demurred thereto, and moved to dismiss the action, and the court allowed the motion and dismissed the action, and plaintiff excepted. This is the only question in the case. The matter before the court is simply the sufficiency of the evidence, and whether it ought to have been submitted to the jury. There was evidence that the fire which destroyed the plaintiff's property was set out by the defendant, and it was also sufficient to show that it spread to the property of the plaintiff and burned it, and he thereby suffered damages.

We will state briefly so much of the testimony as is pertinent to the ruling of the court dismissing the action.

J. W. Phillips testified:

"The fire was in the pasture. There were no woods inside the pasture, but woods adjoining the pasture on the northeast side, and that is how the fire got out. The woods next to the pasture were burned."

N. J. Patterson testified:

"I know where Mr. Lamm and his wife lived and where the fire was. I know Mr. Gibbon's place also. I live about halfway between Mr. Gibbon's place and Mr. Lamm's place, and lived there at the time the fire occurred. The fire burned me out. It came to my house from the southwest, and that was in the direction of Mr. Lamm's. The fire occurred near 2 o'clock, 1:30, or somewhere along there. The wind was blowing strong. The wind was coming from toward Mr. Lamm's premises, coming that way. The fire was between 400 and 500 yards from my house, when I saw the blaze, coming a little to the left of my premises, between me and the graded road. The fire was going in the direction of Mr. Gibbon's premises. Mr. Gibbon's premises were about two miles from my place. It was sometime before I went over to Mr. Gibbon's after the fire occurred, two or three weeks I suppose. Everything was burned from my place over there. Some buildings were burned I noticed. It burned some property for me, and I thought at the time that I was hurt worse than any one else; burned a lot of my dry oats and feed. I didn't go any time after the fire from my premises to Mr. Lamm's. I live about two miles from Mr. Lamm's. The general character of the country between my place and Mr. Lamm's is wire grass and black jack and a little lightwood. Mr. Lamm had a conversation with me about the fire. He came to see me three times to see the damage that was done, and I was wanting him to pay me right smart damage, and he said he wasn't able. He settled the matter with me and gave me \$10. He spoke to me about the fire and stated that he had colored fellows there, and they left for dinner, and the wind got up, and he told them to secure it, and they never went back to see until it got out. I don't think he was there himself. That is what I heard. Mr. Lamm told me that. He said he left the colored fellows and told them to secure it, and they went to dinner, and the fire got out while they were at dinner. He told me that the colored fellows were burning some black jacks for the purpose of getting the ashes."

There was other testimony tending to show that the fire was started in the pasture of the defendant, and burned from there connectedly and continuously to plaintiff's land, and there burned his property, for the loss of which plaintiff brings this suit.

Judgment was entered in the case dismissing the action, and plaintiff appealed.

U. L. Spence, of Carthage, for appellant.
H. F. Seawell, of Carthage, for appellee.

WALKER, J. The court erred in withdrawing the case from the jury and ordering a nonsuit, as there was some evidence under which the plaintiff was entitled to have the issues submitted to a jury. It appears that the fire was originally set in the pasture, and there was testimony to the effect that it was in cleared land, but there also was some that woodland adjoined the pasture on one side of it, and it was by communication of the fire to the woods that "it got

out and spread to the other land." Whether it was negligent in the defendant to have started the fire, by himself or through his agents, or servants, in the pasture, for the purpose of burning the blackjacks to get potash, or, having started it, to have failed after the wind rose with such force and violence, as to endanger the premises of adjoining proprietors, to keep the fire under control and prevent it from spreading to other land and destroying the timber thereon, was a mixed question of fact and law, the findings of fact being for the jury and the law applicable to the facts as found by them being solely a question for the court. If the fire was negligently set, or ordinary care was not exercised on the defendant's own land, and this was the proximate cause of the injury to the plaintiff's property, the defendant would be liable.

"In general it may be said that a person is not liable for damages caused by a fire in the absence of negligence in its use. One may lawfully kindle a fire on his own premises for the purpose of husbandry, and he is not liable for injury caused by it to the property of another, in the absence of negligence in its management. Ordinary care and caution is all that is required; that is, the fire should be kindled at a proper time, under ordinarily favorable circumstances, and in a reasonably prudent manner. The owner will, of course, be liable for injuries from negligence in starting fires or in not using proper precautions to prevent their spread. He is not at liberty to kindle fires, when on account of the time, manner, or circumstances it appears probable that damage to others will result, such as setting it in a dry time, or without guarding it sufficiently to prevent its spreading. Nor should he set it near the property of another in matter through which it is likely to spread to such property from inflammable matter. It is immaterial whether the negligence consisted in the time or manner of kindling or the means used to prevent its spread, and where a fire is negligently kept it is immaterial in what manner it spreads to the premises of another." 29 Cyc. 460, 461.

The following instruction to the jury was given in *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63, a case somewhat similar to this one, and held to be correct, and sufficient:

"That 'to maintain his action the plaintiff must prove that the fire which occasioned the damage to his wood was communicated thereto from the fire which the defendant had set on his own land, and that the defendant in burning his brush did not use due and reasonable care in setting the fire, and in said burning did not use due and reasonable care and diligence to control the fire, and prevent its escape and communication to the adjoining and surrounding lands; and that the burden of proof upon both these propositions was upon the plaintiff.'"

The court there held by Justice Gray that, if a man who negligently sets fire on his own

land, and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated, citing numerous cases in support of the proposition.

But the case goes beyond this, as N. J. Patterson gave testimony from which the jury may have reasonably inferred, and found, that the escape of the fire from the defendant's premises was due to the negligent failure of his servants, or agents, in not preventing the escape of the fire and its spread to other land, as he had instructed them to do, after the wind rose and made it dangerous for the fire to be unguarded. Instead of doing so they went to the house for their dinner, and when they returned, it was too late, as the jury may have found, to stop the fire, and save plaintiff's property, which was burned.

We said in *Caton v. Toler*, 160 N. C. 104, 73 S. E. 929, that the rule of care required of the defendant to prevent the escape of the fire from his own land to that of plaintiff is the ordinary care that a reasonable and prudent person would have exercised under the existing or similar circumstances. In *Averitt v. Murrell*, 49 N. C. 323, a case relied on by the plaintiff, the court charged the jury correctly, as this court said, that the defendant, who had set out the fire, would be responsible for his own negligence, of course, and also for that of his agents, or servants, which had caused the injury.

The question of proximate cause was for the jury under proper instructions from the court, and would depend upon the circumstances under which the fire was started and communicated to plaintiff's land, where his property was destroyed by it. Ordinarily, what is the proximate cause of an injury is a question for the jury, aided, of course, by instructions from the court as to the law bearing upon it. *Railroad Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256.

There was error. The nonsuit will be set aside and a new trial had.

New trial.

(183 N. C. 419)

HARE v. HARE. (No. 414.)

(Supreme Court of North Carolina. April 26, 1922.)

1. Costs \S 61—To be equally divided when judgment for each party for one-half of land in controversy.

Where plaintiff sued to determine his and defendant's rights as to a tract of land, and defendant counterclaimed that he be declared

sole owner, and the judgment was that each was entitled to an undivided one-half interest, the costs should be divided, especially in view of C. S. \S 1243, providing that costs in such actions rest in the discretion of the court.

2. Costs \S 13—In equitable proceedings held in discretion of court.

The adjudication of costs in equitable proceedings is in the discretion of the court.

Appeal from Superior Court, Moore County; Lane, Judge.

Action by Alfred R. Hare against Franklin S. Hare for a declaration of rights with respect to a tract of land. From a decree that each was entitled to an undivided one-half interest, both parties appeal. Affirmed as modified.

H. F. Seawell, of Carthage, for plaintiff.

U. L. Spence, of Carthage, for defendant.

CLARK, C. J. This was an action between two brothers over the home place of their father, containing 48 acres, lying between a 50-acre tract on one side, which he had given to the plaintiff, and a 50-acre tract on the other side, which he had given to the defendant. The plaintiff claimed through an alleged deed for this 48-acre tract from the parents to him; the defendant denied such deed was ever delivered to the plaintiff, and likewise alleged that the parents of the parties and the plaintiff and defendant had all joined in the execution of a deed or paper writing of later date by the terms of which the plaintiff and the defendant were each to care for their parents during their natural lives, and after their death the plaintiff and the defendant should own the land as tenants in common, but if either son failed to contribute to the support of parents, as therein provided, and the other did, the son so contributing should have the whole of the land. The defendant alleged that he had fulfilled his part of the contract, and that the plaintiff had not, and hence the defendant should be declared the owner of the whole interest in the land.

Upon the issues duly submitted the jury found that:

(1) The deed executed by K. H. Hare and his wife to the plaintiff for the 48 acres of land described in the complaint was never delivered to the plaintiff.

(2) The defendant, Franklin S. Hare, contributed to the support of his father during his lifetime as alleged in the answer.

(3) The plaintiff, Alfred R. Hare, contributed to the support of his father during his lifetime as alleged.

(4) The plaintiff is the owner of one-half interest in the 48 acres described in the complaint.

The court entered a decree, reciting that by virtue of the deed executed July 27, 1904, between plaintiff and defendant and their father and mother, duly recorded, the plaintiff is owner in equity in a fee-simple undivided interest in the 48 acres of land described in the complaint; and that the defendant is the owner in equity and in fee simple of the other one-half undivided interest in the said tract of land, and entered a decree that each party should so hold a one-half undivided interest in the premises and the judgment should be a release on the part of each of any other interest in said 48 acres beyond the one-half undivided interest of each in pursuance of the verdict and the judgment of the court. In the verdict of the jury and the judgment of the court we find no error except as to the costs which were adjudged against the defendant.

[1] The chief controversy seems to be in regard to the costs which, as is not unusual, has become the chief concern in this litigation. This was not an action of ejectment, and the plaintiff did not recover on such claim, but this demand for judgment was that "the rights of plaintiff and defendant, with respect to said 48 acres of land be declared by the court." The defendant set up a counterclaim that he be declared the sole owner of the whole tract of 48 acres. Neither party recovered anything from the other under the verdict of the jury. The judgment of the court being that each was entitled to an undivided half interest, the costs should be divided (C. S. § 1243), especially as, the action being in the nature of an equitable proceeding, the costs rest in the discretion of the court. *Simmons v. Allison*, 119 N. C. 557, 26 S. E. 171.

In *Wooten v. Walters*, 110 N. C. 259, 14 S. E. 734, 736, the court held that where an action is not strictly for the recovery of real or personal property, costs will be allowed in the discretion of the court.

[2] The action in effect has been in the nature of an equitable proceeding, and in such case the adjudication of the costs is in the discretion of the court. *Parton v. Boyd*, 104 N. C. 422, 10 S. E. 490; *Yates v. Yates*, 170 N. C. 536, 87 S. E. 317. In *Gulley v. Macy*, 89 N. C. 345, it was held that there had been no recovery of land by plaintiffs, within the strict meaning of the statute, but that the judgment was of an equitable nature, and the court was authorized to adjudge the costs one-half against each party. There are numerous other decisions which can be cited in support of a similar ruling as to costs.

The costs will be paid one-half by the plaintiff and one-half by defendant, respectively.

Modified and affirmed.

SNOW v. HAWKES. (No. 361.)

(Supreme Court of North Carolina. April 19, 1922.)

1. Contempt ¶2—Defined.

"Contempt of court" signifies not only a willful disregard or disobedience of the court's orders, but such conduct as tends to bring the authority of the court and the administration of the law into disrespect, or to defeat, impair, or prejudice the right of witnesses or parties to pending litigation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contempt.]

2. Contempt ¶2—"Direct contempt" defined.

At common law "direct contempt" consisted in words spoken or acts done in the presence of the court which tended to defeat or obstruct the administration of justice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Direct Contempt.]

3. Contempt ¶2—"Indirect" or "consequential contempt" defined.

At common law "indirect or consequential contempt" consisted in words spoken or acts done at a distance, and not in the presence of the court, having a tendency to defeat or obstruct the administration of justice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consequential Contempt; Indirect Contempt.]

4. Contempt ¶52—Offender may be instantly dealt with for direct contempt.

For commission of the acts forbidden in C. S. § 978, relating to direct contempt, an offender may be instantly apprehended and dealt with.

5. Contempt ¶54(1)—Rule based on affidavit is used in case of indirect contempt.

In case of indirect contempt for offenses specified in C. S. § 985, ordinarily a rule based on affidavit is issued requiring the party charged to show cause why he should not be attached.

6. Contempt ¶27—Is committed by defendants bail bondsman compelling plaintiff to withdraw suit by threat of prosecution.

Under C. S. § 985, subsecs. 3, 7, relating to contempts, the act of the bail bondsman of defendant in seduction suit in compelling plaintiff to withdraw the suit by threat of prosecution on a criminal charge and imprisonment is punishable as a contempt.

7. Contempt ¶44—Court has power to punish for contempt committed out of jurisdiction.

Under C. S. § 985, subsecs. 3, 7, relating to contempts, compelling plaintiff in an action for seduction to withdraw his suit by a threat of prosecution and imprisonment, where the offender answered a rule requiring him to show cause why he should not be punished and made a defense, he was punishable as for contempt, though it was committed out of the jurisdiction.

Appeal from Superior Court, Surry County; Long, Judge.

Action by Robert L. Snow against Hobart Hawkes. From judgment of guilty on a rule to attach W. A. Hawkes for contempt, W. A. Hawkes appeals. Affirmed.

The plaintiff brought suit against the defendant to recover damages for the seduction of the plaintiff's daughter, and upon proceedings in arrest and bail the defendant executed a bond with his father, W. A. Hawkes, as surety. Later the plaintiff and W. A. Hawkes happened to meet each other in Hillsville, Va. There W. A. Hawkes compelled the plaintiff by threat of immediate imprisonment (in default of bail) to affix his signature to a withdrawal of, or an agreement to withdraw, his suit against the defendant, then pending in Surry county, N. C. Upon plaintiff's affidavit a rule was served on said W. A. Hawkes to show cause why he should not be attached as for contempt. The respondent answered the rule and did not question the court's jurisdiction of his person. Several affidavits were filed, and at the hearing his honor found in substance the following facts:

The plaintiff duly instituted the above-entitled action in Surry, where the cause arose, and obtained an order for the arrest of the defendant, and the defendant entered into bond in the sum of \$5,000 with the respondent as surety. The summons was duly served, and the pleadings were regularly filed. After the action had been instituted and while it was pending W. A. Hawkes met the plaintiff in Hillsville and told him that Hawkes and the clerk of the court of Carroll county, Va., had found a bill of indictment pending in the court there charging the plaintiff with burning Hawkes's barn some fifteen years before that time, and that, if the plaintiff did not withdraw the suit pending in Surry, Hawkes would have plaintiff arrested before he could leave town. Plaintiff could give no bail at Hillsville, and to avoid arrest and imprisonment he signed the paper referred to, purporting to be a receipt or agreement executed in consideration of \$10. The plaintiff can neither read nor write and did not understand the full meaning of the paper. The plaintiff is satisfied that his daughter was debauched by the defendant. W. A. Hawkes for many years has had the general reputation of being a blockader, and now has the general reputation of intimidating witnesses and parties who appear against him and of exerting a demoralizing influence on the entire community in which he lives. His general character is bad.

His honor further found as a fact that procuring the plaintiff's signature to the paper by the means set out tended by its operation to embarrass and obstruct the due administration of justice in the pending suit, and pronounced judgment from which the respondent appealed.

J. H. Folger, of Mt. Airy, for appellant.
Carter & Carter, of Mt. Airy, for appellee.

ADAMS, J. [1] Contempt of court signifies not only a willful disregard or disobedience of its orders, but such conduct as tends to bring the authority of the court and the administration of the law into disrespect or to defeat, impair, or prejudice the rights of witnesses or parties to pending litigation.

[2, 3] At common law contempts were classified as direct and consequential. Direct contempt may be defined as words spoken or acts done in the presence of the court which tend to defeat or obstruct the administration of justice; and consequential, or indirect, or constructive contempt is an act having like tendency, done at a distance, and not in the presence of the court. The distinction between these classes is preserved in our statute law.

[4, 5] Acts punishable for contempt are set out in section 978, and acts punishable as for contempt in section 985 of the Consolidated Statutes. In case of the former the offender may be instantly apprehended and dealt with, but for the latter ordinarily a rule based upon affidavit is issued requiring the suspected party to show cause why he should not be attached. But in either instance suitable punishment may be administered. In McCown's Case, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N. S.) 603, Walker, J., in a learned and comprehensive opinion said in substance that the power of the courts to punish for contempt is a part of the fundamental law; that it is not conferred by legislation, being an inherent power which the Legislature can neither create nor destroy; and that it arises from necessity, because it is necessary to the exercise of all other powers. And Blackstone characteristically remarks that the process of attachment for contempt "must necessarily be as ancient as the laws themselves." 4 Bl. 286.

The respondent does not controvert the power of the court to punish for contempt, whether direct or constructive; but to the judgment rendered in the case at bar he interposes two objections. He contends: (1) That the act complained of is not punishable as for contempt; and (2) that, if it is, the act was done outside the territorial jurisdiction of the court.

[6] As to the first contention, the instant question is whether the means used by the respondent to effect dismissal of the plaintiff's suit tended to impair or prejudice the rights or remedies of the plaintiff or to defeat the administration of justice. At common law contempt might be committed by treating with disrespect the rules or process of the court, or by perverting such process to the purposes of private malice, extortion, or injustice. 4 Bl. 286. The common-law principle includes any attempt to intimidate or

willfully and unlawfully to prevent a person from instituting or defending an action in any court of record. Rapalje on Con. 27, note 1. To compass the same end our statute in like manner provides that every court of record shall have power to punish as for contempt any person whose unlawful interference with the proceedings in any action shall tend to defeat, impair, impede, or prejudice any party's rights or remedies, and that such power shall extend to all cases where before the statute was enacted attachments and proceedings as for contempt had been adopted and practiced in courts of record for the enforcement of remedies or the protection of rights. C. S. § 985, subsecs. 3 and 7. This principle is applied in numerous decisions. It has been held, for example, that a person who presents to the court a fraudulent claim for the payment of money, or willfully interposes a false answer, or decoys a witness or dissuades him from attending the trial, or insults on account of an adverse verdict a juror who has been discharged, or willfully does any other act which tends to defeat the rights of any party to a pending action, may be punished as for contempt. In re Fountain, 182 N. C. 49, 108 S. E. 342; State v. Moore, 146 N. C. 653, 61 S. E. 463; In re Young, 137 N. C. 553, 50 S. E. 220; In re Gorham, 129 N. C. 481, 40 S. E. 311; Ex parte Toepel, 139 Mich. 85, 102 N. W. 369; Scott v. State, 109 Tenn. 390, 71 S. W. 824. Here it may be noted that the last paragraph of section 978 is applicable, not to constructive, but to direct, contempt. If the respondent by the direct application of overpowering physical force had obtained dismissal of the plaintiff's suit, his act would have been no more effective than intimidation or duress by a threat of imprisonment; and the written agreement procured under duress, although the court was not in session, was unquestionably an act which tended directly to interfere unlawfully with the pending suit and to impair the remedy and defeat the rights of the plaintiff.

[7] The second objection involves a question of jurisdiction, but in our opinion it cannot avail the respondent, if it is true that the plaintiff's signature to the alleged agreement was procured in Virginia, and that the court had no extraterritorial jurisdiction; for since the respondent appeared in court, answered the rule, and made his defense, the question of jurisdiction is material only as it relates to the operation and ultimate effect of his wrongful act. It is perfectly obvious that the respondent's paramount object was to secure dismissal of the plaintiff's suit by fraud, deceit, and imposition on the court. The imposition was to be consummated in the county where the action was pending through an unlawful scheme which was intended to be not only continuing, but

coextensive with the illegal purpose, and therefore operative in the superior court of Surry. The respondent's act is plainly embraced in the provisions of the statute to which we have referred, and the mere fact of his absence at the time he put the agency in motion cannot absolve him from the imputation of constructive contempt.

There being no error in the record, his honor's judgment must be affirmed.

Affirmed.

(133 N. C. 327)

**PIEDMONT POWER & LIGHT CO. v. L.
BANKS HOLT MFG. CO.**
(Nos. 333, 335.)

(Supreme Court of North Carolina. April 19, 1922.)

1. Electricity ☞—Amount of power or light to be supplied determined by general principles of contract.

The amount of power or light to be supplied under a contract, by an electric light or power company, operating under a quasi-public charter, must be determined according to the general principles of contract, which as a rule are absolute.

2. Electricity ☞—Evidence as to possible profit, if rate had not been raised, held irrelevant.

In an electric power company's action to recover an amount charged in excess of the rate agreed on with defendant, evidence as to whether plaintiff could have made a profit or expenses if the rate had not been raised was irrelevant and immaterial, as it could not go beyond the amount agreed on except by order of the corporation commission.

3. Electricity ☞—Excessive payments for power recoverable if made under apprehension of discontinuance of service.

Payments by a manufacturing company of charges for electric power, in excess of the rate agreed on, may be recovered, if made under apprehension of having to shut down its plant if it did not pay.

4. Electricity ☞—Evidence ☞—Whether excessive charges were paid under duress held for jury; judicial notice of chaotic industrial condition.

In an electric power company's action to recover from a manufacturing company an amount charged in excess of the rate agreed on, where it was shown that defendant in 1919 tried to get power elsewhere and finally refused to pay the increased price, it was for the jury to determine whether payments made without protest from September, 1918, to June, 1920, at such increased rate were made to prevent the shutting down of defendant's plant, the court taking judicial notice of a chaotic industrial condition at such time which made it practically impossible to arrange for power elsewhere, so that it would have been useless to protest.

5. Electricity ☞11—Consumer need not apply to corporation commission for relief from increased rates.

It is not the duty of an electric power consumer to apply to the corporation commission for relief against an increase of rates, the power company being bound by the rates as fixed in its contract, until relieved by the corporation commission.

6. Electricity ☞11—Agreement to pay more than contract rate is void if without consideration.

An agreement to pay a rate for electric power in excess of that fixed by contract would be void, unless there were some consideration, as the power company would be doing nothing it was not already under contract to do.

7. Electricity ☞11—Refusal of instructions supported by evidence held erroneous.

In an action to recover charges for electric power in excess of those agreed on, where there was evidence that defendant tried to get power elsewhere and finally refused to pay the increased price, the court erred in refusing to instruct the jury that defendant could recover payments made at such increased rate without protest, if it did so to prevent the shutting down of its mill, the effect of such refusal being to tell the jury that there was not a scintilla of evidence of such facts.

Appeal from Superior Court, Alamance County; Daniels, Judge.

Action by the Piedmont Power & Light Company against the L. Banks Holt Manufacturing Company. From a judgment of nonsuit on the complaint, and for plaintiff on defendant's counterclaim, both parties appeal. New trial awarded on defendant's appeal, and judgment of nonsuit affirmed.

The plaintiff is a public service corporation with its principal office at Burlington. On December 21, 1915, it entered into a contract with the defendant to furnish it electric power to operate and light its mills situated in the town of Graham at the rate of 1 cent per k. w. h. for electric energy. This contract was later modified by divers agreements to the basis of 1½ cents per k. w. h. In September, 1921, the plaintiff wrote the defendant advising that, on account of increased cost due to war conditions, it would be necessary to raise the rate to 2 cents per k. w. h., and thereafter the bills were made out against the defendant at that rate. The defendant pleaded, as a counterclaim, all collected above the 1½-cent rate, which it had paid from November, 1918, to June, 1920.

At the close of the evidence, on motion of the defendant, the court directed a judgment of nonsuit as to the plaintiff's claim to recover the amount in excess of 1½ cents, which excess the defendant had refused to pay after June, 1920.

The court charged the jury that, if they found the facts to be as testified to by the

witnesses, they should answer against the defendant the issue on its counterclaim to recover back the excess above 1½ cents, which the defendant had paid on plaintiff's demand between November, 1918, and June, 1920. Judgment accordingly, and appeal by both parties.

J. J. Henderson, of Graham, and A. L. Brooks, of Greensboro, for plaintiff.

William P. Bynum, of Greensboro, E. S. Parker, Jr., of Graham, and Sidney S. Alderman and Banks Holt Mebane, both of Greensboro, for defendant.

CLARK, C. J. The contract made between the plaintiff and defendant, in December, 1915, stipulated a schedule of rates on a basis of 1 cent per k. w. h. This contract was to extend for five years, from April 1, 1916, and thereafter until terminated by either party upon 6 months' notice, given in writing to the other. In October, 1917, the defendant agreed to increase this amount to be paid by .003 (three mills) per k. w. h. for 6 months, from October 1, 1917. On June 1, 1918, the defendant, in writing, agreed to pay for said electric current in addition to the amount previously paid, the sum of .005 (five mills) per k. w. h. "only so long as the cost of New River or Pocahontas coal shall be more than \$5 per ton f. o. b." The current was billed the defendant on this agreement at 1½ cents per k. w. h. until the 2d or 3d of September, 1918. On that date the plaintiff wrote defendant a letter with a full statement of their expenses and financial condition and said:

"It is now necessary for us to arrange to increase our rate to our large customers to 2 cents per k. w. h. and to ask our lighting customers to pay us a surcharge of 30 per cent, as long as present conditions prevail."

After this, beginning in October or November, 1918, the plaintiff charged the defendant, and the defendant paid for current, at the rate of 2 cents per k. w. h., until June, 1920. In the spring of 1919, Mr. Williamson, active manager of defendant, advised plaintiff that he was "going to get power elsewhere at a lower rate than the 2 cents charged" by the plaintiff.

When the contract was made between the plaintiff and defendant in 1915, the defendant was operating its plant with power generated by steam, and, upon the faith of that contract, they scrapped and sold their steam plant. In June, 1920, the defendant notified the plaintiff that they would no longer pay for current for power in excess of 1½ cents per k. w. h., and demanded repayment for all in excess of this sum, and this is the counterclaim set up in this action.

[1] The plaintiff was under an absolute contract to supply the defendant with all the current it desired to use for 5 years, from

April 1, 1916, at the rate specified. This sum was afterwards increased by consent to 1½ cents per k. w. h., which sum was duly paid.

"Where an electric light or power company, operating under a quasi public charter, enters into an ordinary contract to furnish electricity for a given number of lights or for a given amount of power, the obligation as to the amount of power or light to be supplied must be construed and determined according to the general principles of contract, which, as a rule, are absolute." *Turner v. Power Co.*, 154 N. C. 135, 69 S. E. 769, 32 L. R. A. (N. S.) 848.

Under the laws of this state, the plaintiff could have gone before the Corporation Commission and have made an application to raise its rates. In *re Utilities Co.*, 179 N. C. 161, 101 S. E. 619; *Dry Goods Co. v. Public Service Co.*, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420. This was not done, but the plaintiff arbitrarily notified the defendant that it had raised its rates to 2 cents per k. w. h.

The following agreement is set out in the record:

"It is agreed between the plaintiff and defendant that, if the plaintiff is entitled to recover the difference between the 1½ cents paid and the 2 cents demanded for power supplied by the Piedmont Company of the L. Banks Holt Manufacturing Company after June, 1920, that the amount sued for by the plaintiff is correct, and it is further agreed that, if defendant is entitled to recover on his counterclaim for payments made for power from September, 1918, to June, 1920, in excess of the rate of 1½ cents per k. w. h., then the amount set out in this answer as a counterclaim is the correct amount to which defendant is entitled."

The pleadings show that the defendants began in July, 1920, to deduct from the monthly bills for current used by it the sum of one-half cent per k. w. h., paying to plaintiff 1½ cents per k. w. h. and retaining the balance of one-half cent per k. w. h., and that the amount so retained by the L. Banks Holt Manufacturing Company, amounts to \$4,172.64; and this is the amount sued for, as per the above agreement. On the other hand, the defendant claims, as a counterclaim, the difference between 1½ cents and 2 cents for electric current which it paid without any agreement or by any order of the Corporation Commission, from November, 1918, to June, 1920, amounting to the sum of \$9,529.33.

The defendant asked the court to charge the jury:

"If you should find from the evidence and by its greater weight, that the defendant paid the difference between 1½ cents and 2 cents for its electrical current, in order to prevent the shutting down of its mill, and so as to continue operating same, then I charge you to answer the issue, 'Yes' and to fix the amount at \$9,529.33"

111 S.E.—40

—which was refused, and the defendant accepted. The defendant further asked the court to charge the jury:

"If you shall find from the evidence and by its greater weight, that the defendant had no other source from which to obtain power to operate its mill, and that it paid the difference between 1½ cents and 2 cents, for the time that it did pay same, in order to obtain power to operate its manufacturing plant and in order to prevent the shutting down of the same, then I charge you to answer the issue, 'Yes' and to fix the amount at \$9,529.33."

[2] The evidence as to whether the plaintiff could have made a profit or even expenses, if the rate had not been raised by it above 1½ cents is irrelevant and immaterial. The plaintiff was a public service corporation and had made a contract extending for five years, from April, 1916, at the rate of 1 cent per k. w. h., and then to terminate only upon 6 months' notice. During the lifetime of that contract, there had been modifications increasing the rate by agreement to 1½ cents, but the plaintiff could not go beyond that agreement, except by order of the Corporation Commission.

[3] The defendant scrapped its steam plant upon faith in the contract made in 1916 for 5 years, and later voluntarily assented to increase the price to 1½ cents. If the demand for the extra one-half cent was paid under duress—

"payment coerced under duress or compulsion, though not made in ignorance of the fact, may be recovered."

Within this rule are payments of charges or exactions under apprehension on the part of the payers of being stopped in their business if the money is not paid. *American Brewing Co. v. City*, 187 Mo. 367, 86 S. W. 129, 2 Ann. Cas. p. 821, and notes.

In *Newland v. Turnpike Co.*, 26 N. C. 372, Ruffin, C. J., said:

"It was, however, objected on the trial, that, although the money was not due to the company, the plaintiffs could not recover it back, because they had paid it without suit, and voluntarily; but this objection counsel very properly abandoned here. The payment was not voluntary, that is, as payment of a debt admitted to be due and willingly made; but it was made as a means of obtaining a passage on the road for the mail, which the plaintiffs were obliged to carry, and of keeping their property from being taken from them by distress; and so was compulsory, and without consideration."

In *Lumber Co. v. R. Co.*, 141 N. C. 191, 53 S. E. 823, it is said:

"It is not necessary that, at the time of payment, there should be any protest. . . . The nature of the business considered, the shipper does not stand on equal terms with the carrier in contracting for charges of transportation, and if the shipper pays the rates established in violation of law to the carrier rather than forego his services, such payment is not

voluntary, in the legal sense, and the shipper may maintain his action for money had and received to recover back the illegal charge."

[4] The manufacturing company had scrapped its steam plant, and the court must take judicial notice that, at this time, there was a chaotic condition in industry, so that it was practically impossible for the defendant to arrange for power elsewhere, and, in view of the testimony that in 1919 the protest was so vigorous that the defendant was trying to get power elsewhere and that in June, 1920, it positively refused to pay this price, the matter should be referred to the jury upon the instructions asked and refused, whether the payment was made under duress or not. It was useless to protest, and the law does not require the doing of a vain thing. *Gerringer v. Ins. Co.*, 133 N. C. 417, 45 S. E. 773; *Bateman v. Hopkins*, 157 N. C. 474, 73 S. E. 133, Ann. Cas. 1913C, 642.

[5] There was no duty upon the defendant to apply to the Corporation Commission, for it had an absolute contract by which the rates were fixed. The plaintiff was bound by those rates until relieved by the Corporation Commission.

In *Public Service Co. v. Finishing Co.*, 178 N. C. 546, 101 S. E. 88, the Public Service Company applied to the Corporation Commission and received permission to increase its rates in the corporate limits of Salisbury. The Public Service Company attempted to increase its rates beyond the limits of Salisbury to a customer, whom it was under contract to serve at rates specified in the contract. The court held that it could not do so and that the contract was binding, and the court, in that case, in effect, held that the contract was binding until changed by the Corporation Commission. The exact question presented was decided in *Power Co. v. Burditt Bros.* (1920) 94 Vt. 421, 111 Atl. 582; P. U. R. 1921B, 6, where the court said:

"It is suggested by the plaintiff that, if the defendants felt aggrieved by the action of the plaintiff in raising the rate, their remedy was by complaint to the Public Service Commission, but it was not necessary for them to pursue that course. The contract rate was valid

and binding upon both parties but subject to revision by the Public Service Corporation, as the public good might require."

[8, 7] If this sum was not paid by agreement, then certainly it can be recovered back. An agreement to pay this sum would have been void, unless there was some consideration, as the plaintiff was doing nothing which it was not already under contract to do. The prayers for instruction should have been given, and the court should have left it to the jury to determine whether this sum was paid, in order to prevent the shutting down of its mill. In refusing this instruction, the judge, in effect, told the jury that there was not a scintilla of evidence that defendant had paid to keep from shutting down his plant and to prevent injury to his property.

There is therefore simply and purely a question of damages for breach of contract. The amount of such damages is settled by the agreement above set out, dependent upon the proposition of law. The sole issue, in effect, is whether the defendant, by not giving an earnest protest, acquiesced in the illegal demand from November, 1918, down to June, 1920; or whether, having scrapped its steam plant upon making this contract, it was forced to make the payment demanded under duress, lest its plant might be closed.

It is very clear that the plaintiff's demand cannot be sustained, and the court properly so charged for, after June, 1920, the defendant not only protested, but absolutely refused to pay. We think that the two prayers of instruction asked by the defendant should have been given, and the jury should have found whether the defendant made the payment of the extra one-half cent per k. w. h. between November, 1918, and June, 1920, by duress. If the answer is in the affirmative, the amount of that verdict is agreed upon as above stated. If the answer is in the negative, then the defendant will not be entitled to recover anything.

In refusing these instructions there was, in the defendant's appeal, error for which there should be new trial.

In the plaintiff's appeal, the judgment of nonsuit should be affirmed.

(183 N. C. 338)

MEBANE v. BROADNAX et al. (No. 356.)

(Supreme Court of North Carolina. April 19, 1922.)

Attorney and client §125—Attorney cannot buy adverse interest in subject-matter of litigation without client's consent.

An attorney cannot, without his client's consent, buy and hold otherwise than in trust any adverse title or interest in the subject-matter of the litigation to which his employment relates, though no fee has been paid him and no fraud was intended.

Appeal from Superior Court, Rockingham County; Long, Judge.

Action by B. Frank Mebane against Robert Broadnax and wife and T. H. Chumley, in which W. R. Dalton was made a party defendant. From a decree for defendant Chumley, defendants Dalton and Mrs. Broadnax appeal. No error.

This was an action originally begun against Robert Broadnax and wife and T. H. Chumley and the complaint filed in January, 1919, alleged that the plaintiff was entitled to a deed against Robert Broadnax and his wife for a tract of land of about 400 acres known as "Hunter's Delight." The original plaintiff, Mebane, contended that he was entitled to the deed by virtue of a certain paper writing, referred to as an option or contract to convey, and prayed that the court would require the defendants Broadnax and wife to convey said land to him, and not to their codefendant, C. H. Chumley, who had agreed to purchase the land from them. The defendants Broadnax and wife and Chumley filed an answer, denying that the plaintiff was entitled to a deed of the land and the defendant, W. R. Dalton, now a defendant in this action, signed the pleadings as counsel for T. H. Chumley and Broadnax and wife. In May, 1919, he had himself made defendant to the action, and set up that he had purchased the land from Broadnax and wife and held a fee-simple deed to the same.

On June 21, 1921, T. H. Chumley, a defendant in this action, by a leave of the court filed an amended answer through his present counsel, stating that he was advised that the defendant W. R. Dalton, while acting as counsel for him, had purchased the land for himself, and not for his client, T. H. Chumley; that as he had purchased it for his client, he claimed the conveyance for himself upon the repayment to W. R. Dalton of the money and obligations assumed by him in the purchase, and that, if he had not purchased it for his client, T. H. Chumley, he declared a trustee to that effect, and required to convey the property, upon reimbursement by said T. H. Chumley.

The case was tried at a former term, and

the court determined that the original plaintiff, B. Frank Mebane, could not sustain his cause of action. This left the contest between T. H. Chumley and his former counsel, the defendant, W. R. Dalton. At November term, 1921, the issue between Chumley and Dalton was tried, and the jury found that defendant had purchased and held the land as trustee for the use and benefit of his former client, T. H. Chumley, and a decree was entered accordingly.

The following appeared to be the facts of the controversy between Chumley and Dalton: In August, 1918, Broadnax and wife agreed to sell the tract of land in dispute to T. H. Chumley, who had been a tenant thereon for a number of years. Agreeing upon the price of \$10,000, one-half to be paid cash and the balance in two equal installments, one and two years, the party went to Wentworth to execute the deed and the mortgage to secure the balance due. They employed Dalton, told him to look up title and prepare the papers. Mr. and Mrs. Broadnax were to pay the fee for these services. All parties to the agreement were present, and agreed in placing the matter in Dalton's hands. Upon examination of the record, he advised the defendants Broadnax and Chumley that the title was clear.

After leaving the courthouse, P. W. Glidewell, who was acting as attorney for B. Frank Mebane, approached Dalton and Chumley, and stated to them that Mebane claimed this land, and that Broadnax did not have a right to sell it, and Mebane intended to bring suit to prevent the sale. Dalton stated to Chumley that he need not bother about that, as he (Dalton) would look after the matter. Mr. and Mrs. Broadnax and Chumley then went with Dalton in an automobile to an attorney's office in Reidsville, and Dalton began the preparation of the deed and mortgage for the transfer of the property to Chumley. At this juncture, an officer served the summons in the action by Mebane upon Broadnax and Chumley. Dalton then stated to Chumley that nothing more could be done in the matter of the sale until the litigation was out of the way; that he would represent them and file the proper answer.

The defendant Chumley is an illiterate man, and cannot read or write except to sign his name. Shortly thereafter the defendants Dalton and Broadnax started negotiations without the knowledge of Chumley, whereby Dalton purchased the land from Mr. and Mrs. Broadnax and took a fee-simple deed to himself. To protect himself he entered into a contract with Broadnax on December 26, 1919, in which the terms for the payment of the land are more favorable than those which had been agreed upon between Broadnax and Chumley, and in addition Mr. and Mrs. Broadnax agreed

to hold the said Dalton harmless against any adverse judgment that might be obtained in the pending action, and this paper was deposited with the president of the bank in Reidsville, of which Dalton was counsel and in whose building he had his office.

Dalton did not deny that he did not inform Chumley of his negotiations with Broadnax and wife, and Chumley relied solely upon Dalton as his counsel, and did not engage other counsel until he learned, many months afterwards, that Dalton had taken a deed to the land, which he thought had been done to protect him against Mebane, and did not understand that it was taken by Dalton on his own behalf, thus defeating his own chances to get the land.

At the time of the conclusion of the litigation with Mebane the land was worth from \$13,000 to \$15,000, and still is. T. H. Chumley has a contract to sell the land for \$13,000 and his complaint is that he should have this profit of \$3,000, and not his counsel. Dalton knew nothing of the value of the land and the opportunity of profit in its purchase until the matter was called to his attention in his employment by his client, T. H. Chumley.

The jury found in response to the issue that Dalton purchased the land in question, and now holds the same as trustee for T. H. Chumley, and judgment was entered accordingly. Appeal by defendants.

Manly, Hendren & Womble, of Winston-Salem, and W. R. Dalton, of Reidsville, for appellant Broadnax.

R. C. Strudwick, of Greensboro, and W. M. Hendren, of Winston-Salem, for appellant Dalton.

A. L. Brooks, of Greensboro, and J. R. Joyce, of Reidsville, for appellee Chumley.

CLARK, C. J. The obligation resting upon the attorney by virtue of relationship of client and attorney in such cases as this is thus stated in *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065:

"It may be laid down as a general rule that an attorney can in no case without the client's consent, buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates. He cannot in such a way put himself in adverse position without this result. The cases to this effect are very numerous and they are all in harmony."

This opinion contains a very clear statement as to the high duties and responsibilities of an attorney to his client.

2 R. C. L. 970, thus states the rule:

"It is well established that a purchase by an attorney, without the consent of his client, of an interest in the thing in controversy, in opposition to the title of his client during a litigation concerning the same, is forbidden, because it places him under temptation to be unfaithful to his trust. It is contrary to the

policy of the law, and also contrary to the principles of equity, to permit an attorney at law to occupy at the same time, and in the same transaction, the antagonistic and wholly incompatible position as adviser of his client concerning a pending litigation threatening his title to the property and that of the purchaser of such property in opposition to the title of his client. All such purchases, therefore, inure to the benefit of the client."

In *Bucher v. Hohl*, 199 Mo. 320, 97 S. W. 922, 116 Am. St. Rep. 492, the client had consented to a decree prepared by counsel and 10 years afterwards, and after a third party had acquired title to the property, she sought to have it avoided, and the counsel charged as trustee of the property acquired under it and the court thus said:

"The evidence shows only a case of implicit trust and confidence in her attorneys, and if she acquiesced in that decree it was because her attorneys told her that it was the best that could be done for her. Under those circumstances her attorneys cannot avail themselves to their advantage and to her disadvantage of her acquiescence; as to them she is not estopped from claiming her own."

Such conduct is condemned by the canons of ethics, both of the American and State Bar Associations, article 10 of the latter providing:

"The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting."

In 6 *Corpus Juris*, p. 682, § 208, it is clearly stated, as follows:

"A client has the right to treat all acts of his attorney in any matter intrusted to him as done for his benefit. Equity and public policy are opposed to an attorney deriving any advantage in relation to the subject-matter involved, which is obtained at the expense of the client, even though there is no actual fraud on the part of the attorney. It results that in all cases where an attorney purchases property involved in litigation or any other property connected therewith, obtaining it under a special advantage in consequence of knowledge or information acquired through his client, or in the conduct of the case, his client may elect to treat him as a trustee for his benefit, and compel him to account for all profits, or to convey to him the property, subject only to a lien for his services and expenditures. An attorney cannot make use of any knowledge acquired by him through his personal relations with his client to promote his own advantage, but in every such case will be conclusively presumed to be acting for his client's benefit."

The authorities are numerous and all to the same effect. In *Crocheron v. Savage*, 75 N. J. Eq. 589, 73 Atl. 33, 23 L. R. A. (N. S.) 679, the court said:

"It is not necessary to find that the attorney was guilty of intentional wrongdoing. The reason why he did not disclose the material facts upon which we have commented is not important. The fact that he did not disclose

them is sufficient. The law looks on transactions of this kind between an attorney and his client with suspicion, and will not permit a conveyance to the attorney to stand unless the attorney demonstrates the entire good faith of the transaction. It requires him to be absolutely frank and open with his client, to disclose every fact of which he has knowledge, and as well any professional opinion he may have formed, which could in any way affect the client in determining whether or not to make the conveyance."

In *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777, it was held:

"There can be no acquiescence or ratification of such purchase, unless the client at the time of the alleged ratification is aware of the nature and extent of his actual rights, or that the advice of his attorney was incorrect."

This court in *Gooch v. Peebles*, 105 N. C. 426, 11 S. E. 420, in which the counsel contended that his employment was only in a limited capacity, held that his liability was complete responsibility, and that it made no difference that no fee had been paid, the court saying, "This cannot alter the case." In stating the duties of attorneys the court said:

"He is an officer of courts in which he may practice, and occupies a quasi official relation to the public, and when he assumes the duties of attorney to his client, one of these undoubtedly, is to communicate to his client any fact within his knowledge relative to the business about which he is employed, that it may be important for the client to know; and having once assumed the relation of attorney to client, he cannot terminate it at his pleasure, and without notice to his client, so long as anything remains to be done about the matter in which he is so employed."

The court further held, in that case, that actual fraud was not necessary to compel an accounting on the part of the attorney, saying:

"It was not necessary that there should have been any actual fraud in the transaction, but the rule which forbids it, rests upon the broad principle of public policy which precludes persons occupying these fiduciary relations, from representing conflicting interests that may tempt them to disregard duty and lead to injury on one side or the other"

—and cited with approval, *Weeks on Attorneys at Law*, § 258:

"An attorney employed, or consulted as such, to draw a deed, or an application for an original title to land, is precluded from buying for his own use any outstanding title. In such

case, the relation is confidential, and whether he acts upon information derived from his client, or from any other source, he is affected with a trust. The rule is on the ground of public policy, not of fraud, and prevails, although the attorney be innocent of any intention to deceive and acts in good faith."

In *Lee v. Pearce*, 68 N. C. 76, Chief Justice Pearson, in discussing the doctrines of our law, and the burden of proof, applicable to fiduciary relations, says that one of these relations is "attorney and client, in respect to the matter wherein the relationship exists," and that any transaction had between them affecting the subject-matter of the trust raises a presumption of fraud as a matter of law, to be laid down by the judge as decisive of the issue, unless rebutted.

This latter case has been very recently quoted with the fullest approval in *Stern v. Hyman*, 182 N. C. 424, 109 S. E. 79, in which this court says:

"The able opinion in this case by Chief Justice Pearson laid down the eternal principle of equity and fair dealings from which this court has never deviated"

—and added that in that case, upon the evidence of the counsel himself, "the judge should have held the alleged contract, if made, to have been void as a matter of law."

In this case, the court might well have instructed the jury that upon the defendant Dalton's own showing the relation of trustee existed, and that he could not acquire and hold the land in dispute adverse to his client, the plaintiff Chumley. The court, however, submitted the question to the jury, who have rendered a verdict against the defendant and in favor of the plaintiff.

There must always be the most absolute good faith, *uberrima fides*, on the part of any attorney towards his client. There can be allowed no suspicion of self-serving on the part of the attorney in any dealings with his client. The court will not permit that "self the wavering balance shape." If there has been profit made for himself by counsel out of the relationship contrary to the duty that his knowledge and his skill must be used solely for the benefit of that client, the court will always set aside the transaction, or decree that the benefit which the attorney has reaped must be held in trust for the benefit of the client, though no fee may have been paid by the client and no fraud was intended by the attorney.

The decree in this case made in accordance with the verdict is approved.

No error.

(183 N. C. 369)

SUTTON v. MELTON-RHODES CO., Inc.
(No. 387.)

(Supreme Court of North Carolina. April 19, 1922.)

1. Trial \S 85—General exception to testimony, some of which was competent, not considered.

An exception to all the questions and answers by which certain testimony, some of which was competent, was elicited, without alleging the incompetency of any particular question or answer, is too general.

2. Master and servant \S 270(11)—Evidence as to machines in general use held competent.

In an action for injuries to a moulding machine operator in a woodworking plant, testimony as to the kind of moulder in approved and general use in such plants, and the respect in which that causing the injury differed therefrom, was competent.

3. Master and servant \S 270(10)—Evidence as to broken safety device held competent.

In an action for injuries to a machine operator whose foot was caught in the belt, and carried into the pulley, evidence that a projection from the pressure bar on which the operator's foot could be placed without coming in contact with the belt had been broken off was competent as proof of defendant's negligence in maintaining a defective machine.

4. Master and servant \S 286(10, 41)—Negligence as to minor using defective machine without instructions held for jury.

In an action for injuries to a youthful and inexperienced moulding machine operator, evidence held sufficient for the jury on the question of defendant's negligence in using a machine not in approved and general use and out of repair without properly instructing plaintiff.

5. Master and servant \S 153(1)—Master must warn inexperienced employee.

It is the duty of a master who knows, or should know, the dangers of the employment, and that the servant, by reason of his youth or inexperience, is ignorant of or unable to appreciate them, to give him such instruction and warning as may reasonably enable him to understand his perils; but the mere fact of the servant's minority does not charge the master with such duty if the servant in fact knows and appreciates the dangers.

6. Master and servant \S 289(11)—Contributory negligence of minor caught by belt held for jury.

Whether a boy 15 years old, operating a defective moulding machine, was negligent in bringing his foot into contact with the drive belt held for the jury.

7. Master and servant \S 101, 102(8)—Instruction on duty to provide machinery and working place held correct.

An instruction that it is the master's duty to use ordinary care to provide the servant with reasonably safe machinery and a reasonably safe working place held correct.

8. Trial \S 285—Instruction must be construed as sensible jury would.

An instruction must be given such fair and reasonable construction as an intelligent and sensible jury would give it.

9. Trial \S 295(1)—Instruction must be examined with context and entire charge.

An instruction must be examined with its own context and that of the entire charge, so as to disclose its real meaning and import.

10. Trial \S 296(3)—Instruction as to duty to instruct inexperienced employee held not erroneous, in view of another instruction.

In an action for injuries to a moulding machine operator by reason of a broken safety appliance, where the court fully and explicitly charged the jury as to the law if they found plaintiff had sufficient knowledge of the machine and method of using it, and was apprised of the risk, an instruction as to the master's duty to instruct a youthful and inexperienced employee held not erroneous.

Appeal from Superior Court, Guilford County; Webb, Judge.

Action by Bernice W. Sutton, by his next friend, George W. Sutton, against the Melton-Rhodes Company, Inc. Judgment for plaintiff, and defendant appeals. No error.

The infant plaintiff sued, in forma pauperis and by his next friend, to recover damages for an injury sustained by him at the age of 15 years while operating a moulder in the defendant's woodworking plant on the ground of the defendant's negligence. His foot was caught in the belt, carried into the pulley, his knee held by a protruding shaft, while the pulley carried the foot on around itself, breaking the bones and forcing them through the flesh. He was in the hospital seven weeks, and since the injury can get around a step or two at a time, using a crutch all the time. The jury answered the issues of negligence and contributory negligence in favor of the plaintiff, and allowed \$1,500 as damages. The defendant appealed.

Shuping, Hobbs & Davis and F. P. Hobgood, Jr., all of Greensboro, for appellant.

W. P. Bynum, R. C. Strudwick, and S. S. Alderman, all of Greensboro, for appellee.

WALKER, J. [1] We will consider the exceptions of the defendant according to the order of their statement in the record. The plaintiff undertook to show that the moulding machine at which the plaintiff was injured while at work with it was not the kind which was approved and in general use in similar mills, and, in order to do so, he offered considerable testimony, some general and some special in character, which is set forth by questions and answers in the case. It is stated that to all of said questions and answers the defendant objected. But in this

form the objection is entirely too general, as the record shows. It was taken to a mass of evidence, each exception referring to a page or more of evidence some of which is undoubtedly competent. No question or answer was singled out and alleged to be incompetent, nor was any of these objections directed to any specific part of this testimony. Such an exception will not be considered. *Barnhardt v. Smith*, 86 N. C. 473; *State v. Ledford*, 133 N. C. 714, 722, 45 S. E. 944; *Bule v. Kennedy*, 164 N. C. 290, 300, 80 S. E. 445. But an examination of this evidence, if objection had been properly taken to it, will disclose that it was both relevant and competent. The plaintiff alleged that the particular machine at which he was injured while operating the same was not such as had been approved, and was in general use for the purpose to which it was being applied, and, besides, that it was in itself a defective machine, and in a state of disrepair, and that the angled handle to the pressure bar, which originally projected from under the belt, and allowed pressure to be applied without coming in contact with, or in dangerous proximity to, the belt, had been broken off and negligently allowed to remain in that condition, leaving a straight bar entirely under the belt, and dangerously located, so that pressure could not be applied without bringing the foot into contact with or too near to the moving belt; and, further, that the machine was defective and unsafe, in that the weight was too light to perform its intended function.

[2, 3] The testimony of the witness referred to in assignment 1 as to the kind of moulder in approved and general use, and the respect in which the machine causing the injury differed therefrom, was competent. There was no evidence in the record that any machine other than the kind described by the witnesses as being in general and accepted use was used by other mills engaged in the same business. The evidence objected to under assignments 2 and 3 was that originally the pressure bar had a right-angled projection, protruding out from under the belt, upon which projection the foot of the operator could be placed to increase pressure without danger of coming in contact with the belt, and that this projection had been broken off prior to the injury, and the pressure bar left straight and entirely under the drive belt, so that, when pressure was applied to it, the operator must insert his foot between the bar and the belt moving just above it. This was of course, competent, and very pertinent to the allegations of the defectiveness and dangerous condition of the machine. The only objection we believe the defendant could have to this evidence is that it tended strongly to prove negligence. That, of course, was not the ground, but as proof of negligence it was competent.

[4, 5] The motion to nonsuit was properly disallowed, as there was sufficient evidence for the jury upon the question of negligence. It was alleged, and there was evidence to show, that the plaintiff was a boy about 15 years old, and without experience in the management and operation of such a machine, which was somewhat complicated and dangerous to one of his age having no experience or instructions as to how it should be operated without danger to himself, or as to how danger in its operation could be avoided. It was contended by the plaintiff that the machine was defective and unsafe, in that the weight on the pressure bar had had the set screw, which should have held it in place on the bar, broken off, and the weight had been negligently tied on with a piece of wire from the scrap pile, instead of being properly repaired, and that the defendant knew of this condition through its foreman, Fines.

The question at last was whether the defendant had selected the machine with reasonable care and prudence so as to procure one which had been approved and was in general use, and had used ordinary care to keep it in proper repair, so as to make it reasonably safe for his employee to use it in performing his work, and, if the employer knew it was defective, or should have known it, in the exercise of ordinary care, he should have warned the employee of any danger arising therefrom. We held in *Ensley v. Lumber Co.*, 165 N. C. 687, 81 S. E. 1010, and also in *Dunn v. Lumber Co.*, 172 N. C. 129, 90 S. E. 18, that it is the duty of the master to exercise due care in furnishing his servant with a reasonably safe place to work and reasonably safe and proper machines, tools, and appliances with which to do the work, and, in the case of youthful or inexperienced employees, this further duty rests upon him: Where the master knows, or ought to know, the dangers of the employment, and knows, or ought to know, that the servant, by reason of his immature years or inexperience, is ignorant of or unable to appreciate such danger, it is his duty to give him such instruction and warning as to the dangerous character of the employment as may reasonably enable him to understand his perils.

"But the mere fact of the servant's minority does not charge the master with the duty to warn and instruct him, if he in fact knows and appreciates the dangers of the employment; and generally it is for the jury to determine whether, under all the circumstances, it was incumbent upon the master to give the minor, at the time of his employment, or at some time previous to the injury, instructions regarding the dangers of the work and [as to] how he could safely perform it. It is the duty of a master who employs a servant in a place of danger to give him such warning and instruction as is reasonably required by his youth, inexperience, want of capacity, and as will

enable him, with the exercise of ordinary care, to perform the duties of his employment with reasonable safety to himself"—citing 26 Cyc. 1174-1178; *Turner v. Lumber Co.*, 119 N. C. 387, 26 S. E. 23; *Marcus v. Loane*, 133 N. C. 54, 45 S. E. 354; *Walters v. Sash & Blind Co.*, 154 N. C. 823, 70 S. E. 635; *Fitzgerald v. Furniture Co.*, 131 N. C. 636, 42 S. E. 946; *Rolin v. Tobacco Co.*, 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 835, 8 Ann. Cas. 638; *Leathers v. Tobacco Co.*, 144 N. C. 350, 57 S. E. 11, 9 L. R. A. (N. S.) 849.

See *Holt v. Manufacturing Co.*, 177 N. C. 170, 98 S. E. 369, and *Marks v. Cotton Mills*, 135 N. C. 287, 47 S. E. 432.

[8] There was sufficient evidence in the case to prove that the moulding machine in question was not such as had been approved and was in general use; that it was defective, or out of repair; that plaintiff was inexperienced in its use and operation, and required instruction as to how he should deal with it; and, generally, that defendant was negligent in performing its legal duty toward him as its employee. Whether plaintiff was himself negligent, and by his want of ordinary care caused or contributed to his injury, was manifestly a question for the jury under proper instructions from the court. Negligence on his part was not so conclusively shown, if shown at all, as authorized a nonsuit.

[7] The charge of the court presented the case to the jury in all of its material phases, and substantially responded to all of the defendant's prayers for instructions, so far as they should have been given. The real questions in the case were largely those of fact, and the few relevant principles were simple in themselves, and correctly applied by the court, which fully and accurately stated to the jury the legal duty of the master to use due care in providing the servant with reasonably safe and suitable machinery and a reasonably safe place in which to do his work, the measure of this duty being that he shall use ordinary care in the performance of it. The charge, in this respect, was not at all in conflict with the rule as laid down in *Smith v. Railroad*, 182 N. C. 290, 100 S. E. 22, nor do we think the jury could have so seriously misunderstood the charge which was in substantial agreement with *Marks v. Cotton Mills*, 135 N. C. 287, 47 S. E. 432, and the other cases we have cited.

[8-10] The particular instruction as to the youth and the experience of the plaintiff which is criticized by the defendant's counsel must receive a fair and reasonable construction, such as we must suppose an intelligent and sensible jury would give it, and it must also be examined with its own context and that of the entire charge, so as to disclose its real meaning and import, and, thus considered, it was a sufficiently accurate statement of the law. Besides, we find that the

court in one part of the charge gave full and explicit instructions to the jury as to the law if they found that the plaintiff had sufficient knowledge of the machine and the method of using it, and was apprised of the risk and danger in operating it.

Having considered this case fully, and especially with reference to the assignments of the defendant, no error can be found which should induce us to disturb the judgment. No error.

(90 W. Va. 628)

STATE v. MURDOCK. (No. 4425.)

(Supreme Court of Appeals of West Virginia.
March 28, 1922.)

(Syllabus by the Court.)

1. Indictment and Information \S 125(41)—Misdemeanor of possessing moonshine still and felony of operating it may be included in the same count.

Generally a felony and a misdemeanor can not be joined in the same count in an indictment, but by way of exception to this general rule this may be done when the misdemeanor charged is necessarily, as in this case, included in the greater offense.

2. Criminal law \S 1169(1)—Admission of improper evidence clearly appearing not to have misled or improperly influenced the jury will be regarded as harmless error.

Though some improper evidence may have been admitted on the trial of an indictment, yet if from all the facts and circumstances shown it clearly appears that the jury could not have been misled or improperly influenced thereby, such improper evidence will be regarded as harmless and not reversible error.

3. Criminal law \S 923(2)—Conviction not set aside because of juror's expression of opinion from newspaper or other reports, where he qualified on his voir dire.

Where a juror on his voir dire shows himself fully qualified to sit as one of the triers of an indictment, the general verdict will not be set aside because of his prior expression of opinion of the guilt or innocence of the accused based on reports or newspaper accounts of the facts, when he has sworn on his voir dire that he is without prejudice or bias against the accused and that regardless of his previously expressed opinion he could give the prisoner a fair trial on the law and the evidence adduced on the trial.

Error to Circuit Court, Raleigh County.

Jim Murdock was convicted of unlawfully and feloniously owning and operating a moonshine still, and he brings error. Affirmed.

C. M. Ward and T. J. McGinnis, both of Beckley, for plaintiff in error.

E. T. England, Atty. Gen., and R. Dennis Steed, Asst. Atty. Gen., for the State.

MILLER, J. Defendant was indicted, tried, and found guilty by the verdict of a jury, for unlawfully and feloniously owning, operating and having in his possession a mechanism, apparatus and device, commonly known as a moonshine still, and by the judgment of the court thereon was sentenced to confinement in the penitentiary for a period of two years and to pay a fine of three hundred dollars.

[1] On the present writ of error, awarded him to such judgment, he complains, first, that the court below should have sustained his motion to quash the indictment, on the ground that the one count therein included the offense of having in his possession the mechanism, apparatus and device, which by section 37 of chapter 108 of the Acts of 1919, the statute then in force, amounted to a misdemeanor only, and that a felony and a misdemeanor can not ordinarily be joined in the same count. This is true as a general proposition, except where the misdemeanor charged is necessarily, as in this case, included in the greater offense. We so held recently in the case of *State v. Tomlin*, 86 W. Va. 300, 103 S. E. 110. Since that decision the statute has been so amended, by chapter 115, Acts 1921, as to include the possession of such mechanism, apparatus and device in the offense of felony prescribed thereby.

[2] Another point of error is that the trial court permitted the witness D. G. Fry to give in evidence his opinion that the apparatus proven to have been owned and operated by the defendant was a moonshine still. He was one of the witnesses assisting in the arrest of defendant and the others who were found in charge of and operating the still. His answer was that it was what he knew as a moonshine still, and he knew that only as he was taught, like anything else he knew. Of course under the evidence in the case this fact was one for the jury; but there was no controversy about the surrounding facts and circumstances which were detailed by other witnesses and this particular one. The defendant offered no evidence whatsoever. The apparatus which defendant was found in the act of operating was located in the woods, hidden away from the public view by trees and undergrowths; and the jury could not have truthfully found otherwise than that defendant was guilty of the felony charged. So that, although the opinion of the witness Fry may not have been legally competent, the jury could not have been misled or improperly influenced by the evidence of this witness, nor could it have prejudiced the rights of defendant. In such case the improper evidence is regarded as harmless, and does not constitute reversible error. We seem to have so said in *State v. Hull*, 45 W. Va. 767, 32 S. E. 240, and *State v. Davis*, 68 W. Va. 142, 69

S. E. 639, 32 L. R. A. (N. S.) 501, Ann. Cas. 1912A, 996.

[3] A third point for reversal is that the trial court, on motion of defendant, should have set aside the verdict and awarded him a new trial, on the ground that one of the jurors, J. H. Milam, was not a competent juror to try the case. On his voir dire, the record shows, he was duly qualified and accepted as one of the twelve chosen from the panel of twenty to try the case. In support of his motion to set aside the verdict, defendant undertook to prove by the affidavits of three persons that before the trial they had had conversation with this juror, in which he is alleged to have expressed an opinion of the guilt of defendant, and one of whom, Arthur Walker, swore that Milam had said in conversation with him that "he did not know that he would be called to sit as a juror in said case, but if he was, he intended to see that Murdock got the limit of the penalty." The two other witnesses were called for cross-examination by the State, but affiant Walker, the record shows, could not be found and was not cross-examined; but the State introduced the juror Milam, who denied that he had made up or expressed any opinion of the guilt of the accused, and denied he had any conversation with affiant Walker, as detailed by him. Milam admits that the subject of the arrest of the defendant and others, and the circumstances thereof, had been talked about in the neighborhood, and that on one occasion he concurred in the expression of opinion by others, that if the facts were as reported, he did not see what the accused could do but confess. He admitted on his voir dire that he had heard the subject discussed in the neighborhood, not by any of the witnesses, but had not made up his mind, and swore he could give defendant a fair trial uninfluenced by anything he had heard. We decided in *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434, that a juror who is shown to have previously expressed a decided opinion as to the guilt of the accused, based wholly on what he had heard and read in the newspapers, but who swore that he had no prejudice or bias against the accused, and that regardless of his previously expressed opinion he felt that after hearing the evidence he could decide the case in accordance therewith, is not disqualified, and that the challenge by the prisoner was properly overruled. Counsel for the prisoner rely on our case of *State v. Greer*, 22 W. Va. 800. The defendant in that case was charged with a capital offense, but the rule laid down in point 20 of the syllabus in that case, as therein stated, has no application unless it appears from the whole case that the prisoner suffered injustice from the fact that the objectionable juror served upon the

case. Certainly no injustice is shown in the case here.

The only other error assigned and relied on is the giving of the State's instructions numbers 1 and 2. The first told the jury that if they believed from the evidence that the defendant, on the 18th day of February, 1921, in Raleigh County, West Virginia, owned, operated and had an interest in a mechanism, apparatus and device, commonly known as a moonshine still, they should find him guilty as charged in the indictment. The only complaint of this instruction is that the court should have instructed the jury what a moonshine still is. This the court did do in the second instruction offered by the State, immediately following the first, and told them this in the very language of the statute.

Finding no substantial error affecting injuriously the rights of the defendant, we affirm the judgment.

(90 W. Va. 288)

**STATE ex rel. HALLANAN, State Tax Com'r,
v. WOODS, Judge. (No. 4544.)**

(Supreme Court of Appeals of West Virginia.
Feb. 14, 1922. Rehearing Denied
April 4, 1922.)

(Syllabus by the Court.)

1. Taxation \S 493(7)—Circuit court cannot review action of board of review and equalization unless the evidence was taken before such board as required by law.

A circuit court has no jurisdiction to review the action of a board of review and equalization fixing the value of property for purposes of taxation, unless upon the hearing before such board the evidence offered upon the question of valuation has been taken down and certified by the board, as required by law. Such circuit court may not hear evidence de novo for the purpose of fixing such value, or require the board of review and equalization to certify to it the facts upon which such board acted in the first instance in fixing the assessment, where upon the hearing before such board no evidence was offered or taken down as provided by law.

2. Taxation \S 453—Code provision held not an exclusive remedy for correcting errors in tax assessments.

Section 132a of chapter 29 of Code 1913 (sec. 1018) does not provide an exclusive remedy for correcting errors in the assessment of property based upon the question whether the same is or is not taxable, but the question of the taxability of property may be presented by a party complaining to a board of review and equalization, under the provisions of section 129 of chapter 29 of Code 1913 (sec. 1014), and an appeal entertained by the circuit court from the findings of such board.

Application by the State, on the relation of Walter S. Hallahan, State Tax Commissioner, against J. M. Woods, Judge of the

Circuit Court of Jefferson County, for a writ of prohibition. Writ denied.

John T. Simms, of Charleston, for relator.
Fred O. Blue and Forrest W. Brown, both of Charleston, for respondent.

RITZ, J. This is an application for a writ of prohibition against the judge of the circuit court of Jefferson county to prohibit him from trying an appeal taken by the Standard Lime & Stone Company, a corporation, from the action of the board of review and equalization of Jefferson county, assessing its property for purposes of taxation for the year 1921.

It appears that the Standard Lime & Stone Company is the owner of considerable real estate in Jefferson county upon which it carries on its operations. This real estate is assessed upon the land books of that county together with the buildings thereon, and the assessor also made an assessment against it on account of its personal property. This company has had under construction for several years a building in which was to be carried on a process by which dolomite is roasted, and certain mineral properties extracted therefrom. This building, it is contended, so far as it had been constructed, together with the machinery in it, was of considerable value, but because of the contention of the company that it was not completed the assessor did not make any assessment against the company on account thereof. The board of review and equalization, upon an examination of the assessment against this company, concluded that there should be some assessment made because of this roasting plant, and notified the company that it intended to increase the assessment against it on that account, and fixed upon the 3d day of August, 1921, to hear the company in opposition thereto. On that day the Standard Lime & Stone Company appeared by its counsel and asked to have the matter deferred to a later day because of the illness of its president. This was granted, and the 8th day of August fixed for the hearing. On that day the company's attorney again appeared, and asked for a further continuance of the hearing on the ground that its president had just died, but the board of review and equalization declined to further extend the time, for the reason that that was the last day upon which it could act under the law. The board then announced that it had decided, after it had conferred with various people familiar with the value of the property, and made an examination of it itself, to assess the Standard Lime & Stone Company with \$250,000 as personal property on account of the uncompleted building and the machinery therein. The company's attorney introduced before the board at this

time the record of a hearing had before the county court in the previous year showing that the assessor had increased the value of this company's property by the sum of \$40,000, ostensibly on account of this plant. This seems to have been all of the evidence that was regularly introduced before the board. Its action in making the assessment of \$250,000 was objected to by the company upon the ground that it was excessive, and also upon the ground that the board has no authority to assess the uncompleted building as personal property under the provision of section 42 of chapter 152 of the Acts of the Legislature of 1921, as it purported to do, for the reason that said statute was not in force and effect on the 1st of April, as of which date the assessment should be made.

[1] From the action of the board of review and equalization in assessing the uncompleted building and machinery therein at the sum of \$250,000 the Standard Lime & Stone Company applied for an appeal to the circuit court of Jefferson county. With its petition it tendered a record made by the members of said board showing the proceeding had before it resulting in the assessment. In fact, it tendered two such records, one signed by two members of the board, and another differing slightly in its context signed by the third member. When the appeal came on for hearing in the circuit court, the tax commissioner, the relator here, moved to dismiss the same, for the reason that upon the showing made in the petition the court was without jurisdiction. This motion the court overruled, and entered an order requiring the board of review and equalization to certify to the circuit court the evidence heard by it upon which the assessment was fixed. At this stage of the proceedings the relator applied to this court for a writ of prohibition to prevent the judge of the circuit court from further proceeding, contending that he was without jurisdiction in the premises.

The record made by the board of review and equalization and attached to the petition for the appeal is complete in itself, and shows that the only evidence offered upon the question of the amount of the assessment was the record of the proceedings in the former year, which, it is argued, has some relation to the question of the present valuation of property. It is true the board of review and equalization certifies that it fixed this assessment after interviewing several people who were acquainted with the property, and after making a personal examination of it, but this proceeding upon the part of the board was no part of the proceedings before it from which the appeal was taken. That was simply the acquisition by it of information in the same manner that an assessor acquires it. If it was desired to

impeach this conclusion of the board, under the statute, the duty devolved upon the property owner to introduce evidence and have the same taken down and made part of the record. This was not done. The circuit court upon an appeal is authorized to consider only such evidence as is taken down in this way. Of course, if the board of review and equalization had refused to hear any evidence that was offered by the property owner, or allow the same to be taken down upon the hearing, another question would be presented. No doubt the property owner would be entitled to some remedy to compel the performance of this requirement of the law upon its demand being refused. It is quite clear that there was no reason for the entry of the court's order requiring the board of review and equalization to certify the evidence heard by it, for it appears from its record that no evidence was heard by that board and taken down, as provided by law. The members of that board simply made this assessment acting in their capacity as assessors, and the only thing that was offered before them when sitting to review the assessment was the record made in the previous year. This record does not prove the value of the property at the time of the making of the assessment. Ample opportunity was given to the Standard Lime & Stone Company to present its evidence upon this question, and, while the illness of its president may be sufficient justification to it for not presenting the evidence in its possession, it cannot be held that the failure to produce evidence on account of such illness would justify a reversal of the action of the board in making the assessment. If this were the only question presented upon the appeal, we would have to hold that the petition does not make a case conferring jurisdiction upon the circuit court.

[2] But it appears that not only the question of valuation was involved, but the question of the right to assess the property as it was assessed was also involved, and the record of the board presented and filed with the Standard Lime & Stone Company's petition for appeal clearly presents this question and if the circuit court, on this appeal from the board of review and equalization, has jurisdiction to review a decision of the board, involving the question of the taxability of the property, as well as the question of the valuation of it, then the petition for appeal presents a case involving the circuit court's jurisdiction. Prior to the enactment of chapter 50 of the Acts of the Legislature of 1911, this court held in the cases of *Copp v. State*, 69 W. Va. 439, 71 S. E. 580, 35 L. R. A. (N. S.) 669, and *West Virginia National Bank v. Spencer*, 71 W. Va. 678, 77 S. E. 269, that the exclusive method of reviewing an assessment, either because of the amount thereof, or the taxability of the property involved,

was upon application to the board of review and equalization, and, in case of an adverse decision from it, appeal to the circuit court, under the provisions of section 129 of chapter 29 of the Code (sec. 1014). Perhaps a strict construction of section 129, read in connection with section 18 (sec. 902), would limit the jurisdiction of the circuit court to entertain an appeal from the board of review and equalization to those cases where only the question of valuation was involved, but this court felt constrained to give section 129 such construction as would afford a remedy to a taxpayer who might be assessed with property which was not taxable at all, in view of the fact that no other provision was made in the law by which relief could be had in such a case. In 1911 the Legislature passed the act above referred to. By this act section 132a was added to chapter 29 of the Code (sec. 1018), and by this section specific jurisdiction was conferred upon county courts to hear complaints against all sorts of improper assessments, and to correct the same, except that the county courts could not inquire into the valuation of property. No doubt it was discovered that to require a property owner to apply to the board of review and equalization, which sat only for a short time in the summer, for relief, would result in inflicting hardship in many cases, for it might well be that a taxpayer would not discover an assessment wrongfully made against him until he went to pay his taxes in the fall of the year, after the time had expired when he could make application to the board of review and equalization for correction, and he would be entirely without a remedy to correct the error, however glaring it might be. Did the Legislature, by adding section 132a to chapter 29 of the Code, provide an exclusive remedy for correcting such erroneous assessments? If it did, then no appeal could be entertained by the circuit court from the board of review and equalization involving the question of the taxability of the property, but such proceedings would have to be in the county court in the first instance, with the right of review by the circuit court, and finally by this court by writ of error. As before stated, we held, in the two cases above referred to, that section 129 was broad enough to confer upon boards of review and equalization the power to pass upon the taxability of property, and, if that power is still not possessed by such boards, then it has been taken away by the enactment of section 132a; or, to state the case in other language, the enactment of section 132a by implication repealed section 129 to the extent that it conferred power upon boards of review and equalization to pass upon the question of the taxability of property. There is no language

in chapter 50 of the Acts of 1911 which indicates an express intent upon the part of the Legislature to deprive the boards of review and equalization of any power theretofore possessed by them, or to deprive the circuit court of any jurisdiction theretofore conferred upon it to hear any matter which might theretofore have been heard upon appeal from said boards of review and equalization, and the fact that another tribunal is vested with power to hear complaints involving a part of this jurisdiction does not of itself take the jurisdiction away from the tribunal in which it was theretofore lodged. If section 132a had been a part of the law at the time section 129 was construed by the decisions above referred to, this court might have held that the jurisdiction to entertain complaints, where the taxability of the property was involved, was in the county court, and the jurisdiction of the boards of review and equalization limited to entertaining complaints involving only the valuation thereof. Having held in those cases, however, that section 129 conferred power upon boards of review and equalization to hear complaints involving not only valuation, but taxability as well, and upon circuit courts the power to entertain appeals from the findings of such boards of review and equalization in both classes of cases, we are not disposed to hold that section 132a has the effect to deprive such boards, or the circuit courts, upon appeal, of the jurisdiction conferred upon them by section 129 as construed by the former decisions of this court. The effect of the enactment of section 132a is to give an additional remedy, and not an exclusive one. This being the case, it necessarily follows that there is presented to the circuit court of Jefferson county by the petition for an appeal a question clearly involving its jurisdiction.

Counsel argue that the right to tax the property, under the circumstances, as it was taxed by the board of review and equalization, is clear, but we cannot decide that question on this writ of prohibition. That is the very question which involves the jurisdiction of the circuit court, and so long as that court's jurisdiction exists in relation to any question presented in the case we cannot prohibit it from exercising it, nor can we direct its exercise either one way or the other. The court, having jurisdiction of a particular subject-matter, has just as much power to decide the question involved wrong as it has to decide it right, and the way to correct the wrong decision is by appellate process. This court cannot direct in advance, upon an application for a writ of prohibition, how the question should be decided.

It follows from what we have said that the writ of prohibition prayed for will be denied.

(90 W. Va. 441)

In re MASONIC TEMPLE SOC. (No. 4527.)(Supreme Court of Appeals of West Virginia.
March 7, 1922.)*(Syllabus by the Court.)*

1. Taxation \S 493(8)—Circuit court has jurisdiction upon appeal to review and correct rulings and orders of board of equalization.

The circuit court by section 129, c. 29, of the Code of 1913 (sec. 1014), has jurisdiction upon appeal to review and correct the rulings and orders of the board of equalization and review, not only upon the question of valuation, but upon the question of the taxability of the property assessed.

2. Taxation \S 453—Provision for circuit court review of equalization board's action held not exclusive but a cumulative remedy.

Neither the repealing clause of chapter 50, Acts 1911, nor the provisions of section 132a thereby added to said chapter 29 of the Code of 1913 (sec. 1018), specifically or by implication repealed or took away the jurisdiction of the circuit court to review the orders or rulings of the board of equalization and review conferred by said section 129 of chapter 29 of the Code of 1913 (sec. 1014), as theretofore interpreted by this court. The remedy by application to the county court given by said section 132a is not an exclusive but a cumulative remedy, and is not inconsistent with the remedy by appeal, given by said section 129.

3. Taxation \S 494(1)—Equity has no jurisdiction where statutory remedies are complete and ample.

These statutory remedies being complete and ample, equity has no jurisdiction to correct a voidable assessment of property for taxation.

4. Taxation \S 493(8)—Circuit court is not deprived of jurisdiction to review ruling of the board of equalization because the board has certified the facts instead of the evidence.

The circuit court is not deprived of jurisdiction to review and correct the orders and rulings of the board of equalization and review on the question of the taxability of property because such board has certified the facts proven instead of the evidence of the witnesses, when no objection or exception to that form of certifying the evidence was interposed.

5. Taxation \S 241(1), 251—Masonic lodges and orders held to be charitable and benevolent bodies in view of taxation statutes.

Lodges and orders of Free and Accepted Masons are charitable and benevolent bodies, and their property, when used solely for charitable and benevolent purposes and not held or leased out for profit, is by the laws of this state exempt from taxation, and if erroneously assessed, such assessment may be avoided by the aggrieved order or corporation holding such property, by the proceedings provided by statute.

6. Taxation \S 241(1) — Statute exempting from taxation funds of fraternal benefit societies, but not their real estate, held not applicable to the property of charitable and benevolent orders.

The provisions of section 30 of chapter 55A of the Code of 1913 (sec. 3255), which exempts the funds of fraternal benefit societies but not their real estate and office equipment, has no application to the property of charitable and benevolent orders held and used exclusively for charitable and benevolent purposes. That statute applies solely to fraternal orders with insurance and other benefit features connected therewith.

Error to Circuit Court, Wood County.

The Board of Equalization and Review of Wood County placed the property of the Masonic Temple Society in the City of Parkersburg on the land books for taxation, and from a circuit court judgment annulling such action and adjudging the Society and its property not taxable, the State brings error. Affirmed.

Jno. T. Simms, of Charleston, and C. N. Matheny and R. B. McDougale, both of Parkersburg, for the State.

H. D. Matthews and Ambler, McCluer & Ambler, all of Parkersburg, for defendant in error.

MILLER, J. This is an appeal by the State from a judgment or order of the circuit court of Wood County pronounced on December 10, 1921, which set aside and annulled the action of the board of equalization and review of said county in placing the property of the Masonic Temple Society in the City of Parkersburg upon the land books of said county for taxation for the year 1921, and further adjudged that said society and its said property are not liable to assessment for taxation, and that it be exonerated from the payment of said taxes, and that if the taxes assessed had already been paid to the sheriff, he was thereby ordered to refund the same.

[1] The first point of error is that neither the board of equalization and review nor the circuit court on appeal is given jurisdiction to determine the question of the taxability of property assessed for taxation, and that the State's motion in the circuit court to dismiss the appeal of the temple society should have prevailed. The contention of the State is that by section 132a of chapter 29 of the Code (sec. 1018), a new section added to that chapter by chapter 50 of the Acts of 1911, sole original jurisdiction to determine the question of taxability of property was thereby conferred upon the county court, this notwithstanding two prior decisions here, namely, *Copp v. State*, 69 W. Va. 439, 71 S. E. 580, 35 L. R. A. (N. S.) 669, and *West Virginia National Bank v. Spencer*, 71 W. Va. 678, 77

S. E. 266, held that section 129 of said chapter 29 (sec. 1014), construed in connection with section 18 of the same chapter (sec. 902), gave the taxpayer an appeal from the decision of the board of equalization and review as well on the question of the taxability as on the subject of the valuation of his property. We had this exact question before us in the recent case of *State ex rel. Hallanan v. Woods*, Judge, 111 S. E. 634, decided at the present term and now pending on the petition of the State for rehearing. We have considered that petition in connection with the arguments and briefs of counsel in the present case and have found no good reason for departing from the views expressed in the opinion in that case. The reasons given for the conclusion reached in that case, we believe to be sound. Moreover, the Legislature, since the two decisions referred to, has twice dealt, not comprehensively it is true, but with certain sections of said chapter 29, first in chapter 27, Acts 1919, and lastly in chapter 152, Acts 1921, and amended and re-enacted certain of the sections thereof, but in neither act did the lawmakers disturb sections 129 or 18 construed in those decisions, unless as contended they were modified or repealed by implication by chapter 50, Acts 1911. That this construction of the different sections of the same statute results in giving two concurrent remedies, is unimportant. Good reasons we perceive are given in the opinion in *State ex rel. Hallanan v. Woods*, Judge, *supra*, for both remedies, and we need only refer to the opinion in that case for those reasons.

[2] Nor do we think, as is urged on behalf of the State, that the repealing clause of the act of 1911, repealing all acts and parts of acts inconsistent therewith, was intended to repeal said sections 18 and 129, as construed in our prior decisions. The new section does not say that the county court shall have sole jurisdiction of cases involving the taxability of property, nor are sections 129 and 18 as construed inconsistent with the provisions of the added section. As we construed those sections, they gave a remedy; the new section does but give another. What is there in the prior sections that may be regarded as inconsistent with the new? That a remedy is given which may be availed of within a longer period of limitations does not make the previous and earlier remedy given by section 129 inconsistent therewith. Indeed the two sections are in perfect harmony. It is a familiar and salutary canon of construction that repeals by implication are not favored. If, when enacting section 132a, the Legislature had intended to take away the remedy given by section 129 as previously construed, they would undoubtedly have said so in plain terms, when dealing with other provisions of the same chapter subsequently,

[3] As an added argument against our construction of section 129, and the reasons given in the prior decisions, based on the apparent necessity for some relief to the taxpayer, it is said that equity always affords relief to a taxpayer against *void assessments* of his property. Here is just where the argument breaks down. There is a marked distinction between a void assessment and one that is merely voidable, as the one in this case. The owner may choose not to avoid the assessment. If so, the assessment would not be void. To avoid it, he must pursue the remedy which the law affords him. He has no reason for resorting to equity in such cases, and this is the very reason for the holding in *Bank v. Spencer*, *supra*, that the statutory remedy is exclusive and that equity cannot be resorted to in cases of voidable assessments at least. This proposition was distinctly affirmed in the case of *Island Creek Fuel Co. v. Harshbarger et al.*, 73 W. Va. 397, 80 S. E. 504, and was adhered to in *Pardee & Curtin Lumber Co. v. Rose*, 87 W. Va. 484, 105 S. E. 792, where it was sought to maintain jurisdiction in equity on the grounds of fraud also. Notwithstanding the charges of fraud, we held the remedy given by statute to be exclusive.

[4] The next ground of objection to the jurisdiction of the circuit court to entertain the appeal is that the record from the board of equalization and review is insufficient, in that the facts proven, and not the evidence of the witnesses adduced on the hearing, were taken down and certified, and that as the circuit court did not have before it the evidence so taken and certified, it had not the jurisdiction to hear and determine the question involved upon the inquiry before the board of equalization and review. The record certified by the board shows that upon the last day upon which the board was authorized to sit, namely, the 25th day of August, 1921, the assessor of Wood County appeared before the board and for the first time undertook to place upon the land books for Parkersburg District of said county for assessment the property of the Masonic Temple Society, consisting of the temple building and the lot of ground on which it is located, valuing the lot at \$20,000.00 and the building and improvements thereon at \$130,000.00, or a total valuation of \$150,000.00. Up to that time the assessor for that year had not nor had the assessor for any previous year ever undertaken to assess this property for taxation, and the society had received no notice of the purpose of the assessor to so assess its property except the verbal notice of the assessor given one or two members of its board of trustees a few hours beforehand. On the day fixed, the certificate of the board shows that the Masonic Temple Society appeared by attorney, and the assessor having placed the property on the land books

as proposed, the society entered its protest against the action of the assessor, and moved the board to strike said property from the land books for taxation and to place the same thereon as property exempt from taxation, which motion was opposed by the state tax commissioner, represented by counsel, and the board proceeded to hear the evidence adduced by the temple society, neither the state tax commissioner nor the State by any other representative offering any evidence whatsoever; and after the hearing the motions were overruled.

The board certified that being without the services of a stenographer, and keeping no record of its proceedings other than the entry of its findings upon the land books, the evidence introduced was not taken in shorthand or reduced to writing, but the board certified the facts proven substantially as follows: That it appeared from the charter of the society introduced in evidence the Masonic Temple Society was organized as a corporation under a charter issued by the secretary of state March 24, 1916, and recorded in the clerk's office of the county court of Wood County, the objects whereof as stated in the charter being as follows:

"For educational, literary, scientific purposes, and for the purposes of public charity and dissemination of the principles of Free Masonry, the principles of Royal Arch Masonry, principles of the Order of Christian Knighthood, principles of Ancient and Accepted Scottish Rite Masonry, and the principles of Ancient Arabic Order of Nobles of the Mystic Shrine of North America, and for the purposes of maintaining a library and club rooms and social, scientific, literary, educational, and charitable clubs and associations without profit, and for the improvement of morals and sociological conditions and for intellectual development, without profit, and for benevolent and charitable purposes, and to buy and hold real estate and personal property to be used and devoted for the aforesaid and above mentioned purposes."

That after the introduction of the charter, the society also introduced as witnesses in its behalf W. T. Rittenhouse, Robert S. Lemon and James A. Wetherell, and proved by them substantially as follows: That the membership of the Masonic Temple Society was composed of the various Masonic bodies having their headquarters in the City of Parkersburg; that said Masonic bodies were organized solely for charitable and educational purposes; that they take care of all needy members of the organization, and of the sick, and that their object is to relieve the poor and distressed among them, and to that extent they relieve the State and the county of this burden; that the property of the society had never before been listed for taxation; that all of it was used for charitable purposes, and that no part thereof was let out, leased or used for profit;

that the society is a benevolent association, not conducted for private profit; that its property has at all times been used for charitable purposes and for the purposes of moral and physical education; that the various bodies of the Masonic fraternity occupying the building so assessed are supported by dues and membership fees paid by the members and by initiation fees received from new members, and that the whole of the amounts so received, after paying the expenses of maintenance, is used for charitable and educational purposes; that no part of the property so assessed has ever been used for purposes other than the meeting place of the several Masonic bodies and in the carrying on of its charitable, benevolent and public welfare work, without charge or profit; that each of said bodies constitutes and is a benevolent and charitable association, and is so denominated and classified by the statutes of West Virginia; that the assessment of said property made on the land books is in the name of the Masonic Temple Association, but that the property in fact belongs to the Masonic Temple Society, which carries on no business of any kind for profit, and that no profit of any sort accrues to the members of said society or to any of the affiliated bodies, and that the said bodies and all their property, including the property so assessed, are devoted exclusively to charitable, educational and benevolent purposes; that the building contains no store rooms or other rooms capable of producing a revenue, and was built solely for the use of the Masonic bodies for their headquarters in the City of Parkersburg, and is not adapted, nor can it be advantageously used for any other purposes, and could not be rented for business or commercial purposes.

The only question of fact necessarily involved was the nature and character of the property and the business and status of the owner, and the affiliated or associated bodies interested in the property, and to what purposes the property was devoted and adapted. The evidence of the witnesses, or the facts proven by them, was full and ample on these questions. But the point is made that the certificate was not in compliance with the letter of the statute, requiring that the evidence be taken down and certified. Such we think is too strained a construction of the statute, section 129 of chapter 29 of the Code. We do not think this statute was intended to be given such a narrow construction. Besides, the certificate of the board of equalization and review amounts to a substantial compliance with the statute. It substantially states the evidence on the only material facts. The facts stated were not mere conclusions of law, but the very substance of what the witnesses must have testified to. True, the board of equalization

and review is not a court of record, but the statute authorizes them to certify the evidence in appeal cases. Section 9, c. 131, of the Code (sec. 4913) requires the evidence on the trial of causes in the circuit court to be certified. But no one could well contend that if the facts proven and not the verbatim evidence of the witnesses should be certified, and that without objection, the appellate tribunal would be without jurisdiction to hear and determine the appeal. To so hold would be to sacrifice substance to mere form. We are ministers, "not of the letter, but of the spirit [of the law]; for the letter killeth, but the spirit giveth life" to the law. And so we held in *King v. Jordan*, 46 W. Va. 106, 110, 32 S. E. 1022, that if before the act requiring it the evidence was certified, that would not preclude a consideration of the case in this court, so now, notwithstanding the act, a certificate of the facts proven, without all the evidence, should not prevent a consideration of the case, the statute being directory, not mandatory. We think section 129 should be so liberally construed, and that the motion to dismiss the appeal on the ground that the facts proven and not the evidence was certified, was properly denied by the circuit court.

[8] The only question of merit presented is whether the circuit court erred in denying the taxability of the Masonic Temple Society's property. Exemption of this property is predicated on various provisions of our constitution and statutes and prior decisions of this court. Section 1 of article 10 of the Constitution permits the Legislature, with certain other property, to exempt "property used for *educational, literary, scientific, religious or charitable purposes*." We italicize those purposes strictly covered by the charter of the temple society. And we emphasize the fact that the constitution does not say used exclusively for those purposes. Nor does it limit the Legislature in such exemption to purely public charities as distinguished from private charities. Section 1 of chapter 55 of the Code (sec. 3196), relating to the incorporation of non-stock associations, says:

"Corporations (other than joint stock companies) may be formed under this chapter for benevolent associations, societies and orders, including cemetery associations, orphan, blind and lunatic asylums and hospitals, lodges of Free and Accepted Masons, Independent Order of Odd Fellows," etc.

Section 57 of chapter 29 (sec. 941), the chapter relating to assessment of taxes, provides that:

"All property, real and personal, described in this section, and to the extent herein limited, shall be exempt from taxation; that is to say," etc.

And among the classes of property thereby exempted are:

"Property used for charitable purposes and not held or leased out for profit; * * * all property belonging to benevolent associations not conducted for private profit and used exclusively for the purpose of moral and physical education, all books, furniture, apparatus and instruments belonging to such society."

And section 119 of chapter 32 (sec. 1251), the chapter relating to license taxes, says that its provisions—

"shall not apply to literary, dramatic, musical or benevolent societies, where they do not give exhibitions outside of their own counties."

And section 138 of the same chapter (sec. 1271) says:

"Nothing in this chapter shall be construed as imposing a license tax on corporations chartered strictly for educational, literary, agricultural, scientific, religious or charitable purposes, or upon charters incorporating cemeteries or lodges of Masons, Odd Fellows, or the like, or other charitable fraternal or patriotic societies not incorporated for profit to the stockholders; but the secretary of state shall require full proof as to the character of any such corporation claiming such exemption from the payment of license tax."

That the Masonic Temple Society, limited and prescribed by its charter, is of the class of non-stock corporations organized not for profit, but for the purposes designated therein, is by the constitution and laws referred to exempt from taxation, seems to us beyond doubt. The evidence or facts proven before the board of equalization and review show clearly that it is engaged in no business or practices not authorized by its charter. But the State insists that the property of the society, the temple building, is not used strictly for charitable purposes, but as a club house or rendezvous where activities other than charitable and benevolent ones are carried on, and that being so its property is liable to assessment and payment of taxes. The State also undertakes to institute some distinction between property belonging to a charitable or benevolent institution and the organization itself, which may be exempt, insisting that under section 1 of article 10 of the constitution its property is taxable, notwithstanding the same section authorize the Legislature to exempt property used for charitable purposes. We fail to appreciate this refinement. If property used for such purposes may be exempted, it matters not to whom it belongs, whether it be a Masonic or other benevolent order; and we think the Legislature in the several provisions of the statute referred to has undertaken to do this, and that the provision of the constitution requiring uniformity of taxation has no application. The sole question is, is the property of the temple society devoted to charitable and benevolent purposes? The facts proven and certified, we think, leave no doubt on this question. And it follows that none of the authorities cited

by counsel on this important question of constitutional law have any real application to the question before us. The distinction sought to be drawn between the meaning of the word "charitable" as used in the constitution and the word "benevolent" also used in the statute, as describing a certain class of associations whose property is exempted when used *exclusively* for the purposes indicated, is not well conceived. The proof shows that the property of the temple society is used *exclusively* for charitable and benevolent objects.

[8] Counsel for the State would also apply section 30, c. 55A, of the Code (sec. 3255) to the case here, which exempts the funds of a fraternal benefit society, but not its real estate and office equipment, from taxation. Clearly this statute applies to fraternal benefit societies, and not to the property of a charitable or benevolent society which is itself used for charitable purposes. In fact section 29 of this chapter (sec. 3254) says that nothing in the act shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows or Knights of Pythias (exclusive of the insurance department, etc.).

It is furthermore argued that no case in West Virginia has ever held that a Masonic lodge is a charitable institution, nor any holding its property to be exempt from taxation. But there are cases holding that the property of like organizations used for the purposes enumerated in the constitution and statutes referred to, is or may be exempted by law. In *Reynolds Memorial Hospital v. County Court*, 78 W. Va. 685, 90 S. E. 238, we laid down the proposition that—

"If the property is used for charitable purposes within the meaning of the Constitution, then it is exempt from taxation; if it is not so used, it is not exempt."

And in the recent case of *State v. Kittle*, 87 W. Va. 526, 105 S. E. 775, we applied this liberal rule of construction to the statute in the case of a church parsonage which was not occupied by the minister, but rented out for the time being and the rents applied to church purposes. In that case we held the property had not been forfeited to the State for non-payment of taxes.

And while it may be true that we have no decisions in this State, as counsel for the State cited, specifically holding the property of Masonic lodges exempt from taxation, we have statutes recognizing their charitable and benevolent character, and permitting their incorporation as such; and we know from the facts proven in this case that the property of the Masonic Temple Society here involved is used for charitable and benevolent purposes exclusively. The law makes no distinction between persons or corporations whose property may be exempted. In our statute of charitable uses, section 3 of chap-

ter 57 of the Code (sec. 3294), societies of Free Masons are numbered among those to whom conveyances of lands may be made, to trustees or without the intervention of trustees, for benevolent and charitable uses.

And we have many precedents from states having like or similar constitutional and statutory provisions to those of our own. With but few exceptions, which are distinguishable because of the differences in the language of the constitutions or statutes, they unite in holding that Masonic societies and lodges or orders of like character are charitable institutions, and that their property when devoted to benevolent or charitable purposes may be lawfully exempted, and are generally exempted by law from taxation.

In Virginia, from which we have derived most of our laws and policies, such societies are exempted. It was held in *Petersburg v. Petersburg Benevolent Mechanics' Association*, 78 Va. 431, that a statute which provided that the real estate owned by Masonic, Odd Fellows and other like benevolent associations, when the proceeds arising from such property are devoted exclusively to charitable or educational purposes, shall be exempt from taxation, carried with it the exemption of such proceeds however acquired. Under this statute the same rule was applied with even more liberality to funds received by a Y. M. C. A. from donations or other sources and devoted to the work of the association. *Commonwealth v. Lynchburg Y. M. C. A.*, 115 Va. 745, 80 S. E. 589, 50 L. R. A. (N. S.) 1197. And in *State v. Kittle*, supra, we gave our statute like liberal construction. The principal cases cited and relied on by counsel for the temple society are: *Burdine v. Grand Lodge*, 37 Ala. 478; *Horton v. Colorado Springs Masonic Building Society*, 64 Colo. 529, 173 Pac. 61, L. R. A. 1918E, 966; *City of Savannah v. Solomon's Lodge No. 1, F. & A. M.*, 53 Ga. 93; *Morrow v. Smith*, 145 Iowa, 514, 124 N. W. 316, 26 L. R. A. (N. S.) 696, Ann. Cas. 1912A, 1183; *Indianapolis v. Grand Lodge*, 25 Ind. 518; *Grand Lodge of Masons v. Board of Review of Moultrie County*, 281 Ill. 480, 117 N. E. 1016; *Mason v. Zimmerman*, 81 Kan. 799, 106 Pac. 1005; *State ex rel. Bertel v. Board of Assessors*, 34 La. Ann. 574; *Appeal Tax Court v. Grand Lodge*, 50 Md. 421; *Baltimore v. Grand Lodge*, 60 Md. 280; *Kling v. Parker*, 9 Cush. (Mass.) 71; *Plattsburgh Lodge No. 6, A. F. & A. M. v. Cass County*, 79 Neb. 463, 113 N. W. 167; *State ex rel. Linde, Attorney General v. Packard*, 35 N. D. 298, 160 N. W. 150, L. R. A. 1917B, 710; *State ex rel. Grand Lodge v. Addison, Sheriff*, 2 S. C. 499; *Morris v. Lone Star Chapter No. 6, R. A. M.*, 68 Tex. 698, 5 S. W. 519; *Cumberland Lodge v. Mayor of Nashville*, 127 Tenn. 248, 154 S. W. 1141; *Hardin v. Rock Springs Lodge of Masons*, 23 Wyo. 522, 154 Pac. 823. Some of these cases are criticized and sought to be

distinguished, as either controlled by the peculiar facts, or by the particular statutes involved, and some of them not involving the question of taxation. But it may be said of all of them, that they unite in holding Masonic societies or orders to be charitable and benevolent societies; and without exception, we believe, those which deal directly with the subject of tax exemption unite in holding that when the property, real or personal, held by such a society is held exclusively for charitable and benevolent objects, it may be exempted by law from taxation, but if not so devoted, as in some cases where the building or other property is rented out and revenue derived therefrom for profit, as store rooms, offices, or other commercial or business purposes, the property so employed does not come under the laws exempting property devoted to charitable purposes. We have already referred to the Virginia cases. And in Missouri, for instance, the constitution and statute exempts property "when used exclusively for purposes purely charitable." (Our constitution, as we have noted, does not contain the word "exclusively.") In the case of *Fitterer v. Crawford*, 157 Mo. 51, 57 S. W. 532, 50 L. R. A. 191, such property was there held exempted, except when rented out for profit. In *Cumberland Lodge v. Mayor of Nashville*, supra, the constitution exempted from taxation property used "purely" for charitable, educational or religious purposes. The statute exempted all property belonging to any religious, charitable or educational institution when used exclusively for those purposes. The court held that the word "purely" in the constitution, and the word "exclusively" employed in the statute, were synonymous, and required that the property be used wholly for charitable purposes and not to any extent for profit or gain. In *Grand Lodge of Masons v. Board of Review of Moultrie County*, supra, it was held that a farm conveyed to a Masonic lodge, subject to an annual charge in favor of the grantor, and for the benefit and as a home for sick Masons, was exempt from taxation as a charity, and that the reservation in favor of the grantor did not affect the character of the property as a charity. In *Horton v. Colorado Springs Masonic Building Society*, supra, the property involved was a building owned and used very like the property under consideration here, and was supported by funds derived from dues and donations, and used, the evidence shows, like the funds in this case are used. The constitution allowed an exemption of property used "for strictly charitable purposes," and the property was held to be exempt, although some of the rooms in the building were used for entertainment, and a cigar stand was maintained for the accommodation of members, if the surplus receipts therefrom were devoted to the maintenance of the building. In *Plattsmouth Lodge No.*

6, A. F. & A. M. v. Cass County, supra, the property involved was the second story of a building in the City of Plattsmouth, Nebraska, with the furniture therein, used exclusively for lodge purposes, the first story of the building being occupied by a bank, and not owned by the lodge. The constitution exempted from taxation property used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, when so provided by general law. The statute, among other properties, exempted from taxation properties in the language of the constitution used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes. The court held that the property of the lodge, which it was agreed was used exclusively for charitable purposes, was within the provisions of the constitution and statute, and was therefore exempt from taxation. In referring to this case, counsel for the State say that, as the stipulation of facts brought the case clearly within the provisions of the statute, the court was obliged to hold as it did, that the property was exempt. In the case here the facts proven and certified show that the property of the temple society is used exclusively for charitable purposes. In *State of North Dakota ex rel. Linde, Attorney General, v. Packard*, supra, the constitution required the Legislature by general law to exempt from taxation property used exclusively for school, religious, cemetery and charitable purposes. The statute enacted in pursuance thereof undertook to exempt from taxation personal or real property owned by charitable associations known as posts, lodges, chapters, councils, commanderies, consistories, and like organizations and associations not organized for profit, grand or subordinate, and used by them for places of meeting, and to conduct their business and ceremonies, provided that such property is used exclusively for such charitable purposes; and it was held that a building belonging to a Masonic organization, and devoted exclusively to Masonic use, the greater portion of said building being used for the place of meeting in which to conduct the business and ceremonies of various subordinate Masonic bodies, but a small portion thereof being occupied by the office of the grand secretary, was exempt from taxation under the provisions of the statute, and that the legislature had not exceeded its constitutional powers in enacting the statute.

Some of the cases cited hold that such property is none the less exempt as being devoted exclusively to charitable purposes, because the charity of such society is limited to the membership thereof. *Petersburg v. Petersburg Benev. Mech. Ass'n*, supra; *Horton v. Masonic Lodge*, supra; *Fitterer v. Crawford*, supra; *Indianapolis v. Grand Lodge*, supra; *Portland Hibernian Benevolent Society v. Kelly*, 28 Or. 173, 42 Pac. 3, 30 L. R.

A. 167, 52 Am. St. Rep. 769. In the case of Book Agents of Methodist Episcopal Church, South, v. Hinton, 92 Tenn. 188, 21 S. W. 321, 19 L. R. A. 289, the liberality of construction of constitutions and statutes observed in other states was extended to the property of an incorporated publishing house under the control of the church, which did some secular work in its job office, and printed and manufactured books and circulars, in the interest and under the auspices of the church, whereby it raised a fund to support its worn-out preachers and their families.

The cases mainly relied on by the State are cases like those from Pennsylvania, Ohio and Wisconsin, where the constitution and statutes limit such exemptions to property of a *purely public* character, to the exclusion of all private institutions, such as we have involved here. Philadelphia v. Masonic Home, 160 Pa. 572, 28 Atl. 954, 23 L. R. A. 545, 40 Am. St. Rep. 736; Baraca Club v. City of Madison, 167 Wis. 207, 167 N. W. 258; Gerke v. Purcell, 25 Ohio St. 229.

But one case is referred to where the constitution contains a similar provision to ours, and where it was held that the property of a Masonic lodge is not exempt from taxation. That is the case of Bangor v. Masonic Lodge, 73 Me. 432, 40 Am. Rep. 369. In that case the court undertook to apply the principles of the Pennsylvania and Ohio cases, controlled as they are by the special provisions of constitutions limiting such exemption to public charities, although conceding that Masonic lodges are charitable institutions. This decision is opposed to our own and the decisions of Virginia and many other states, as those we have cited and many others will attest. A review of all the cases cited by counsel and related to the subject is not within the reasonable limits of this opinion. Those we have reviewed illustrate the principles applicable to the case we have here.

What we decide here is that the property of a Masonic order devoted exclusively to the purposes of its business as a charitable and benevolent organization is exempt from taxation under the constitution and laws of this State. The result is that the judgment of the circuit court must be affirmed.

(153 Ga. 126)

DREW et al. v. DREW. (No. 2824.)

(Supreme Court of Georgia. March 18, 1922.)

*(Syllabus by the Court.)***Refusal of interlocutory injunction not error.**

This was a suit to enjoin the sale of land under a power contained in a security deed. Under the pleadings and the evidence the court did not err in refusing to grant the interlocutory injunction.

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Suit by B. L. Drew and others, by guardian, against W. D. Drew. Judgment refusing an interlocutory injunction and plaintiffs bring error. Affirmed.

Alfred Herrington, Jr., of Swainsboro, for plaintiffs in error.

E. V. Heath, of Waynesboro, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 130)

RAVENEL v. STATE. (No. 2928.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

1. Rape \S 51(1) — Evidence held to support conviction.

We cannot say, as a matter of law, that the verdict was without evidence to support it.

2. Rape \S 59(15)—Instruction as to matters that must be shown held substantially correct.

It is urged that the court erred in charging the jury as follows: "I charge you further, on the trial of rape, it is essential to show, either [by] direct or indirect evidence, that actual carnal knowledge or carnal sexual intercourse, however slight, penetration is deemed necessary." It is not alleged in the motion for new trial in what respects this charge is erroneous. This instruction was substantially correct. Wesley v. State, 65 Ga. 731; Morris v. State, 54 Ga. 440.

3. Criminal law \S 1064(7), 1064½—Ground of motion not considered when not showing error, not verified by judge, and indefinite and general.

No error is assigned in the ground of the motion for new trial alleging that the court did not caution the jury that they should disregard certain applause on the part of the spectators when a certain witness was testifying. Besides, this ground is too indefinite and general to enable this court to ascertain therefrom what transpired on this occasion; and the recital of facts therein stated is not verified by the trial judge. For these reasons this ground cannot be considered.

4. Criminal law \S 1064(7)—Ground of motion asserting that facts required full charge held too general.

In the third ground of the amended motion it is alleged that "the facts in the case required a full and complete charge, including the definition of expert testimony." This ground is so general that no question is presented for decision by this court. Besides, there is no complaint of error therein.

5. Criminal law ⚡1064(4)—Witnesses ⚡78—Victim of rape properly permitted to testify on evidence showing that she possessed sufficient strength of mind; nothing presented for consideration by ground not assigning error on any ruling.

The court did not err in permitting the victim of the alleged rape to testify against the defendant, on the ground that she was mentally incapable of so doing; there being evidence that she possessed sufficient strength of mind to render her competent to testify. Besides, in the ground of the motion for new trial raising this question no error is alleged in any ruling of the court concerning this matter; and, no error being alleged, there is nothing for this court to pass upon.

Error from Superior Court, Hart County; W. L. Hodges, Judge.

Will Ravenel was convicted of rape, and he brings error. Affirmed.

The defendant was indicted for rape, alleged to have been committed by him on Fannie Nixon on September 15, 1921, in the county of Hart, this state. The evidence for the state was as follows:

Fannie Nixon testified:

That she was a widow, 51 or 52 years of age. Doc Adams, Mr. Temples, her brother Charlie, and Mitch Adams were her closest neighbors. Her house fronts on the public road, not far from it. Doc Adams lived not very far from her house, in hollowing distance. On or about September 15 (the trial occurred October 13, 1921), Thursday night three weeks ago, she was at home alone. She went to bed about dark, or a little after; does not recollect whether she had a light, but guesses she did. She had a light. Will Ravenel and Rufus Adams are all that she heard of coming to her house that night. There might have been one or two more. Sometimes there are so many running up and down the road. She has been living in war since her husband died. Will Ravenel came to her house, and Rufus Adams claims they were together. She felt like it was about 12 o'clock in the night. She heard a calling and a knocking when they came to her house. It was just knocking at the door and kept knocking. Rufus Adams was knocking. She let him in. When he came in he said that he had a little whisky out there that he had gone off for and had for his boy. He said, "Aunt Fannie, I thought you were sick, and I thought I would stop and give you some of it;" and she told him she did not care much about it, but he could pour her out some. She had gotten out of bed, opened the door, and lit a lamp. She did not go outside of the house. The whisky was brought inside of the house. About a half teacupful was poured out for her. She drank a little of it, and the balance next morning. Rufus said Will Ravenel was with him. She saw the bulk of Will Ravenel out there in the road. She had been knowing Will Ravenel all the year. He had been passing up and down the road all the year, and he took charge of the stables like they were his. Does not know where he kept his mules, but his wagon and buggy stayed out there under the shel-

ter. Rufus did not stay at her house very long after he got there. She told Rufus that this did not look nice at all, coming here at this time of the night; told him he ought not to be coming here waking her up. When she waked up she heard them talking, and she said: "If you are going to bring me any whisky, tell Will to go on." I didn't want him to be in my house and nobody here but me." Rufus said he was going to leave her; said he was going home. She saw the bulk of the man out there in the road come into her house. He jerked hold of her arms and told her that he was going to kill her. That was after Rufus left. It did not seem like it was more than five or six minutes. After Rufus Adams left, Will Ravenel came to her house. He jumped into the door and grabbed her by the arm. The door was open. When he came into the house, he said he was going to kill her. After he said that he jerked her on into the back room, threw her down on the bed, choked and smothered her with quilts. When he first came into the house he took hold of her arms and shut the door after him. She was in the front room when he came into the house, and she was carried from there to the back room. At the time he grabbed hold of her he tried to make a wife out of her; that is what he tried to do, but he did not. (The stenographer here made this note: "The witness had turned her head to one side, and he understood her to say in a low tone of voice, 'but he didn't.'") He choked her until she could not put her hands on her face, throat, or breast anywhere for two or three days. He had murdered her, because she knows she will die. She had just as well be dead now. She had done suffered 10,000 deaths. She was trying to get away from him, and she screamed and hollered as loud as she could. She thought somebody would hear her and come to her. She told him to turn her loose, and it was not his place; that she was at home and was not boarding him at all, and he did not have any business there at all, for she did not give him any provocation to be there.

In regard to stating whether or not she said a while ago that he tried to make a wife out of her, she guesses so. He had hold of her arm and choked and smothered her. Besides choking her, he mashed her; besides mashing her, acted like a dog, she reckoned. When he choked her and carried her into the back room, he had sexual intercourse with her; that is what he tried to have. She had on the clothes that she had been wearing that day; does not recollect that she had pulled off her clothes to retire. She might have laid down with her clothes on. Sometimes she does. Thinks she laid down with her clothes on. When Alex came after her she pulled her clothes off, stripped, and put on some clean clothes. On this particular night she remembers this party who pulled up her clothes and had sexual intercourse with her. There were bruises on her body. Her neck was clawed and scratched up clean down to there on her neck (indicating). She spit up lumps of blood all the next day. After this person did this, he broke and run. He broke through the dining room and bedroom and went on home. The reason she knows that is, she saw the bulk of him. She tried to get to the door to see where he went. This happened on Thursday night. With reference

to how many weeks, "Wasn't it last week?" She does not know what month it was in. With further reference to how many weeks it has been, she said, "Wasn't it last week when it was done?" Dr. Hailey and you (referring to the solicitor general) come down there; you have better minds" than she has. This happened in Hart county. The next day after this happened she never saw anybody but Mitch Adams hauling syrup cane, and saw an automobile. She was lying down most of the time; could not hardly be up at all. In regard to whether she saw anybody passing the house the next day, she told the solicitor general that all she knew that was Mitch Adams hauling syrup cane. Mitch came into the big road, but she did not speak to him, and why she did not was she was bad off. Little Mitch Adams was the first person she told about this transaction. She told him she wanted him to go to Alice and let them know it at once, and she wanted to have some one come down and swear out a warrant and put him in jail. She did not want him to come back to finish. That was on the next day. She does not recollect what time of day it was, but it was about 11 o'clock. The reason why she did not tell somebody about it sooner, she went out to get Rufus Adams, and told him to come up, but he did not come. When he did come on Saturday, she thinks it was, he said, "Aunt Fannie, I wouldn't tell this; I don't believe it looks so bad." Explaining why she did not make an outcry sooner about this, she said, "Mr. Skelton, would you feel like going and striking off up here, when you couldn't touch your throat or face or nothing with your hands and coughing up blood?" She thinks she would have been dead in two or three days. The reason she did not tell somebody about it, there was nobody to tell. She told little Mitch Adams, and asked him to go to Alice and let them know about it. She wanted him to come down and swear out a warrant, and have him where he would not bother anybody else. Mr. Temples came to her house—she does not remember when—but he came up there and came too late and got Mr. Kidd and got Sheriff Brown and Dr. Hailey and sent them down there. Somebody came in her house and she asked who was that, and he said, 'Will Ravenel.'

Cross-examination:

"When Rufe came in with Will Ravenel, I saw him with Rufe. He was out in the road. Q. Do you think you wouldn't know anybody that come into your house? A. I told you when Will come back the second time the light was burning. That was at the time Will come in the door. I told you a while ago it was four or five minutes after Rufe left until Will come back the second time."

Rufus Adams, for the state, testified:

"I live something like 200 yards from Mrs. Fannie Nixon's. Mr. Temples lives in about 400 yards. Will Ravenel lives about a quarter of a mile from Mrs. Nixon's. I remember the time of this alleged offense. Was with Will before night, and was with him when we come by the home of Mrs. Nixon. It was about 12 o'clock, I guess. Stopped there with the intention of giving her a drink of whisky, if she wanted it. There was a light in the house. Went up there and knocked on the door, and

she came to the door. She asked me to come in. Told her I did not have time. She asked who was with me. I said, 'Will.' I said, 'Will has a drink of whisky and wants to give you a drink.' I said, 'If you want a drink, I will give you a drink.' She said, 'All right.' She got a cup. I carried it to him, and Will poured it half full. When he poured out the liquor, he said, 'I have got to go home, and am going through the field.' Will was about 25 yards from the house, on the back side. Will left Mrs. Nixon's first. It was about four or five minutes before I left. He went towards his home. Don't know what become of him from that time on. Didn't see him any more that night. I went home. Mrs. Nixon was standing in the door, and I handed her the whisky in the cup. She set it down in the hall. Told her I wanted to get a match. She went and got a match. I lighted a cigarette and went home. My house is in plain view of her house. It is about 200 yards, I guess. When I got home I went to bed. Didn't see Mrs. Nixon until the next morning. She came to the top of the hill and holloed for some of us to go up there. Nobody went. She was about 25 yards from the house. Didn't go to her house until Saturday morning; this was on Friday evening. She made complaint of something happening to her. She said that he came in and grabbed her. She made complaint of having been assaulted or raped. On Saturday when I saw her, her neck was scratched up. There seemed to be cut places on her neck and on each side of her throat, and it looked like it had been done with finger nails. Didn't observe any other marks of violence of a more aggravated nature, but saw those on her throat."

Cross-examination:

"Saw Will on Friday. He was at his home. Went to see if I could get him to help pull cane fodder. Saw him on Thursday evening and Thursday night. He, his boy, and I went to Mr. William McCurley's. Don't think we brought any whisky. I taken a drink that night after we got back home. In coming back from the fish fry we passed by our house before we got to Mrs. Nixon's. The reason I went up the road with Will, he said that he wanted to see Charley Stowers, and he insisted on me going up the road with him. I didn't go up there. Will went on towards Charlie's. He went up here with me and passed by Mrs. Nixon's house. Stopped at Booze's house. Will was gone down the road 10 or 15 minutes. I sat on the side of the road. That was about 400 or 500 yards from Mrs. Nixon's house. There was a light down there at her house. Will didn't see the light when we were at Booze Temple's. Saw the light at her house while passing only. Will left me at Booze's, and I sat down on the bank. Going up the road I took a pretty good swallow of whisky, something like half a teacupful. I suppose it was homemade. Will had it and give it to me. It was in a gallon jug. Austin was not along. He went on home when he came back from the fish fry. Will took a drink. When we got back to the house, my father walked in and went to bed. I suppose it was about half past 11 or 12 o'clock. Austin got out in the yard, and Will told him to go on home, and said, 'You are pretty drunk; make it if you can.' Will suggested that I go up to Charley Stowers' with him. I wanted to

get some tobacco. Mr. Temples run a store before you get to Charlie's. After I got up there it was late, and I wouldn't get him up and get me some tobacco. Stopped there at Booze's and went on. When we got back to Mrs. Nixon's house I saw a light burning. The door wasn't open. Aunt Fannie was standing in the door when I left. Stayed there something like 5 minutes after Will left. Didn't see Mrs. Nixon taking any whisky while I was there, but handed it to her. Will said that he wanted to give her a drink. I said, 'All right; don't go up in the yard.' There was about a gallon in the jug. I said, 'If she wants any whisky, I will bring it up there, and I will bring a glass.' I don't want her to see this whisky. Will was standing there in the door. The moon was shining. I went to the porch, asked her if she wanted a drink, and she said 'Yes,' and she got a glass, and gave her a half teacupful. When I left Mrs. Nixon to go to my house, I went to the back door to a little room on the far side, which was away from Mrs. Nixon's. Saw Mrs. Nixon the next morning at a distance, but was not close enough to talk to her. She holloed for some one of us to go there, but nobody went. The reason why was we were fixing to go to the field, and I was in a hurry. She didn't hollo like she needed help, but she wanted some of us to come there. Didn't tell her not to say anything about Will."

Mitch Adams, Jr., for the state, testified:

"I am a son of L. B. Adams. I live about 200 yards, I suppose, from Mrs. Fannie Nixon's. Her home is in view of my home. I remember the time of this alleged assault, which happened in the month of September, about the 15th, on Thursday night, I think. Saw Mrs. Nixon on Saturday following, about 12 o'clock, at her home. I went to Booze Temples' store, and passed by, and she holloed to me and said she had something to tell me. She said somebody had come there and had intercourse with her. She said she had been raped. She wanted me to see about her, and she said that he treated her like she was his wife. I went to the store and told them not to say anything until I went to Alex and told him. Told Booze about it first, and if he saw Alex to tell him. Rufus Whitney, his brother-in-law, came down the road, and she told him. I went to town and told Mr. Kidd. Mr. Kidd went and got him Saturday evening. That was the first night I had seen Mrs. Nixon during that week. Mrs. Nixon is about 50 years old, and is a weak woman. She had the fever one time, and lost her health."

Cross-examination:

"This thing happened on Thursday. Don't remember whether I passed Mrs. Nixon's house that day. Saw Will Friday. Saw him over there at his house, when I went over there early in the morning. Went to Will's early Friday morning about a half hour by sun. Will was just getting up while I was there. Had a drink that morning out of a gallon jug. Will give me the jug and all that was in it. The first conversation I had with Mrs. Nixon was on Saturday about 12 o'clock. She said I was the first one she had told it to. Mrs. Nixon had a severe spell of fever about 10 years ago. She is not as bright as the brightest, but her mind is such that she knows people, and she

talks with a reasonable degree of intelligence in ordinary conversation. She is able to take care of herself."

Monroe Kidd, for the state, testified:

"I know Will Ravenel. He weighs about 175 pounds, I should judge, and I reckon he is a pretty stout man. I was brought information to the effect that Mrs. Nixon had been assaulted. An arrest was made. After the arrest I went to the home of Mrs. Nixon. Mrs. Nixon was on the front porch lying on a pallet and I observed abrasions on her neck. The collar of the dress was torn. The left side of the neck was bruised and considerably swollen. The skin was broken about the collar. In my opinion these wounds and abrasions were made with the hands and fingernails. The breaks on the skin indicated that she had been choked. She was very weak and could scarcely talk, but she was rational. She knew me, but did not know Mr. Britt Brown. Her conversation indicated that she was rational. He mind was normal. She was excited, but after a minute or such a matter she became quiet, and related the circumstances to Mr. Brown, myself, and Mr. Temples. I have known her for something like 32 years. For the past 10 years she has been physically weak, and her physical condition is not such as to enable her to have much powers of resistance."

Cross-examination:

"In stating that she was rational I didn't mean that she was in possession of all her senses. I meant that her mental condition was as good as it has been in the past 10 years. Her mental condition has not been the best for the last 10 years. It was caused from fever. The throat around the collar of the dress was scratched on both sides, as if it had been clawed with finger nails. This part of the neck was swollen and bruised, as if it had been squeezed. That was in front. A man with a big hand could get nearly around her throat. The swollen place was on the side of her neck. Didn't see any blue place on the goozle, but it was red. Don't know positively that she was scratched with finger nails. It is possible that she could have scratched herself, but she could not have bruised this and have caused this side of her neck to have been swollen. The only bruises I saw were on the throat and neck. Haven't got anything against Will. I want to see him have a fair trial, justice. I think he is the meanest nigger I ever saw. Mrs. Nixon is in a weak condition, which I attribute to her sickness. She hasn't the best of mental condition. Have seen her when she was irrational. Don't remember the exact time when it was, but Dr. Hailey and I went down there once to treat her husband, John, and at that time she was not normal or rational. She just seemed nervous at that time and talked about everything. That has been 10 or 15 years."

Dr. W. I. Hailey, for the state, testified:

"Am a practicing physician at Hartwell. Have been engaged in the practice about 29 years. I know Mrs. Fannie Nixon, and have known her about that long. I practiced for her and her family, and with her. It has been since her spell of sickness. Several years ago she had a spell of typhoid fever. Since then I

have visited her as a physician a number of times. Have observed her on the streets, and at other times when I visited her in a professional way. She has been physically weak most of the time. Her mental condition has been fairly good; it has not been good, but fairly good. From my knowledge of her in the past 10 years, in my opinion Mrs. Nixon is a woman who possesses such a degree of mentality as to enable her to distinguish right and wrong. In her physical condition she is not strong enough to engage in a continuous resistance against force. She is a woman of such physical weakness as to be easily overcome by force. I remember the day of this alleged assault. Saw her on the 24th of September, and it was alleged to have been on Thursday night before. Was there on Saturday evening. I made a physical examination of Mrs. Nixon, and found marks of violence or abrasions. She had been choked, and finger nails had cut into the skin on one side. From the character of the abrasions I could determine that they had been made by finger nails. The left side of her neck was swollen. She was scratched badly where the choking was. The outer skin was scratched off and showed signs of blood where the finger nails went into the outer skin. At the time I saw it it was not bleeding. It was a draw cut with finger nails into the middle skin. The abrasions of the skin were of sufficient depth to cause a scab to form, and I observed the scab one week after I made the first examination. I found marks of violence on her legs. On her left and right legs I found blue places. The blue places were done with a sharp instrument, with pressure of some kind. Found some red places below the knee. There were two or three on each side of the leg. She was complaining very much with her left foot. There were signs of soreness around the chest. She could hardly stand for me to move her shoulder from one side to the other to examine whether she had a broken bone. She could not stand for me to examine her. That was from soreness. She said she was spitting blood, but I did not see any at that time. Made an examination of her private parts. Found the vagina and the vulva congested, swollen, and I found inside of the vulva matter like seminal fluid or vaginal mucous. By congestion I mean a swollen condition, which is an indication of sexual intercourse; and there were reasons to indicate that sexual intercourse or violation of the woman had occurred. The congested condition of the vagina and vulva was brought about by penetration of some kind, which I think was done with the male organ."

Cross-examination:

"I went down there at the solicitation of Alex Temples, her son-in-law. He told me she had been raped. Didn't find any bruises on the throat, but cuts with the finger nails. I think I can tell finger nail cuts from a scratch by the shape and appearance. There were five on one side and one on the other. The thumb nail was on one side, and five on the other. The neck was scratched. In making an examination of the vagina I found matter that looked like semen—vaginal mucous. I know how semen looks. I don't know that mucous out of the nose looks the same way. It has a different appearance. I don't know what it was,

but it looked like semen more than anything else. How I know it was a mucous discharge; it looked like it. I did not say it was all mucous; I said semen. Didn't carry a microscope. In a great many persons after they are passed 40 years an emission might take place without spermatozoa. An examination of a normal man 30 or 40 years of age will disclose spermatozoa nine times out of ten. It is owing to the number of times sexual intercourse has been had and the short length of time. If the alleged offense took place on the 15th and I went there on the 24th, I would have gone nine days later. I went there the second day. I was there on Saturday after it was alleged to have been done on Thursday. The 24th is the time I went there. If you make an examination of semen, it will disclose a germ. A discharge of a woman is a germ which is called an ovum. I don't think I would have discovered spermatozoa, if there had been sexual intercourse, nine times out of ten, if I had made an examination. If intercourse had taken place between Mrs. Nixon and this man here, and he had gonorrhea, it might or might not have shown up in Mrs. Nixon by this time. It is not true that in a good many cases a person is almost certain to catch gonorrhea. Gonorrhea is catchable, but no man can say what percentage of gonorrhea is catchable. Mrs. Nixon is not mentally strong, and she is not physically strong. In 1919 I was on the jury that committed her to the asylum. She was not in a mental or physical normal condition at that time. The only thing we had in view at that time was to have her cared for by some special man, and in company with Dr. Meredith she was adjudged a fit subject for the lunatic asylum on the 28th day of November, 1919. Her mental condition is better and has been better since that time. There is no question in my own mind, from my experience and my examination of her, but that she has had sexual intercourse. I am positive about that. I believe she has been raped. I am not positive that this defendant did it."

William McCurley, for the defendant, testified:

"Was at home, I recall, part of the time on Thursday night about the time of the alleged rape. On Thursday night I carried Will and Austin to a fish fry, and Doc Adams and Rufus Adams went with me. I got home about 10 or 11 o'clock. In regard to where Will went, they got out and went home. They left my house. They went in the direction of home. Doc and Rufus were with him and Austin."

Cross-examination:

"In going home he would go by Doc Adams."

Willie Tate, for the defendant, testified:

"I know this negro over there. Saw him in Elberton three weeks ago, I suppose. I was in jail. I saw his penis. It looked like there was some kind of disease, clap I suppose, wrong with it."

Cross-examination:

"I am not a doctor. It looked like it was running, and judging from mine (I have had the same thing), it looked like to me it was in the same shape mine was in. He had a bottle like that (indicating), but smaller than that, but the

same kind of medicine, and I saw him using it. It cured me."

B. R. Brown, for the defendant, testified:

"I went to the jail in Elberton with this negro on the 24th of September. Had a conversation with Rufus Adams down here in front of the store. It was on Saturday evening; and he said that he, his father, Will, and several others went down below Negro Sardis' to a fish fry, and they got hold of some liquor, and they all got pretty drunk, and they came back by home, and his father stopped here at home, and him and Will started to Charlie Stowers', and they stopped at Mrs. Fannie Nixon's, and Will wanted to give her a drink. Rufus said that he went and asked her if she wanted a drink of liquor, and she said, 'All right,' and he poured out what he thought was a reasonable drink. He said she said to fill up the cup, and he filled it up and she drink it; then she said to pour out a drink for the next morning, and he did that. They then went to Charlie Stowers', and Rufus said they come back, he went home, and Will went home. He said that Will went to Miss Fannie's and caused this trouble, so she said. He insisted that a mob was going to kill him."

Cross-examination:

"He said that this alleged offense was committed on Thursday night, and this was on Saturday evening, just two days afterward."

Austin Ravenel, for the defendant, testified:

"Think I am 14. Heard Pa say that. Last time I saw him before to-day was when they locked him up. Mr. Kidd came after him. Thursday night before I went to a fish fry with Mr. William McCurley, Mr. Mitch Adams, Joel Millford, Coyle Sanders, Rufe Adams, and Pa. Saw some whisky setting in the car. Rufus Adams took a drink. Did not see my father drink that night, but did the next morning. After we left the fish fry we came home. We came back by Mr. Mitch Adams' house. We walked from Mr. McCurley's home, four of us. When I got to Doc Adams', I went on home, and my daddy came on behind me. Heard him whistling. Don't know what time it was when we left Doc Adams, but it was pretty late. Don't know what time I got home. It didn't take my very long to walk from Doc Adams' to our house. Was home when my daddy come. I pulled off my shoes, and he walked in, shut the door, and went to bed. Saw him the next morning. I got up the next morning and left him in the bed. Went to feed the mules, and Rufus Adams came over there. Me and him went back to the house together. My father was in the house patching a pair of pants. He had already got out of the bed. Left him in the bed when I went to bed. If he left the house that night I don't know anything about it. Believe I would have heard him if he had left. I didn't sleep sound that night. He could not have gotten out of the house without my hearing him. Didn't hear him go out. He was there the next morning. Rufus Adams and I had a drink the next morning."

Cross-examination:

"Got up on Friday morning just as the sun

was rising. Didn't hear anything that happened on Thursday night after I went home. Didn't hear any boys around home hunting possums. The reason I didn't was there was nobody around, I reckon. When I got home Thursday night I pulled off my shoes and went to bed and went to sleep. Didn't sleep all night. My father was in the bed with me. He come not long behind me. I had time to get in the door and he was coming by our barn. Don't know what took place at Mrs. Nixon's."

Charlie Stowers, for the defendant, testified:

"I live near Will Ravenel's, and pretty close to Mrs. Nixon's. Didn't hear any noises at Mrs. Nixon's from half past 10 on. The first part of the night I was in town. That was the night these men went to the fish fry. I didn't go with them. I was back by 12 o'clock. Didn't see Will Ravenel come to my house that night, and didn't hear anybody down the road. Didn't see Rufus Adams that night. Can see Mr. Bruce Temples' house."

Curtis Kay, for the defendant, testified:

"Know Mrs. Fannie Nixon, and have had occasion to pass her house. Have seen her in an irrational frame of mind one time. She seemed to have a spell of some kind. Couldn't say what the trouble was. She had a spell, and they all thought she was going to die. Drs. Hailey and Jenkins came while I was there. Mr. Nixon was there drinking. Couldn't say that he acted like anybody drunk. She seemed to be torn up about something. She wrung her hands. She walked and seemed to be pretty strong."

Dr. T. R. Gaines, for the defendant, testified:

"Am a practicing physician. Have been practicing five years. Have never had any experience previous to this time, except in the medical college, and had 3½ years in the army, and 1½ years in a hospital in Atlanta. There is no way of telling absolutely, without a microscopic examination, that the stain resulting from sexual intercourse is semen from a man. The fluid thrown off from the female reproductive organs resembles semen. You couldn't distinguish that with the naked eye. A distinguishing characteristic of a woman's discharge is the ova, and that of a male is spermatozoa. The ova is a round body. The spermatozoa is shaped more like a tadpole. Wouldn't say it was an easy matter to examine a person two days later, who is said to have had intercourse, to tell whether the stain on the outside of clothing or on the legs was the discharge of a man. It can be done with a microscope. A discharge from some men does not contain spermatozoa, which is the case with settled men or very old men. If this defendant is a normal man, it is my opinion that discharge from him will contain spermatozoa. It might have been possible for me to have taken a microscope down there and determine whether the discharge was from a man or woman. I wouldn't say it was very probable after two days. I don't know whether any expert can testify of his own knowledge, without a microscopic examination, whether a discharge is from a man or woman. It is not true that

during sexual intercourse a woman ejaculates like a man. It is possible that through her ejaculation a discharge could get on her clothes and leg without sexual intercourse. You couldn't tell whether it was from her or the man, unless you put it under a microscope. It would not be possible in every case to make an examination and tell whether or not the person she had intercourse with would leave evidence of having had the clap. In some cases he would, and in some cases he wouldn't. Gonorrheal infection depends upon the state the gonorrhea is in, whether acute or chronic. In most instances, if either of the parties had acute gonorrhea, it would show up, but not in every case. Think 60 per cent. of the cases would show up infection in the acute state. An examination of the penis alone would not tell whether it was an acute or chronic case. In the acute case we have the white discharge with pain and blood on urination, and usually weakness from the back, general bad feeling, and some temperature. In chronic stages we have what is known as occasional dripping instead of profuse discharge, dripping of the urine at the end of urination. General bad feeling is not so marked."

Cross-examination:

"How long spermatozoa will live depends upon where they are and the conditions. It depends on which female organ they are deposited in, whether the vagina, the uterus, or the Fallopian tube. Gestation takes place in the uterus. Sometimes it begins in the uterus. If gestation starts in the uterus, it stops right there. That is the normal place. The Fallopian tubes are the natural place for gestation to begin at times. If this alleged assault happened on the night of the 24th, I think there would have been signs of seminal fluid on the private parts of the female Saturday evening, between 4 and 5 o'clock, if we could recognize them. It will be possible to discover that, with the aid of a microscope, if we recognized such things. Don't know whether they will be in the vagina two days or not. They would in the uterus. To determine whether or not a given deposit is from a male or female, we would have to determine that by a microscopic examination. The ovum is the egg. The spermatozoa is like a wiggletail under microscopic examination. I wouldn't say in this case definitely whether you could tell two days after the alleged act that sexual intercourse took place. It is not natural or probable that a woman will ejaculate without there being some agitation from actual sexual intercourse. If there was any female seminal deposit in this case, it would have been brought about by artificial means, but in diseased conditions we have that. Gonorrhea is transmitted by a germ. Seminal fluid is a white, starchy-like fluid, and if on clothes it would dry up like starch. In gonorrheal discharges you find the organism causing the gonorrhea."

Dr. W. E. McCurry, for the defendant, testified:

"It would be possible to discover spermatozoa in the vulva or the womb if I were to make an examination with a microscope two days after rape had taken place and actual penetration had been of the womb. Don't think it possible for the spermatozoa to live outside the womb,

or on the clothing. They wouldn't live probably longer than a few hours, not over 24 hours. Don't think there have been cases where they lived as long as 12 months on hairs. You could recognize them dead or alive. In making an examination of the case 2 days after the alleged rape I could probably distinguish spermatozoa in semen by a microscope or other means from the vagina, not actually from the clothing, but think the probability would be you could. To make an examination like that I think it essential to make a microscopic examination."

Dr. W. O. Meredith, for the defendant, testified:

"It is not possible to determine spermatozoa in a discharge from a man without resorting to a microscope. They could not be discovered with the naked eye."

The defendant made a long and somewhat rambling statement, giving an account of his going to a fish fry on Thursday night of the alleged offense, and a search by him and others for whisky on that occasion. Finally he got a gallon of liquor, for which he paid \$12. He then said, "You white men have a drink first." William McCurley, the driver of the car, took a drink. Rufe Adams took a drink. Defendant took a drink. They stayed at the fish fry a half hour, and then started home. Got to Mitch Dooly's where the Millford boy got out and took a drink going down the road. They got to Mr. McCurley's house, the defendant sitting behind in the automobile with Adams. His boy was holding the jug. Adams said, "Will, you hold that sister, and don't break it." Before they got to Mr. McCurley's house Rufe Adams said, "I will tell you, if I had a wife to-night she sure would be ——" and he said to defendant, "Will, what would you do?" and the defendant said, "I would try if she would give it to me." And they all burst out in a laugh. They went on home, and they got out at Mr. McCurley's. Adams said, "We had better take it again." He took a drink, and the defendant took a drink. When they got in Mr. Adams' yard, defendant said, "Do you want a drink?" and he said "No; take it home with you; I will be there in the morning." Adams went in the house. The defendant started on. Adams said, "Will, I want some of that whisky," and the defendant said, "Go in the house and get a bottle and pour out some." It was awful mean liquor, and he could not drink much of it. The defendant and his little boy went on home, and the boy beat him home a little bit, went in, shut the door, and went to bed. The next morning, pretty soon, Rufus Adams came over there. "I said, 'Here comes Rufe for his dram.' He didn't say anything about it, and got to telling something about Mr. Mitch Moody and a darky having trouble on account of liquor. We heard somebody talking, and he said, 'Yonder comes Mitch now and Pa,' another white fellow. Dooly said,

'Will, I want a dram,' and I said, 'Well, we've got it,' and he said, 'That is what me and Mr. Adams and this man come here for.' He went back of the barn and got it and took it and set it down on the table, and said, "There it is, gentlemen; help yourself," and they drank and said toasts and big tales and holloed and laughed. They stayed over there three hours, as near as he can tell. They went back to Mr. Adams', and he went with them. That was Friday morning. They went up the road by Miss Fannie's and stopped the car where the road turns out to Ocharlie Stowers.' Saturday evening, about the middle of the evening, he and his boy came to town and came by Miss Fannie's. Walked to the Racket store, and was going opposite to Mr. Alford's, and Mr. Kidd called to him, "Will, come to me," and "I walked up to him, and I said, 'What is it?' and he said, 'Come to the courthouse with me,' and I said, 'What is that for?' and he said, 'You will find out.' He told Mr. Snow Skelton to handcuff me and lock me up. I said 'Captain, what have you got me for?' He said I was charged with raping old Miss Nixon, and he said 'Rufe told me that he went up there and poured out one teacupful of liquor, and he went back and poured out another one and gave it to her and went on home,' and he said, 'They done that, Will, to make up this, and to get your crop.' That is what he told me. That is the truth of the thing."

Mitch Dooley, for the defendant, testified:

"Know Will Ravenel. Saw him on or about Friday after this happened at Mrs. Nixon's. Saw him over there at a gin at his house. I, Mr. Adams, and — were there together. Guess we stayed half an hour over there. Saw Mrs. Nixon on Sunday evening after that at Alex Temples.' She didn't make any statement to me. She said that Mr. Monroe Kidd said that negro would be killed before night. She could rest assured of that. She said, I think, that she blamed the white folks for it as much or more as she did the negro."

Burt H. Morehead, for the defendant, testified:

"Remember seeing Mrs. Nixon one time at my home, something like two years ago. It was some time in the fore part of the night about 9 or 10 o'clock. No one was with her. She came and holloed. I had gone to bed. My wife went out, and she was inquiring as to where Mr. Snelling lived. It was not but a little piece. She wanted my wife to go with her to Mr. Snelling's. She went with her up to Mr. Snelling's. Mr. Snelling's folks weren't at home, and she came back to my house and spent the night. I wouldn't think Mrs. Nixon was in her right mind at the time."

Cross-examination:

"She said she had got lost."

Jno. B. Morris and T. S. Mason, both of Hartwell, for plaintiff in error.

A. S. Skelton, Sol. Gen., of Hartwell, and Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

HINES, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(153 Ga. 92)

MULL v. AKINS. (No. 2632.)

(Supreme Court of Georgia. March 4, 1922.)

(Syllabus by the Court.)

1. Receivers \S 58—Denial of motion to set aside appointment of receiver not conclusive on demurrer on same grounds.

J. P. Mull instituted an equitable action in the superior court of Putnam county against E. M. Akins. The petition as amended alleged, in substance, that the defendant is indebted to the plaintiff in the sum of \$5,000 and interest, on account of a breach of general warranty contained in a deed executed by the defendant, conveying certain lands in Colquitt county; that defendant owns a certain other tract of land in Putnam county, Ga., which he holds under a deed from C. A. Webb, subject to an unsatisfied and outstanding security deed in favor of a certain mortgage and security company, on which there is due \$4,591; that on account of fraud practiced by the defendant the plaintiff has lost all of his property, and is unable to pay off the amount due on the alleged security deed, and consequently is unable to subject the Putnam county land under the attachment laws of Georgia, and, even if the land were subject to attachment without paying off the security deed, plaintiff is unable to give an attachment bond as required by the statute; that defendant is seeking to sell his equitable interest in the Putnam county land, for the purpose of further defrauding the plaintiff and preventing him from collecting his debt; that defendant is a nonresident of this state, and resides in the state of Tennessee. The prayers were for process; for the appointment of a receiver to take charge of the described land in Putnam county and collect and hold whatever assets said Akins may have in this state, and hold the same subject to the final judgment of this court; and for general relief. The petition was sanctioned, and a receiver was appointed; the order of the court granting leave to the defendant to move, within a stated time, for a discharge of the receiver. The defendant appeared by his attorney and filed a formal motion for discharge of the receiver, on the sole ground that the petition showed upon its face that the court was without jurisdiction of the person of the defendant or of the subject-matter. The motion was denied by the court, prior to the appearance term of the case. The defendant filed a demurrer to the petition, on the same grounds which were set up in the motion to discharge the receiver, i. e., that the petition showed on its face that the court was without jurisdiction of the person of the defendant or the subject-matter. At a subsequent term of the court the judge sustained the demurrer to the petition,

and dismissed the action. The plaintiff excepted, assigning error on that judgment.

1. The motion to set aside the appointment of the receiver, on the ground that the allegations of the petition showed that the court was without jurisdiction of the person of the defendant or the subject-matter, was in effect a demurrer to the petition. Being of such character, the court did not have jurisdiction to render a final judgment thereon before the appearance term. Accordingly the judgment (unexcepted to) refusing to set aside the appointment of the receiver on the grounds taken was not conclusive on the court in rendering the decision on the demurrer at a subsequent term, although the demurrer was based upon the same grounds.

2. *Receivers* §29(2)—Court held without jurisdiction in suit for receivership of non-resident's land.

Under the facts alleged in the petition the court was without jurisdiction of the person of the defendant and the subject-matter of the suit, and consequently the court did not err in dismissing the case upon general demurrer.

Hines, J., dissenting.

Error from Superior Court, Putnam County; James B. Park, Judge.

Suit by J. P. Mull against E. M. Akins. Judgment for defendant, and plaintiff brings error. Affirmed.

Dowling, Askew & Wheelchel, of Moultrie, and Meriwether F. Adams, of Eatonton, for plaintiff in error.

Thos. A. Brown, of Blue Ridge, Geo. F. Gober, of Atlanta, and Stubbs & Duke, of Eatonton, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except HILL and GILBERT, JJ., absent, and

HINES, J. (dissenting). Where a creditor without judgment or other lien holds a debt against an insolvent nonresident debtor who owns land within the jurisdiction of the court, which he has incumbered by a security deed, and where the creditor from insolvency or inability is unable to redeem the lands embraced in such deed by paying the principal of such debt and the interest thereon to maturity, as is required by our statute, in order to have the same levied upon by attachment, such creditor can apply to the superior court of the county in which such lands are situated to have the same seized by a receiver appointed by the court, for the purpose of satisfying the creditor's debt; and the seizure of the res gives the court jurisdiction of the subject-matter. As to property within the jurisdiction of the court personal service is not required. Jurisdiction of the res is obtained by a seizure under process of the court, whereby it is held to abide such orders as the court may make concerning it.

THOMPSON v. STATE. (No. 2929.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

1. *Homicide* §203(3) — Dying declaration properly admitted, on showing as to condition and consciousness of approaching death.

The court did not err in admitting in evidence the testimony of a witness as to the dying declaration of the decedent, there being evidence that the decedent said, within an hour or two after making this declaration, that he was dying, and a showing also that the decedent was at that time in articulo mortis, and the character of the wound itself being of such a nature as to authorize the jury to infer therefrom that the decedent was conscious of his condition and approaching end.

2. *Criminal law* §1159(2)—*Homicide* §250—Evidence sufficient to support conviction for murder; judgment not disturbed, when verdict supported by some evidence.

There was some evidence to authorize the verdict, and, that being true, this court will not disturb the judgment of the court below; no error of law committed pending the trial being made to appear.

(Additional Syllabus by Editorial Staff.)

3. *Homicide* §215(4), 221—Dying declaration that defendant shot declarant held a statement of fact, and weight was for the jury.

A dying declaration by deceased that defendant shot him was a statement of fact proper to go to the jury, and to have such weight with them as it was entitled to, and was not a mere conclusion.

Error from Superior Court, Clarke County; Blanton Fortson, Judge.

John Thompson was convicted of murder, and he brings error. Affirmed.

Henry C. Tuck and Dorsey Davis, both of Athens, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

BECK, P. J. John Thompson was tried under an indictment charging him with the murder of D. W. Huff, by shooting the decedent with a shotgun, and the jury trying the case returned a verdict of guilty. The defendant thereupon made a motion for a new trial, which contained the usual general grounds, and the additional ground that the court erred in admitting certain testimony set forth in the motion. Upon the hearing the court overruled the motion, and the defendant excepted.

[1] 1. In the first ground of the motion error is assigned upon the ruling of the court in admitting in evidence the following testimony of a witness, one Alex. Hill:

"I says, 'Uncle Doc [meaning Huff, the decedent], do you know who shot you?' and he

says, 'Of course I do.' And I says, 'Who?' and he says, 'Old Big John Thompson is the negro who shot me.'"

This evidence was objected to on the ground that no foundation had been laid for its admission; that no proof had been submitted to show that the decedent, Huff, was in a dying condition at the time, and that he realized his condition. The court did exclude this evidence upon the objection, but afterwards admitted it. There was no error in admitting the evidence when the court finally ruled upon its admissibility. The decedent was shot about 12 o'clock. The weapon was a shotgun, the entire load penetrating the bowels. The defendant died in about two hours, and subsequently to making this statement to the witness Hill the dying man stated in the presence of two physicians and a nurse that he was dying, and there was testimony showing that he was conscious and rational. In the light of that evidence, the court properly permitted the introduction of the testimony. Indeed, the court might have admitted the testimony when it was first offered in view of the character of the wound. In *Young v. State*, 114 Ga. 849, 40 S. E. 1000, it was said:

"It is not, in order to render dying declarations admissible in evidence upon a trial for murder, essential for the state to show that the declarant affirmatively said he was in a dying condition or used language of like import. If he was in fact in articulo mortis and the circumstances were such as to indicate that he must have known that this was so, it is proper to allow the declarations to be proved. * * *

And in the case of *Barnett v. State*, 136 Ga. 65, 70 S. E. 868, it was said:

"It is not necessary that the person whose statements are sought to be introduced should express himself as believing that he is in a dying condition. Consciousness of his condition may be inferred from the nature of the wound or from other circumstances."

[2] 2. The evidence authorized the verdict of guilty; that is, it made the question of the defendant's guilt a question for the determination of the jury. The decedent was shot at about 12 o'clock at night. Shortly after the gun was fired the witnesses introduced by the defendant, one Woods and Mrs. Woods, arrived and found the dying man in a recumbent position where he fell. Woods testified:

"I asked him who shot him; and he said 'he didn't know, a big black negro.' I asked him where he hit him, and he showed me. I says, 'Can't you tell who it was?' and he said, 'No; I cannot tell who it was; it was dark.' So I started in there to telephone for a doctor, and he told me not to go in there as the telephone wire was cut, and says, 'He is still in there; he has not gone out yet.' And he says, 'Go, get a doctor, quick;' and I run over about a half mile to get a telephone, and woke up Mr. Hill, and got him to go over there and tele-

phone for a doctor, and I run on back over there. My wife went down there with me, Mrs. Woods. She went with me over to Mr. Hill's, and we left Mr. Huff there. I got Mr. Hill, I woke him up."

Upon cross-examination the same witness testified:

"I told Mr. Huff [referring to the son of the decedent] just as plain as I could the next morning just what Mr. Huff told me, 'It was a big black negro shot him;' and he couldn't tell, and I asked him who did it and he never did tell."

In answer to the question:

"You told him a big black negro shot him; that he didn't give any name, and you didn't ask him. Didn't you tell Mr. Huff here that?"

—witness answered.

"I told Mr. Huff that his father told me that a big black negro shot him, and he didn't tell me who did do it. I asked him who killed him. Mr. Huff told me it was a big black negro, and he could not tell who it was."

This evidence of Woods was corroborated by the testimony of his wife. But a witness introduced by the state, Dr. H. W. Birdsong, testified:

"He [Huff] died about 2 o'clock. He lived about an hour after I saw him. The wound was just to the left of the lower end of the sternum about an inch to the left of the lower end of the breast bone—sternum. He lived about an hour after that. The cause of his death was a gunshot wound. I made a thorough examination of the wound. I found that the left lobe of the liver was shot into. First, there was an opening through the skin about as big as a dollar, caused from a shotgun. The lobe of the liver was shot into, and also the lead went through the stomach and the large bowels, and also portions of the smaller bowels was shot, and the left kidney; the upper pole of the left kidney, and also the spleen. In the wound I found some shot and a few fragments of his clothing; and after he was carried to the undertaker's parlor we went down there and opened him up, and found the wadding just at the upper pole of the kidney; wadding from a shotgun. He made a statement in my presence with reference to who did it; his condition at that time was fair. He was rational at that time. As to his condition or knowledge as to whether or not he would live, he thought he was dying. He told me, before he made the statement, he was dying. I asked him who shot him; and he said, the first time I understood him to say, 'Big John Thomas;' and I asked him, 'Who did you say?' and he said, 'Big John Thompson.'"

In answer to the question whether or not the decedent made any other statement about where he was or anything, witness answered, "That was the only statement he made." In answer to the question, "Was anybody else present at that time?" witness answered, "Yes; Dr. Coffee and the night superintendent, Miss Hutchins. She is the night superin-

tendent." Dr. H. D. Coffee also testified that he heard the decedent make a statement as to who shot him. At that time he was conscious and rational. He knew that he was dying. He said that "Big John Thompson," a negro, shot him. Dr. Coffee and Dr. Birdsong both testified as to the character of the wound.

Alex. Hill, a witness for the state, testified:

"I have known Big John Thompson a year or two. I never spoke to him, as I know of, to recall of. As to any trouble with Mr. Huff and John Thompson prior to this—just about two weeks before he was killed, me and old man Doc [the decedent] was coming to town one Saturday evening, and old man Doc had loaned Big John \$5, and he had been owing it three or four or five months, and old man Doc told me to stop up there, and says, 'I will ask old Big John if he has any money for me,' and we stopped and asked him, and he told him, 'No,' he didn't have any money for him, and the old man says, 'You just ain't a negro of your word, or you would have paid me when you promised,' and he says, 'God damn you, I will see you later,' and turned around and walked off. That is all he ever said to him. What John Thompson stated to old man Doc was: Thompson told old man Doc, 'God damn you, I will see you later.' This may have been two weeks before the killing; maybe a little less or maybe a little more."

Notwithstanding the testimony of Mr. Woods and his wife as to the statement made by the decedent, the jury were authorized to find that the dying man, while absolutely in articulo mortis and fully conscious of his condition, made the statement that the defendant was the man who killed him. And there was also the evidence, slight though it may be, tending to show that the accused entertained feelings of enmity towards the dead man.

[3] It is urged in the arguments of counsel for the plaintiff in error that the dying declarations made by the decedent are not to be considered as anything more than an impression made upon the mind of the declarant. In other words, that it was a mere conclusion of his, and ought not to have any weight as a conclusion stated by him, in the absence of evidence of facts upon which he based that conclusion. Manifestly, the statement was one of fact, and a fact proper to go to the jury, and to have such weight with them as it was entitled to under all the circumstances. That it was a single bare fact, unaccompanied by a statement of surrounding circumstances; that in the poor light where the shooting was done it was impossible for the wounded man to recognize his assailant; that he might have jumped to the conclusion that it was John Thompson who killed him, without actually recognizing him—all of these suggestions in the written arguments of counsel were arguments proper to be made before a jury. But this court will not weigh

nicely the evidence that is submitted. We have no right to do so. Evidence which was competent under our statutes was submitted for the consideration of the jury, and it satisfied their minds beyond a reasonable doubt of the guilt of the accused; and this court cannot declare that the court below abused his discretion in overruling the motion for a new trial, based upon the ground that the evidence was not sufficient, and that the jury did not have the facts before them which would authorize a conviction.

Judgment affirmed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 66)

MUMFORD v. FOSS. (No. 2543.)

(Supreme Court of Georgia. Feb. 28, 1922.)

(Syllabus by the Court.)

1. Pleading \S 356(1)—Answer of second mortgagee setting up rights under note prior to both mortgages properly stricken on demurrer.

The court did not err in striking the amendments to the answer, on oral motion in the nature of a general demurrer.

2. Subrogation \S 17—Transferee of purchaser's note surrendering note and taking mortgage held not subrogated to purchaser's rights as against prior mortgagee.

Under the facts of the case, the holder of the second mortgage, who became the purchaser pursuant to a power of sale contained therein, was not entitled to any right of subrogation.

3. New trial \S 70—Properly denied when verdict supported by evidence.

The principles ruled in the foregoing headnotes cover the only assignments of error mentioned in the brief of the plaintiff in error. The verdict was supported by evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Ben Hill County; O. T. Gower, Judge.

Suit by M. J. Foss against C. M. Mumford. Judgment for plaintiff, and defendant brings error. Affirmed.

Mrs. Foss filed a petition against Mumford, alleging that on September 3, 1908, B. C. Mosher executed to petitioner a mortgage deed, duly recorded on September 5, 1908, containing a power of sale, covering described realty as security for a loan of \$1,500; that at the time of the execution of the mortgage said property was free from liens, and the title thereto was in B. C. Mosher [the maker of the mortgage]; that, upon the failure of Mosher to make payment of the debt, she did, after compliance with the terms of the

mortgage as to advertisement, etc., make sale of the property pursuant to the power of sale, and, being the highest bidder, she became, on October 16, 1909, the purchaser of the property for the consideration of \$1,000; that on November 28, 1908, Mosher executed to Mumford, the defendant, a mortgage containing a power of sale, covering the same property, to secure a loan of \$800, the mortgage reciting that the debt would become due and payable on November 28, 1909; that after a purported advertisement of the property Mumford did, on the first Tuesday in March, 1910, in disregard of petitioner's rights and the fact that the property had already been sold under the power contained in the mortgage to her, sell the property and attempt to convey the property to himself for a consideration of \$100; that notwithstanding petitioner had, since the purchase by her at the sale under the mortgage to herself, been in possession by her tenants, who had recognized her as landlord and paid the rent on the premises to her, Mumford is continually harassing and annoying her tenants, representing to them that he is the owner of the property, and endeavoring to induce them to attorn to him for the rent; that the deed purporting to convey the title to the property to Mumford in fact conveyed nothing, because the title had previously vested in petitioner; that this pretended title outstanding (the deed appearing upon the records of Ben Hill county) constitutes a cloud upon petitioner's title and makes it impossible for her to sell the property at anything like its fair market value; that whatever lien the defendant had on said property was divested when the same was sold under petitioner's mortgage, and attached to the proceeds of the sale under her mortgage; that, at the time defendant attempted to sell the property under his mortgage, the property was entirely free from any and all liens against Mosher; and that petitioner is without an adequate remedy at law, and is suffering injury and damage because of the cloud upon her title to said property. The prayers are for process, for decree declaring null and void the deed conveying the property to the defendant, and for general relief.

The defendant's answer denied all the material averments of the petition, and asserted that the sale of the property under the mortgage to himself was regular in all respects and did in fact convey to him the title to the property. Two amendments to the answer were offered. The petition orally moved to strike these amendments, because the facts alleged showed no right of subrogation on the part of the defendant. The motion was sustained; the defendant excepted *pendente lite*, and assigned error thereon. The stricken amendments set up substantially that on November 26, 1907, Mosher sold the

property under bond for title to one Lester, who paid \$500 in cash and gave his note due in one year for \$800; that from that time until November 26, 1908, Mosher was in possession of the property as owner; that in February, 1908, Mosher sold the note of Lester to defendant, for \$800; that defendant was induced to purchase the note by reason of the fact that he knew it had been made to cover a part of the purchase price of the property, that Lester had paid the balance and held bond for title, and that the property was worth more than the amount of the note; that, about the time the note became due, defendant was informed that it had been agreed that Lester would sell the property back to Mosher upon the return of Lester's note which defendant held, and that as a part of the same transaction Mosher would execute to defendant his note for the same amount and secure the same by a first mortgage lien on the property; that upon the carrying out of this arrangement Lester became the tenant of Mosher, and remained in possession of the property as such until after the alleged sale of the property under the mortgage claimed to have been held by petitioner; that defendant had no knowledge and no actual notice whatever of the existence of any mortgage on said property in favor of plaintiff, until many months after he had received from Mosher the note and mortgage aforesaid; that at the time of said transaction Mosher represented to defendant that, upon procuring from Lester the possession of the property and surrender of the bond for title, he would be in position to give defendant a first lien on the property; that, on the occasion of the alleged sale of the property by petitioner under the mortgage to her, defendant was present and gave notice that he held his mortgage, and that the purchaser would take the property subject to the lien of his mortgage; that the lien held by him upon said property was superior to any held by petitioner; that he acquired a valid title to the property; and that the title asserted by petitioner is null and void. He prayed that the title asserted by plaintiff be canceled, and that the legal title be decreed to be in defendant; that he recover possession of the property, together with a judgment against the petitioner for the rental value of the property during the time she had had possession; that, if the lien asserted by petitioner should be held superior to the mortgage held by defendant, he be subrogated to the rights of Lester prior and up to the time of the transaction by which Lester resold the property to and became the tenant of Mosher; and that the title to the property be decreed to be in defendant free from any and all rights of the plaintiff under or by virtue of her alleged mortgage.

The trial resulted in a decree that the deed held by Mumford constituted a cloud upon

petitioner's title, that the same be canceled, and that the defendant be perpetually enjoined from interfering with petitioner's possession. Error is also assigned upon the overruling of the defendant's motion for a new trial.

A. J. & J. C. McDonald, of Fitzgerald, for plaintiff in error.

Wall & Grantham and Samuel Kasewitz, all of Fitzgerald, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur.

(152 Ga. 828)

MIRAGLIA v. BRYSON. (No. 2505.)

(Supreme Court of Georgia. Feb. 22, 1922.)

(Syllabus by the Court.)

1. Sufficiency of assignment of error.

The assignment of error in the bill of exceptions being sufficient, the motion to dismiss the same is overruled.

2. Judgment \S 299(1), 342(1)—Cannot generally be set aside or altered unless proceeding begun during the term.

The general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during the term. *U. S. v. Mayer*, 235 U. S. 55, 67, 35 Sup. Ct. 16, 59 L. Ed. 129; *Alley v. Halcombe*, 96 Ga. 810, 22 S. E. 901.

3. Dismissal and nonsuit \S 81(3)—Judgment \S 299(1)—Motion to reinstate on sufficient excuse may be after the term; errors reviewable on writ of error coram nobis, etc., may be corrected at subsequent term; motion for reinstatement at subsequent term proper when plaintiff dead and no administrator appointed in time.

There are exceptions to the above rule: (a) A party can make a motion to reinstate a case, after the expiration of the term at which the order of dismissal was entered, when he can make the same excuses for delay as must be shown in making an extraordinary motion for new trial. *Austin v. Markham*, 44 Ga. 161; *Watkins v. Brizendine*, 111 Ga. 458, 36 S. E. 807.

(b) The court at a subsequent term can correct such matters as are reviewable in writs of error coram nobis or coram vobis, for which the proceeding by motion is the modern substitute. *U. S. v. Mayer*, 235 U. S. 55, 68, 35 Sup. Ct. 16, 59 L. Ed. 129.

(c) Where a plaintiff is dead when suit is dismissed, a motion by an administrator at a subsequent term of the court is the proper form of proceeding to have it reinstated; there being no administration on the estate of the plaintiff in time to make such motion during the term at which the judgment of dismissal was entered. *Armstrong v. Nixon*, 16 Tex. 610. This is so because the judgment rendered under such circumstances is generally a nullity. This case falls with this exception.

4. Dismissal and nonsuit \S 81(3)—Judgment reinstating case not reversed for laches or unreasonable delay.

A suit was filed on June 25, 1918, returnable to the July term, 1918, of Bibb superior court. Shortly thereafter the plaintiff died. On January 15, 1919, the judge granted an order, reciting that the plaintiff's death had been suggested of record, and requiring parties to be made by the next term, or the case be dismissed. Leading counsel for the plaintiff consented to this order. On April 29, 1919, the case was by order dismissed, because parties had not been made. On November 3, 1919, an administrator was appointed upon the estate of the deceased plaintiff. The administrator took his oath of office on December 18, 1919. He gave bond on October 6, 1920. On October 18, 1920, he made a motion to set aside the order dismissing this case. *Held*, that this court cannot say that there was such laches and unreasonable delay as will require a reversal of the judgment of the court below, although several terms intervened between the order of dismissal and the motion to reinstate.

5. Appeal and error \S 840(4)—Question not passed on below as to sufficiency of petition not considered.

This court will not pass upon the question whether the plaintiff's petition set out a good cause of action, and hold that the court should have denied the motion to reinstate because no such action was therein set out, as this matter was not passed upon by the court below.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by Coleman Bryson, administrator, against Ed Miraglia. Judgment for plaintiff, and defendant brings error. Affirmed.

B. S. Deaver, of Macon, for plaintiff in error.

Chas. H. Garrett, Walter De Fore, and Jas. C. Estes, all of Macon, for defendant in error.

HINES, J. Judgment affirmed. All the Justices concur.

(153 Ga. 122)

BATTLE et al. v. F. S. ROYSTER GUANO CO. (No. 2819.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

1. Injunction \Leftrightarrow 8—Receivers \Leftrightarrow 26—Injunction and receiver not granted on behalf of creditor fully protected by injunction previously granted in another suit.

Under the facts appearing in the record, the court erred in appointing a receiver.

(Additional Syllabus by Editorial Staff.)

2. Fraudulent conveyances \Leftrightarrow 229—Garnishment lies where debtor has turned over to another creditor property in excess of such creditor's claims.

If a debtor has for any purpose turned over to a creditor assets exceeding in value the claims of such creditor, another creditor, by common-law garnishment, may subject to its demands the excess of the funds or property in the hands of the first creditor over its just demands.

Error from Superior Court, Warren County; E. T. Shurley, Judge.

Suit by the F. S. Royster Guano Company against B. C. Battle and others. Judgment for plaintiff, and defendants bring error. Reversed.

The F. S. Royster Guano Company filed a petition in the superior court of Warren county against Mrs. Bessie C. Battle and the Fourth National Bank of Macon, Ga. (hereinafter referred to as the bank), for an interlocutory injunction and a receiver. Plaintiff filed two amendments to its petition, which were allowed. Mrs. Battle filed her plea in abatement, also her demurrer to the petition and an answer thereto, as well as answers to both amendments. The bank filed a demurrer to the petition and a plea in abatement and sworn response to the rule nisi granted in the case.

In the present petition is set forth the pendency of another suit in the superior court of Warren county, the reference thereto being as follows:

"On the 13th day of June, 1921, petitioner filed suit in this court, in which petitioner asked for a judgment against defendant for the amount of the said note [it being the same note the collection of which is sought in the present suit], and praying, among other things, that she be restrained and enjoined from disposing of or alienating in any way certain growing crops on property described therein, except by order of the court. Reference is prayed to said suit, the prayers therein asking for injunction and a restraining order and the injunction granted therein."

In addition there was a prayer for judgment on the note, and that Mrs. Battle be enjoined and restrained from disposing of or alienating or incumbering any of her prop-

erty therein described, or the growing crops on the property. Numerous parties were named as codefendants with Mrs. Battle in the suit filed in June, 1921, and the petition in that suit set forth numerous conveyances to the various codefendants, conveying several thousand acres of land in many different lots, which are fully described; and it was prayed in that former suit that Mrs. Battle be restrained from transferring this property, and that the codefendants, who were grantees in the several deeds, be enjoined and restrained from transferring the title to the realty conveyed by Mrs. Battle, or from in any wise changing the status of the title to the property, it being alleged that the property had been fraudulently conveyed and transferred to them by Mrs. Battle. Injunction was also sought in that suit to prevent the defendant from disposing of or in any manner incumbering any other of her property, and particularly the crops up and growing on her lands for the year 1921. And further it was prayed that each of the codefendants with Mrs. Battle, some 10 or more, who were grantees in the deed referred to, be required to deliver up the fraudulent conveyances made to them by Mrs. Battle, together with their notes which said conveyances were made to secure, and that the conveyances and notes be canceled. There was also a prayer for general relief.

The injunction and restraining order sought in the first suit filed in Warren superior court June 13, 1921, upon the interlocutory hearing were granted as prayed. In this present case, filed in August, 1921, the same petitioner further sets forth and describes certain property conveyed by security deed by Mrs. Battle to the Fourth National Bank of Macon on June 4, 1920, it being part of the same property the growing crops on which Mrs. Battle had been previously restrained and enjoined from alienating or conveying; that under and in accordance with the power of sale in the security deed the bank had advertised and is about to sell said property; that said sale will by operation of law include all the growing crops thereon; and that the sale is a collusive scheme between the bank and Mrs. Battle to defraud the other creditors of Mrs. Battle. In the petition are set forth the names of other creditors and the amounts due them. Defendants filed their sworn responses, answers and pleas, in which the material allegations of the petition were denied, except that the bank held a security deed and was about to exercise the power of sale thereunder. The bank also demurred to the petition. Upon the presentation of this petition the court issued a temporary restraining order against the bank restraining it from selling the property. After hearing argument of counsel the court vacated the restraining order previously granted as

against the bank, and denied the injunction against the bank, but granted the injunction against Mrs. Battle, and appointed receivers for all the property as prayed. To the order granting the injunction against Mrs. Battle, and appointing receivers for her property, the defendants excepted.

L. D. McGregor, of Warrenton, and Jones, Park & Johnston, of Macon, for plaintiffs in error.

Crenshaw & Lindsay, of Atlanta, and M. L. Felts, of Warrenton, for defendant in error.

BECK, P. J. (after stating the facts as above). [1] It affirmatively appears in this case that an injunction had already been granted in a prior case pending in the same court, at the suit of the plaintiff in the present action, F. S. Royster Guano Company, for substantially the same cause of action, restraining Mrs. Battle from incumbering or alienating any of her property, which order preventing the alienating or incumbering of any of Mrs. Battle's property included the land involved in the instant case. In the present case the Guano Company petitioned for and obtained in the same court another injunction against Mrs. Battle, and also obtained the appointment of a receiver for her property. As previously pointed out, in the first suit an injunction had been obtained by the plaintiff in the court below, the defendant in error here, restraining and enjoining Mrs. Battle from alienating or incumbering any of her property. The present action is directed against the Fourth National Bank as a codefendant with Mrs. Battle. Can this have the effect of supporting the action against the latter? If the court had found, under the facts alleged, that the plaintiff in the suit was entitled to its injunction against the bank and the other relief against that bank which was denied, a different question would have been raised from what is presented now. But, when the prayers of the petition against the bank were denied, then there was no further occasion for retaining this action against Mrs. Battle, in view of the relief sought and granted in the first action; and the court erred in granting the prayers for injunction and receiver against Mrs. Battle. The plaintiff in the court below had no lien on any of the property nor any interest or right in any portion thereof, and the injunction which had been granted in the previous suit fully protected it in its rights; for, after having recovered a judgment, if it should recover one, it could levy upon the property. Moreover, to allow this receivership to stand as to the land which was conveyed to the bank to secure the debt held by it would be indirectly defeating the bank in its attempt to enforce its claim, though refusing by the direct remedy of injunction to prevent the bank from exercising the pow-

er of sale given in the deed from Mrs. Battle to that corporation.

[2] If, as a matter of fact, in this case Mrs. Battle has for any purpose turned over to the bank an amount of assets exceeding in value the real claims of the bank against her, the plaintiff in this case can, by plain, common-law remedy—that is, by garnishment—subject to its demands the excess of the amount of funds or property in the hands of the bank over its just demands. We think for these reasons that in no view of the case, after the refusal of the equitable relief directly sought against the bank, was the plaintiff entitled to the remedy and relief additional to the full and comprehensive relief granted it in the former suit filed in June.

It is unnecessary to quote lengthy extracts from authorities supporting the views set forth above, and upon which our judgment is based. It is not improper, however, to cite in this connection the following: Civil Code 1910, § 5495; McWilliams-Rankin Co. v. Thompson, 135 Ga. 424, 89 S. E. 554; Virginia-Carolina Chemical Co. v. Provident Savings Life Assurance Society, 126 Ga. 50, 54 S. E. 929; Spence v. Solomons Co., 129 Ga. 81, 58 S. E. 463; Guilmarin v. Ry. Co., 101 Ga. 565, 29 S. E. 189; Stuard Lumber Co. v. Taylor, 150 Ga. 135, 102 S. E. 894; Colonial Trust Co. v. Central Trust Co., 243 Pa. 268, 90 Atl. 189; Magniac v. Thomson, 15 How. (56 U. S.) 299, 14 L. Ed. 696; Booth v. Mohr, 122 Ga. 333, 50 S. E. 173.

Judgment reversed.

All the Justices concur, except FISH, O. J., absent because of sickness.

(153 Ga. 212)

WALKER v. STATE. (No. 3091.)

(Supreme Court of Georgia. April 11, 1922.)

(Syllabus by the Court.)

1. Criminal law ⇐1092(14)—Supplemental certificate to bill of exceptions held unauthorized.

The bill of exceptions in this case was certified on the 3d day of February, 1922, and the transcript of the record was filed in this court on February 20, 1922. On March 20, 1922, a supplemental certificate of the judge, dated March 18, 1922, was filed in this court, in which the court certified that a portion of the brief of evidence duly approved and made a part of the record at the time of the hearing of the motion for a new trial was incorrect, and that the statement as contained in an affidavit accompanying the supplemental certificate was the true and correct statement of the evidence had on the trial in that respect. Counsel for defendant in error suggested a diminution of the record accordingly. Held that, when the judge of the superior court has signed a certificate to a bill of exceptions, he has exhausted his power in that regard, and cannot add a supplemental certificate explaining or changing

the first. *Minhinnett v. State*, 106 Ga. 141, 32 S. E. 19; *Reynolds Banking Co. v. Beeland*, 142 Ga. 242, 82 S. E. 662; *Consolidated Naval Stores Co. v. McPhatter*, 147 Ga. 797, 95 S. E. 686; *Cartledge v. Ashford*, 148 Ga. 589 (2), 97 S. E. 521.

2. Criminal law §935(2)—Failure of proof of venue ground for new trial.

One ground of the motion for a new trial is based on the failure of the state to prove the venue. After a careful examination of the evidence, we find this ground is well taken; in fact, it is conceded in the brief of the attorney general. Proof of the venue being essential to confer jurisdiction on the trial court, it was error to overrule the motion for a new trial.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

George Walker was convicted of an offense, and he brings error. Reversed.

Geo. B. Davis, John W. Thomas, and Fred Kea, all of Dublin, for plaintiff in error.

E. L. Stephens, Sol. Gen., of Wrightsville, Geo. M. Napier, Atty. Gen., Seward M. Smith, Asst. Atty. Gen., and J. S. Adams & R. Earl Camp, or Dublin, for the State.

GILBERT, J. Judgment reversed. All the Justices concur.

(153 Ga. 184)

MANNING v. STATE. (No. 2800.)

(Supreme Court of Georgia. April 11, 1922.)

(Syllabus by the Court.)

1. Criminal law §371(12), 372(4)—Evidence of other homicides held admissible to show motive or scheme.

Evidence showing the participation of the defendant in homicides other than that for which he is being tried is admissible to show a motive, or scheme to commit such crime.

2. Homicide §286(2)—Instruction that defendant's admission of killing did not show malice, when accompanied by explanation, improperly refused.

Where a defendant admits the perpetration of a homicide, but, in connection with such admission, gives an explanation justifying or excusing his commission of the offense, it is error for the trial judge to refuse a timely written request to charge that such admission, with such explanation, would not create a presumption that the accused was actuated by malice.

3. No opinion expressed as to evidence.

A new trial being granted, this court expresses no opinion upon the evidence.

(Additional Syllabus by Editorial Staff.)

4. Criminal law §823(11)—Failure to charge that admission of killing, with explanation, did not justify inference of malice, held not cured by instruction given.

Where defendant had admitted the killing, but claimed to have been acting under coercion,

the refusal of an instruction that such admission, so qualified, did not warrant an inference of malice, held not cured by a charge on the commission of a crime under threats or menaces pursuant to Pen. Code 1910, § 41, and a charge that, if defendant was forced by coercion to take the part he did and the coercion was of such a nature as to excite in his mind a reasonable fear that his life was in danger, etc., he should be acquitted.

5. Criminal law §372(4)—Not error to permit jury to consider other offenses committed as part of same scheme in determining guilt.

If other homicides tended to show a scheme or plan under which the offense charged was committed, the jury could consider such evidence in determining the truth of the defense that defendant committed all the homicides under coercion, and an instruction was not erroneous because permitting the jury to consider evidence of such other crimes as tending to prove defendant's guilt.

6. Criminal law §783(1)—Instruction as to purpose and effect of evidence of other homicides held not misleading or objectionable.

Instructions that the questions whether evidence of other offenses showed a motive or scheme or tended to connect defendant with the offense charged were exclusively questions for the jury to determine, that such evidence had been admitted, not for the purpose of showing or establishing defendant's guilt of such other crimes, but solely to show whether or not a motive or scheme existed and in that way connect defendant with the commission of the crime alleged, held not misleading or objectionable except so far as it left to the jury the question whether evidence of such other offenses connected with the crime charged.

7. Criminal law §1172(2)—Instruction permitting jury to determine whether evidence of other offenses connected defendant with crime harmless, where he had admitted participation.

An instruction permitting the jury to determine whether or not evidence of other homicides connected defendant with the murder for which he was being tried, if erroneous, was harmless, where defendant in previous statements and in his testimony on the trial of a codefendant admitted that he participated in the homicide for which he was being tried.

Gilbert, J., dissenting in part.

Error from Superior Court, Newton County; John B. Hutcheson, Judge.

Clyde Manning was convicted of murder, and he brings error. Reversed.

At the March term, 1921, of Newton superior court, John S. Williams and Clyde Manning were jointly indicted for the murder of Lindsey Peterson. The homicide was alleged to have been committed "by tying a chain about the neck of said Lindsey Peterson and weighting the body with a certain sack full of rocks and drowning the said Lindsey Peterson in Yellow river." Williams was tried and convicted, and the judgment was affirmed by

this court. *Williams v. State*, 152 Ga. —, 110 S. E. 286. Subsequently Manning was tried and convicted. He made a motion for new trial, which was overruled, and he brings his case to this court assigning error on this judgment. The evidence introduced on his trial was substantially as follows:

Carl Wheeler testified:

I lived near Allen's bridge, in Newton county, Ga.; was there the morning they found those people; don't know who they were. They were men, two of them black men. Mr. Cassell's boy went and found them. They were in the water. No part of the body was exposed except a shoe sticking up out of the water, with a foot in it. I and another fellow pulled them out. They were dead. That was in Newton county. Don't remember when it was. It was in the spring of this year, if I am not mistaken. These men were fastened together around the neck. Saw nothing but the trace-chains. A sack with rocks in it was tied to them. The sack was tied to those negroes, and the rocks were tied to them with a rope. Don't think it was tied to the chain. We pulled them out on this side of Yellow river at Allen's bridge. Was there when Sheriff Johnson came.

Dr. C. D. Hardeman testified that—

He lived 2½ miles this side of Allen's bridge. Remembered the occasion when some bodies were found down there, on March 13, 1921. Went down there about the time the sheriff got there. When he got there the bodies were on this side of the river, on the bank. They were chained together with a trace-chain around their necks, tied with wire, and a sack of rocks tied to the chain. The hands were tied. One negro's hands were tied. Another had one hand loose. Three hands were tied together. In his opinion these men were put in the water alive. He has mighty little ground on which to base that opinion. He bases it upon the condition of the neck, of the tongue, and the general conditions. At Allen's bridge the water, he guesses, was something like 10 feet deep in the main run of the stream, and 3 or 4 feet deep at the edges. The point where they discovered the bodies was pointed out to him. It was not in the main run of the river, but a little this side of the main run. The water was deep enough to drown them.

B. L. Johnson, sheriff of Newton county, testified that—

He remembered the occasion when some bodies were found drowned at Allen's bridge. It was in March of this year, between the 12th and 15th. Found two dead bodies, black men. They had on overalls and were fully dressed. The bodies were tied together with a trace-chain around their necks. There was a sack of rocks tied to the trace-chain in the way of a sinker, attached to the chain between their necks. They were tied pretty close together. The sack of rocks was tied with a wire rope, and the rope tied to the chain. The sack of rocks would probably weigh 75 or 100 pounds. At that place the water is pretty deep. Tied in that condition it would be easy to drown them there in the water. Their hands were tied together with wire. One of them had one

hand tied and one loose. That place is in Newton county. At the coroner's inquest Clyde Manning identified these bodies as those of Willie Preston and Lindsey Peterson. Manning made a statement in reference to those bodies, as to the death of those men, and how they came there. No one offered him any inducement to make these statements. Did not threaten him in any way. Nothing was said to him by which he could have apprehended any trouble to himself in any manner, before he made such statement. No offer of reward or hope of benefit was held out. He said he, Mr. Williams, and Charlie Chisholm brought them there, and threw them off the bridge alive into the water. He told me that Mr. John S. Williams and Charlie Chisholm was with him; that they came there in an automobile on Saturday. It seems it was about ten days or two weeks before we discovered the bodies. Clyde told us about other bodies, and we wanted to see whether or not he told the truth. We went to search for the other bodies, and found them as he told us. Some were buried, and some drowned. Some were buried on Mr. Williams' place. He told us the names of those who were buried. Three, Johnnie Williams, Johnnie Green, and Will Givens, were buried in the pasture of Mr. John S. Williams. Fletcher Smith, he thinks, was the one in the cornfield. Manning pointed out the places where these three were buried. We found the graves, and in the graves found the bodies. We found Fletcher Smith in the cornfield. Corn had been planted where he was buried, and some had come up right over the body. They had plowed over the body.

From there we went to a cornfield on another one of Mr. Williams' places, and he pointed out another one. He was buried in a sort of new ground. They called this one Big John. He was buried right at a vacant house. Manning pointed that place out. We went and found some more bodies in the water where he told us they were in the river. One was Charlie Chisholm at Water's bridge on the Alcovy river. The water in that river is from 10 to 30 feet deep. Was not there when that body was pulled out, but saw it. It was tied with a chain, and my recollection is there was a sack of rocks tied to the negro around his neck. The sack of rocks would weigh something like 75 pounds. We discovered some other bodies the next day, Sunday. Found them in Alcovy river, at the same place we found Chisholm's body. Those bodies were chained together. The chain was around their necks. Was not there when the bodies were first found. A big piece of iron was attached to the chain for a weight.

No threats, inducements, or promises of reward or benefit were held out to Clyde Manning, nothing done in any way to get him to show us those bodies or identify them. He told us if we would take him he would show us. It was all voluntary, and of his own will, without any inducement or reward or hope of reward. No officer made any threats, and we offered him no inducement whatever. Found the body in South river at Mann's bridge about March 15th. That was directly after the discovery of the bodies at Allen's bridge. It was tied around the neck with a chain and a sack of rocks attached to the chain. The sack of rocks would weigh something like 75 pounds.

The water was of sufficient depth there to drown a man tied around the neck with a chain and a sack of rocks tied to it. That was two or three days after the bodies were found at Allen's bridge. Clyde told us who it was. He said it was a negro by the name of "Foots." His other name was Harry Price. Clyde said he was thrown in the same night that Preston and Peterson were thrown in at Allen's bridge. He said after they had thrown those two over at Allen's bridge they carried this one over to the other river and put him in there. They went in Williams's automobile, and Williams drove. It was near a mile from Allen's bridge to Mann's bridge. Allen's bridge, it seemed to him, would be 10 or 12 miles from Williams's home, and Mann's bridge would be about a mile further. Manning's house, where he lived, was 150 yards from Williams's house. From Williams's house you can see the pasture, which is some 200 yards from Manning's house, and probably 300 or 350 yards from Williams's house. The pasture is in front of Williams's house to the side and back of it, and back of Clyde's house. The body of Fletcher Smith was found on the hillside in the cornfield. I was told that that was John S. Williams's land. Clyde Manning told us that Fletcher Smith was killed by John S. Williams, who shot him with a shotgun in the head. There was a wound in Fletcher Smith's head. Clyde didn't say he helped Williams kill Fletcher, but he helped bury him. Manning said that Charlie Chisholm killed Big John. He said he helped dig the hole to bury Big John, and helped throw the dirt on him after Chisholm killed him. He said he killed William Givens and Johnnie Green, but his understanding was that Charlie Chisholm killed Johnnie Williams. He said John S. Williams was with them when they killed him. They killed them by hitting them with an axe. We found Little Bit, John Brown, and Charlie Chisholm at Waters Bridge, something like 7 or 8 miles from Williams's place, near the county-line bridge. Have been told that Newton county owns two-thirds of this bridge and Jasper county one-third. Mann's bridge is a county-line bridge, and I understand half and half belongs to each county. Clyde showed us where "Foots" or Harry Price jumped off. He said it was on the upper side of the bridge; and that would be in Newton county.

On cross-examination the sheriff testified as follows:

I first saw Clyde Manning during the March term of our court. The grand jury had him subpoenaed in a case about the bodies that were found down about the river, and those of Lindsey Peterson, Will Preston, and Harry Price. Mr. Wismer and Mr. Chastain were present at two conversations with Clyde Manning when he was present. In those conversations Manning told us about these various details that I have testified about. He stated that John S. Williams was present on each occasion when the deaths occurred. He stated that he participated in each of those deaths in the manner I have described, because he said he was afraid not to do it. He was afraid Mr. Williams would kill him. That was a part of the conversations in which he made the admissions about which he had testified. He said he was willing to tell all about it. He told us the complete

story, and his statement has been substantially the same ever since then. No one, no attorney or adviser, had seen Manning at that time, that I knew anything about. He always stated that he did it at the command of Mr. John S. Williams, and because he was afraid not to do it; he was afraid Mr. Williams would kill him. In those statements he said he did it through fear of death, if he did not obey the command of Mr. Williams.

A. J. Wismer testified:

I am special agent of the Department of Justice of the United States. Had occasion in the course of my duties to the government to go to the farm of John S. Williams. That was on February 19, this year. Went to Mr. Williams's house to conduct an investigation for the government. Mr. Brown was with me. Went to Mr. John S. Williams's farm to make an investigation as to alleged peonage conditions on his plantation. When we got there, Williams was not at home. We saw Clyde Manning, John Brown, and Johnnie Williams. We talked to Clyde Manning. Asked Clyde Manning whether he acted as guard over the hands on the place and locked them up at night, as had been reported to us, and asked whether he had gone and helped catch one Gus Chapman and return him to the place. He denied all about it to us. Don't recollect having talked to a man by the name of Lindsey Peterson on that occasion. Brown talked to some of the negroes that I didn't see. I didn't take the names of those from whom I got no information. I talked to John Brown and Johnnie Williams, at John S. Williams's house before he came. Talked to some of them together, then separately. We had practically finished talking to them when Williams returned, and we began talking to him. Williams drove up and introduced himself. I told him my business, and told him I had been talking to those boys there, and had asked them about Gus Williams, and his having run away from his place, and he said, yes, he had; and he said that he and Clyde, and I forget the name of the other negro that went, went and caught him, brought him back, and when he made that statement Brown turned around to Clyde and said, "You just told me a lie, didn't you?" I don't believe Clyde answered one way or the other. We then got in Mr. Williams's car and went back with him over to his other place. Clyde was not with us. We talked to some other negroes and to Mr. Williams's three sons. Don't recollect all the negroes we talked to, but we talked to Clyde Freeman. We talked to Williams about the killing of the negro, Blackstrap. I have since found out that his name was Nathaniel Wade. I am not sure that Clyde Manning was present, but Mr. Williams denied that there had ever been such killing there on his place. I asked him if any one else had been killed on the place, and he said there had been a negro killed on the place by the name of Will Napier, by his son, Hulan, in self-defense. Mentioned to Mr. Williams other negroes, but he said that was the only killing that had ever taken place on his place. We talked to Clyde Manning about Blackstrap being killed, and he denied all about it. The only information I got while I was on the place that day, which had any bearing on the situation, was from Johnnie Williams. He was the

only negro on the place that told me anything. I have seen Johnnie Williams since I was there. Saw him over in the pasture, and he was dead. He had been buried at the edge of the creek. It was approximately three weeks after I saw him and talked to him until I saw him there dead. Clyde Manning pointed out the place where Johnnie Williams was buried.

Cross-examination:

Have been present here each time that Clyde Manning has made admissions to the officers, as far as I know. The first time I heard his story was the time Sheriff Johnson referred to. I was present. Never talked to him outside of the presence of these officers. Cannot give the exact date of that conversation, but it was when the March grand jury was in session. At that time Clyde admitted his participation in those acts. He stated that after we had been down there conducting that investigation Mr. Williams had said to him, "Clyde, we have got to do away with these negroes, or they are going up to Atlanta and break me and my boys' necks." Clyde stated that he told him he "hated to do anything like that." Mr. Williams told him, "Well, it is just your neck or theirs, whichever you think the most of." Every time he made those statements with respect to each one of those particular killings, it was always accompanied with the statement that he acted through fear of death at the hands of Mr. Williams.

The evidence of Clyde Manning, as a witness for the state, on the trial of John S. Williams, was read to the jury. This evidence is set out substantially in the report of the case of Williams v. State, 152 Ga. —, 110 S. E. 286, and need not be repeated here.

Clyde Freeman testified for the defendant substantially as follows:

Had been living with Mr. John S. Williams going on 13 years. Remember when the officers came down to the farm. Saw Mr. Wismer there. He didn't talk to me, but the other fellow with him did. Didn't tell them anything. Was afraid to tell them anything. I was afraid of Mr. John Williams and his boys. Knew Peterson, Preston, and Price. Know when they left the place. John S. Williams came to the place that Saturday evening and told them he would take them to the train that night or Sunday morning, but don't know when he told them. Saw Peterson and Preston after they were dead. Never saw them any more after they left the place that Saturday afternoon. Williams came up there about dinner time and asked them if they wanted to go back home, and they all told them they wanted to go. Knew Blackstrap. He and "Little Bit" ran off one day. They caught "Little Bit," and looked for Blackstrap two or three days before they found him. They brought him back. Never heard any of them say what became of them. Knew "Iron Jaw." Mr. Leroy Williams killed him. We were over there by the little neck of the pond from the house when he shot him. They whipped him first. He had been running up some wire by the pasture, and Mr. Leroy told Char-He was not having it done right, and he got a stick and hit "Iron Jaw" and told him he would kill him. "Iron Jaw" told him, "Well,

kill me," and he just says, "I will do it," and he pulled his pistol and killed him. He shot him in the arm the first time, and shot him in the body the next time. After he shot him he told me to pull his clothes off. They then took "Iron Jaw" down to the river, down to the pond, and threw him out there in pond. Marvin Williams asked witness what the United States officers said to him, and he told him what they had asked him, and he said he had never told them anything. He then described the whippings of the employees by Williams and his sons. He had never seen anybody else killed on the place, except those named, but saw Will Napier after he was killed.

Gus Chapman, for the defendant, testified that—

He worked on the Williams farm. He was locked up in the Atlanta station house. Hulan Williams came up there and said to him: "Go down and work for me. It will be the same as your home." And he went down and worked for him. This was in April, 1920. When he got down there they locked him up. He ran away last July. He had gotten down before Shady Dale, when he was overtaken by Mr. Williams and taken back. Williams took him into a wagon shelter, and made him pull down his clothes, and said he would kill him. He was whipped with a buggy trace. Williams said he would let him go this time, but if he ever ran away again he would kill him. On Thursday after Thanksgiving he ran away again and had never been back. Knows about the killing of Blackstrap. Blackstrap had run away. He had been gone about a week, and was hired by a man down there who sent word that he had three negroes and to come down. He went down Sunday and got him and brought him back. They had him down over a barrel, whipping him, and he was begging them. He said kill me; and Hulan gave Charlie Chisholm his gun and told him to shoot him, and Chisholm shot him through the head.

Frank Dozier, for the defendant, testified that—

He had worked on John S. Williams' farm, worked for his son Leroy, and stayed in a little shack at night, locked up. He came from Macon. Was arrested in Macon for sitting down at the depot, and for vagrancy. Was fined \$20.75, and Hulan Williams paid that. When he paid his fine he brought him on home that night. Marvin Williams hit him on the head three times with a stick, and left some scars. He got more whippings after that. They whipped him for just most anything. Knows about "Iron Jaw" being killed. Didn't see the shooting. He and Fletcher were cleaning up the engine, and heard a pistol fire three times. Leroy came to them and said he didn't want to hear anything about that. Clyde Manning knew about this, and he knew about the killing of Iron Jaw.

Jack Strickland, for the defendant, testified that—

He worked on the Williams place; got there by being in the stockade. Hulan Williams got him out. They locked him up at nighttime. Was there when Long John ran away. They

caught him and brought him back and whipped him. Marvin, Leroy, and Hulan Williams and Clyde Manning and June Manning all whipped him. One night they beat Long John up. Clyde Freeman got some wire to build a hog pasture. Freeman and Long John went to get the wire. Long John was not able to tote it, and Freeman wanted to whip him, and he asked Leroy to stop whipping him and kill him. Leroy Williams asked if he wanted him to kill him sure enough, and he told him yes, and he shot him in the arm. Williams then asked him again if he wanted him to kill him. He nodded his head, and Williams then shot him in the side of the head. Williams told me and "Foots" to take the clothes off of him. I pulled off his shirt, and "Foots" took off his overalls.

Emma Freeman testified for the defendant:

Lived with Hulan Williams the first of the year, this year. Have been living there seven years. Remember John Singleton when he was on the Williams farm. He got killed, but I don't know how he got killed. He came to the house for dinner, ate dinner, and went back there to plow corn, and I never saw him any more. Saw his body the next week for the first time down there in the river; in the "pond," we call it. What caused the discovery of the body when it came up, the buzzards were flying around there so thick, and they found it was the body of John Singleton. They said Charlie Chisholm and Leroy Williams killed him. Marvin Williams saw him kill him, and Charlie Chisholm said he helped kill him, and then Marvin Williams said he killed him. Saw the body of Blackstrap after he was killed. Went down to the river and saw him lying in the river, when he had come to the top of the water. He had been sunk and come up again. Have seen men on the place whipped. Saw them whip Bill Givens and Peter. Saw them whip Big John. Have seen a heap of whippings. Saw Lula Benton after she was hit. She was as bloody as she could be. John S. Williams hit her. Clyde Manning was not there all the time I have been telling about, but he was there when Lula got hit. He saw all the whippings down at Mr. Johnnie's.

Claude Freeman testified for the defendant:

He had been living with Hulan Williams going on three years. He had been on the Williams farm for 12 years. Employees on Williams' place were from the stockade. They have had as high as 18 at a time. The employees were put in a house every night, and fastened up. There were bunks up by the side of the wall for the men to sleep in. Some slept in the bunks and some on the floor. I was on the place when John Singleton was killed. He was killed the last of July or the first of August, 1918. That night Luke Williams, the little boy of John S. Williams, asked Marvin Williams about John Singleton, and Marvin Williams told him, "Hush, he ran away." When Clyde Freeman and Clyde Manning came up and asked where Singleton was, Marvin Williams told us that he had better not hear any word about John Singleton; if he did, he would know where it came from. After that saw the body of

John Singleton down in the pond. That was 8 or 10 days after he was killed. Was down there, and buzzards were flying around so thick that Marvin Williams sent to the house to get some ropes and some wire, and they went down there and he tied it around his neck, got the boat, and this witness and he got a big rock, put it in the boat, dragged his body out in the water where it was deep, tied the rope to the rock, tied it to his body, and the body sunk. Saw Will Napier after he was shot before he died. He was killed the first of the year by Hulan Williams. That was in 1919. Knew when "Iron Jaw" was killed. His body is in that lake down there, called the "pond." We picked up Will Napier's body, carried it to the house, and put it in the bed. He was alive then. He died that night. Hulan Williams said he shot him. Knew when Long John was killed. Leroy Williams whispered to Harry Price, that is, "Foots," tell the boys he did it, and when he went away Harry Price told the boy Leroy Williams killed him. Negroes on the place didn't talk about these things. They wouldn't talk about it. They were all scared to say anything about it. Whenever Hulan Williams told them to do anything, they would do it. He would threaten to shoot them, kill them, or whip them. Remembers when Blackstrap was killed. He and "Little Bit" ran away. They caught "Little Bit," brought him back. A day or two after they caught "Little Bit," they caught Blackstrap and brought him back. They kept bloodhounds on the Williams place. They used these hounds to catch people who ran away. Clyde Manning knew the bloodhounds were there. He shot at hands by the direction of Mr. Williams and his sons.

The defendant Manning made his statement. He described in detail the killing of various employees on the Williams farm. He gave the same account of the killings mentioned by Sheriff Johnson. He stated that his participation in these homicides was due to the fear of the defendant Williams; that he was afraid he would be killed if he disobeyed the commands of Williams in these matters. In reference to the killing of Will Preston, Lindsey Peterson, and Harry Price, he stated that the defendant Williams told him, "I am going to do away with them boys to-night." He further stated that Williams said to him, "It ain't going to do to let these boys go off from here." Williams told him and Charlie Chisholm to tie them. He did not want to do it. He did not want to hurt them. He had to do it to save his own life. He did not leave Williams after these killings started, because Williams had a bloodhound.

Underwood & Pomeroy, of Atlanta, and A. D. Meador, of Covington, for plaintiff in error.

Alonzo M. Brand, Sol. Gen., of Lithonia, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

HINES, J. (after stating the facts as above). [1] 1. The first twelve grounds of

the amendment to the motion for new trial deal with the admission, over the objection of the defendant, of evidence of the commission of other homicides by the defendant. The objections to the admission of this evidence were: (a) That such evidence was irrelevant, immaterial, and inadmissible, and (b) because there was no general scheme or plan shown by the state, under which these other homicides and the one for which the defendant was tried were committed, and this evidence was not so connected up, as to show that there was any plan or scheme of which the one charged in the indictment formed a part. In reviewing the case of Williams, who was jointly indicted with this defendant for this homicide, this court, in dealing with similar, if not the same, evidence, said:

"The evidence tending to connect the accused with the homicides other than that for which he was indicted was admissible as tending to show a motive, plan, or scheme to commit the crime for which he was on trial." Williams v. State, 152 Ga. —, 110 S. E. 286.

The defendant admits his participation in these other crimes, but asserts that he committed them, and the one for which he was tried, under such threats and menaces of his codefendant, Williams, as to render him guiltless. This evidence of the commission of these other crimes was as much admissible against him as against his codefendant, as the jury might find, from the evidence in the case, that he had a motive for getting rid of the other negroes who were killed. He might become involved in the peonage charge with Williams. After he participated in the first homicide, he might have the further motive of getting rid of others who had knowledge of such homicide, and might become witnesses against him in regard thereto. Anyway, we think this question is decided against this defendant under the ruling in the Williams Case, which we see no reason to change.

[2] 2. The court was requested in writing by counsel for the defendant to charge the jury as follows:

"I charge you that murder does not consist merely in the killing of a human being; the killing must be done with malice. When the fact of the killing is shown, and the evidence adduced to establish the killing shows neither circumstances or justification nor alleviation, malice may be inferred. Likewise, if the statement of the defendant admits the homicide without explanation, malice may be inferred from such admission. But if at the time of the admission the homicide is justified, such qualification of the admission of the homicide robs it of the vital element of murder, and the burden would still be on the state to show that the killing was done with malice."

The court erred in refusing to give in charge to the jury the principle of law embraced in this request. The state relied for

conviction, in part, upon statements of the defendant and upon his testimony given as a witness for the state, when his codefendant, Williams, was tried under this indictment. Without such statements and testimony the state might not be able to connect the defendant with the crime charged. In each of these statements of the defendant and in his testimony on the trial of Williams he stated that his participation in this offense was due to threats or menaces made by Williams, which were sufficient to show that his life or member was in danger, or that he had reasonable cause to believe, and did actually believe, that his life or member was in danger. If this were true, he would have been justified in his participation in the offense. His admission of participation in this crime was accompanied by this explanation, which, if true, would negative malice. He was therefore entitled to an instruction which presented this matter clearly and fully to the jury. This would have been done if the court had given the principle embraced in this request.

That part of his statement and testimony, which, if unexplained, would criminate, although it could be received as evidence of the fact admitted, could not, to the exclusion of another part which qualified and explained it, create a presumption that the accused was actuated by malice and was guilty of murder. Futch v. State, 90 Ga. 472, 480, 16 S. E. 102; Green v. State, 124 Ga. 343, 52 S. E. 431; Mann v. State, 124 Ga. 760, 763, 53 S. E. 324, 4 L. R. A. (N. S.) 934.

[4] Did the refusal of the court to give this instruction, which embraced a correct and pertinent principle, constitute such harmful error as requires the grant of a new trial? Was it a harmless error, or did it, in the absence of such instruction, tend to do harm to the defendant? If harmful, was it cured by other instructions which the court gave to the jury? The court gave in charge to the jury section 41 of the Penal Code, which bears on the subject of the commission of a crime under threats or menaces, which sufficiently show that the life or member of the defendant was in danger, or that he had reasonable cause to believe, and did actually believe, that his life or member was in danger, and which provides that, under such circumstances, the defendant shall not be found guilty. The court then charged the jury as follows:

"Gentlemen, the defendant has admitted he did certain things in conjunction with the codefendant in the bill of indictment, John S. Williams, but he says he acted under threats and menaces and under coercion; and in determining this question you can look to all the facts and circumstances of the case, and if it appears to you that the defendant, Clyde Manning, was forced by coercion to take the part that he did, provided you believe that he did in fact take a part, and that the coercion was of such a

nature as to excite in the mind of the defendant, Clyde Manning, a reasonable fear that his life or member was in danger, and the facts and circumstances were such as to cause you to believe that the defendant now on trial did whatever the evidence and the statement of the defendant show that he did do, and that he did those things by reason of threats or menaces, as I have heretofore charged you, then he would not be guilty of any crime and it would be your duty to acquit him."

Did these instructions cure the error committed by the refusal of the court to give the above instruction requested by the defendant? Can this court say that the defendant was not hurt by the refusal of the court to give the pertinent legal principle embraced in this request preferred by him? The instructions of the court upon the subject of the commission of a crime under threats and menaces fully presented to the jury the defense urged by the defendant. But would this dispense with a pertinent, proper, and correct instruction upon the subject of malice, which is the gist of murder? Was not the defendant entitled to an instruction that "murder does not consist merely in the killing of a human being; the killing must be done with malice"? Was he not entitled to an instruction that, if he made a statement admitting the homicide, but at the time of making such statement he excused the killing, such qualification would negative the vital element of murder and place upon the state the burden of showing malice?

The state relied, in part certainly, for the conviction of the defendant, upon his previous statements and testimony, the latter being given on the trial of his codefendant for the same homicide, in all of which, while admitting the homicide, and the atrocity attending the same, he stated that he engaged in the commission of this atrocious crime under threats or menaces on the part of his codefendant, which, the jury may find, sufficiently show that his life was in danger, and that he had a reasonable cause to believe, and did actually believe, that his life was in danger. To convict the defendant, the jury would have to accept his inculpatory admission and entirely reject his exculpatory explanation of his participation in the killing. Under such circumstances, the defendant was entitled to have the court give in charge to the jury every correct, pertinent principle of law bearing upon the question of malice. This is especially true when the court instructed the jury that—

"Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart."

The defendant was entitled to an instruction that, although no considerable provocation appeared for the homicide, and although the circumstances of the killing showed an abandoned and malignant heart, the jury

should not presume malice from the proof of the above statements and testimony of the defendant. So we cannot say that the error of the court in refusing the above request was cured by his other instructions to the jury.

[5] 3. The fourteenth and fifteenth grounds of the amendment to the motion for new trial can be considered together. In the fourteenth ground the defendant complains that the court erred in charging the jury as follows:

"As to whether or not such evidence does show a motive or a scheme upon the part of the defendant, or whether or not such evidence tends in any way to connect the defendant with the offense charged in this indictment, are exclusively questions for you to determine and upon which the court intimates or expresses no opinion."

In the fifteenth ground the defendant complains of the following charge:

"The court has admitted to you testimony relied upon by the state to show that the defendant, Clyde Manning, has committed other crimes and other homicides than that set out in the bill of indictment. I charge you that evidence of these other crimes have been submitted to you, not for the purpose of showing or establishing the fact that the defendant Manning is guilty of these other crimes, but solely for the purpose, which you may consider, in showing whether or not a motive or scheme existed on the part of the defendant, and in what way connect the defendant with the commission of the crime alleged in this indictment; and it is for this purpose only that I have permitted this evidence to go before you. As to whether or not such evidence does show a motive or scheme upon the part of the defendant, or whether or not such evidence tends in any way to connect the defendant with the offense charged in this indictment, are exclusively questions for you to determine, and upon which the court intimates or expresses no opinion."

The errors assigned on these charges are:

(1) That under them the jury could consider evidence of other crimes as tending to prove the guilt of the defendant of the crime charged; (2) because they were misleading, as thereunder the jury could consider the commission of other crimes as proving or tending to prove the commission by the defendant of the crime for which he was tried; and (3) because such charges do not limit the use of such evidence to the establishment of a general plan, scheme, or motive, but permit the jury to consider the evidence referred to as tending to prove the defendant's guilt of the crime for which he was being tried, independently of a general plan or scheme. It is complained that under these charges the jury could consider the defendant's admissions of the commissions of crimes other than that for which he was being tried, as tending to establish his guilt of the offense charged against him in the indictment in this case. If the other homicides, in which the defend-

ant admits he participated, were a part of the scheme, under which the one for which he was tried was committed, why should the jury not consider the former in determining the guilt of the accused? If the same motive existed for the commission of all these crimes, why should not the jury consider such motive as tending to establish the guilt of the defendant in this case? Such motive might turn the scale against him. If these other offenses tended to show a scheme or plan under which the offense for which the defendant was being tried was done, why should not the jury consider this evidence in determining the guilt of the defendant? It seems to us that the jury should especially consider this evidence in determining the truth of the defense set up by the defendant that he committed all these homicides under coercion. If the jury should find that there was a scheme formed under which both of these defendants committed these homicides, then such scheme would tend to disprove this defense.

[8, 7] We do not think that the objection to these charges, that they are misleading, is well taken. We do not see how the jury could have been misled by them.

The next objection to these charges is that they did not limit the use of such evidence to the establishment of a general plan, scheme, or motive, but permitted the jury to consider the evidence referred to as tending to prove the defense of the guilt of the crime for which he was being tried. The court distinctly charged the jury that the evidence of the commission of other homicides by the defendant was submitted to them, not for the purpose of showing that he was guilty of these other crimes, but solely for the purpose of showing whether or not a motive or scheme existed on the part of the defendant, and in that way connect the defendant with the commission of the crime alleged in the indictment. The court further instructed the jury that it was for that purpose only that he permitted this evidence to go before them. He further instructed the jury that whether such evidence showed a motive or scheme on the part of the defendant or not, or whether such evidence tended in any way to connect the defendant with the offense charged in the indictment, were exclusively questions for their determination. If any part of these instructions is objectionable, it is that which left to the jury the determination of the question whether or not the evidence of these

other homicides connected the defendant with the commission of the crime for which he was being tried. As the defendant admitted in his previous statement, and in his testimony on the trial of Williams, that he participated in the homicide for which he was being tried, clearly these instructions were harmless, even if erroneous.

In this case proof of the intent with which the defendant acted in the commission of the crime for which he was being tried was of prime importance. Where the crime charged is part of a plan, or within the scheme, of criminal action, evidence of other crimes near to it in time and of a similar character is relevant and admissible to show the intent of the accused, and that the act charged was not the result of coercion.

For none of the reasons assigned do we think that the court erred in giving the instructions complained of in these grounds.

[3] 4. As the case goes back for a new trial, we express no opinion upon the evidence.

Judgment reversed.

All the Justices concur, except

GILBERT, J. (dissenting). The writer dissents from the ruling made in the second headnote and the second division of the opinion, and from the judgment of reversal. The case is reversed alone because the court refused to instruct the jury in accordance with the request quoted in the above-stated headnote and division of the opinion. As also shown in the opinion, the court did instruct the jury fully, fairly, and concretely the law applicable to one who commits a homicide under threats, menaces, and coercion, as provided in the Penal Code (1910), § 41. Under this concrete instruction to the jury, it was the duty of the jury to acquit the accused if they believed that he committed the offense because of threats, menaces, and coercion, and that the coercion was of such nature as to create in the mind of the defendant a reasonable fear that his life or member was in danger. This concrete charge gave the defendant the full benefit of his defense, and the only defense he interposed. The court did not charge that malice would be implied merely from evidence that the homicide was committed, and consequently the failure to charge the converse could not, in the opinion of the writer, be injurious, when considered in connection with the charge on the subject of duress as above stated.

(153 Ga. 162)

CROZIER v. GOLDMAN et al. (No. 2780.)

(Supreme Court of Georgia. March 18, 1922.)

*(Syllabus by the Court.)***1. Sufficiency of evidence.**

The verdict was contrary neither to the evidence nor to the law.

2. New trial §41(2)—Not ordinarily granted for admission of irrelevant evidence.

Ordinarily the admission of irrelevant testimony is not cause for the grant of a new trial.

3. New trial §41(3)—Not granted for instruction permitting recovery on theory not made in petition.

An instruction to the jury, which enables the plaintiff to recover on a theory other than that set out in his petition, is favorable rather than prejudicial to the plaintiff; and a new trial will not be granted on this ground.

*(Additional Syllabus by Editorial Staff.)***4. Appeal and error §1032(2), 1050(2)—Admission of irrelevant evidence held not ground for reversal.**

In an action involving title to a certificate of deposit, claimed by plaintiff as a gift from plaintiff's intestate, the admission of alleged irrelevant testimony held not to require a reversal; prejudice not appearing from its peculiar nature and not being pointed out.

5. Witnesses §180—Objection held to go only to admissibility of testimony, and not competency of witness.

An objection to testimony on the ground that it was a conversation between the witness and his father since deceased, the witness being interested as an heir at law, went only to the admissibility of the testimony, and did not raise the question of the competency of the witness.

6. Appeal and error §728(2)—Assignment not setting forth evidence complained of not considered.

An assignment of error upon the admission of evidence which does not literally or in substance set forth the evidence referred to is without merit, and cannot be considered by the Supreme Court.

7. Gifts §48—Note claimed to have been subject of another gift held properly admitted.

In an action involving title to a certificate of deposit claimed by plaintiff as a gift from defendant's intestate, where plaintiff claimed also that the intestate gave him a note to be delivered to his mother as a gift, the note signed by plaintiff and his father, and payable to the order of the intestate, was admissible to illustrate the reasonableness of plaintiff's claim and testimony, especially as doubtful evidence should be admitted rather than excluded.

8. Trial §295(4)—Instruction held not misleading notwithstanding use of double negative.

An instruction that, if the jury did "not" believe that defendant's intestate gave plaintiff a certificate of deposit, that he delivered it to

him actually and constructively, that it was "not" done by the intestate in contemplation of death when he was in peril of death, that he intended it as a gift, and that it was accepted by plaintiff, then they should find for defendant, held not misleading in view of the entire charge, though inaccurate because of the double negative.

9. New trial §39—Lack of verbal precision in charge not ground.

When the court's charge respecting an issue is substantially correct, mere lack of verbal precision which could not mislead the jury is not ground for a new trial.

Error from Superior Court, Lincoln County; E. T. Shurley, Judge.

Bill of interpleader by the Farmers' State Bank against John Crozier, Jr., and J. H. Goldman, as administrator of Wilkes Goldman. Judgment in favor of Goldman, and Crozier brings error. Affirmed.

This was a bill of interpleader filed by the Farmers' State Bank against John Crozier, Jr., and J. H. Goldman, as administrator of Wilkes Goldman. On January 23, 1920, Wilkes Goldman deposited with this bank \$1,500, taking therefor its certificate payable six months after date. Wilkes Goldman died in 1920. On July 28, 1920, Crozier brought suit on this certificate against the bank. Crozier claimed that the money represented by said certificate was his property, and that the deposit was made by his grandfather, Wilkes Goldman, who at the date thereof was very old and in a very poor state of health, and realized that he could live but a short time, and after making said deposit gave to him the certificate therefor, delivering it to him personally, but not indorsing same, and telling him that the money represented thereby should be his property absolutely in the event of the death of Wilkes Goldman who instructed him to pay his funeral expenses out of said fund and keep the remainder as his own. Wilkes Goldman was in full possession of his mental faculties at the time of making this gift.

The administrator of Wilkes Goldman alleged that said certificate belonged to the estate of Goldman, and that Crozier had no right or title to the same; that he held the same as against the right of said estate; and that, if he was in possession of the certificate, it was put in his possession to be kept for Wilkes Goldman, or he got possession of it wrongfully.

The bank prayed that these claimants be required to interplead, so that it could be determined to which one of them the bank should pay said money.

The jury trying the case returned a verdict in favor of the administrator, whereupon Crozier made his motion for a new trial, which, as amended, was overruled by

the court, and error was assigned upon this judgment.

Burnside & McWhorter, of Lincolnton, for plaintiff in error.

John T. West & Son, of Thomson, and C. J. Perryman, of Lincolnton, for defendant in error.

HINES, J. (after stating the facts as above). [1] 1. There was sufficient evidence to support the verdict, and a new trial should not be granted upon the formal grounds of the motion for new trial.

[2, 4] 2. In the first ground of the plaintiff's amendment to his motion for a new trial it is alleged that the court erred in admitting in evidence, over objection of plaintiff, the following testimony of John Crozier, Sr., on cross-examination:

"I didn't get the money from the sale of that house. Jack got it. Monk hadn't got none up to that time as I know of."

It is alleged in this ground that the witness referred to the disposition of part of the proceeds of a place which was not involved in this suit. The objection to this testimony was that it was irrelevant, and did not elucidate any issue involved in the trial of this case. Ordinarily the admission of irrelevant testimony is not cause for the grant of a new trial, unless, from its peculiar nature, or from statements in the assignment of error, it is shown to have had a prejudicial effect on the party complaining. *Travelers' Ins. Co. v. Thornton*, 119 Ga. 455 (8), 46 S. E. 678; *Thompson v. Thompson*, 77 Ga. 693 (7), 3 S. E. 261. It is not pointed out in this ground of the motion, however, that this testimony, if irrelevant, was prejudicial to the plaintiff, and prejudice does not appear from the peculiar nature of this evidence. So we cannot say that the court erred in admitting this evidence.

[5] 3. In the second ground of the plaintiff's amendment to his motion for a new trial it is alleged that the court erred in permitting Hogan Goldman, the administrator of Wilkes Goldman, one of the parties to the case, over objection by the plaintiff, to testify as follows: "He wanted me to take it and put it in my place." It is alleged that the evidence referred to a conversation the witness had with his deceased father as to what the deceased said he wanted to do with his money. The objection to this testimony was that it was irrelevant, and, further, that it was a conversation between the witness and his father, who had subsequently died, the witness being interested as an heir at law in the estate of his deceased father, which was involved in the case on trial. What is said in the preceding section of this opinion disposes of the question whether a new trial should be granted because this testimony is irrelevant. It is not alleged

how or in what manner it is prejudicial, and prejudice does not appear from the nature of this evidence. The second objection to the admission of this testimony is not sufficient to raise the question of the competency of this witness. The objection made is to the admissibility of this testimony, and not to the competency of the witness to testify. So we cannot consider this objection as raising the question of the competency of the witness.

[6] 4. In the third ground of the plaintiff's amendment to his motion for new trial it is alleged that the court erred in overruling his motion to rule out all the testimony of Hogan Goldman, the administrator, in regard to the conversation had with his deceased father in regard to what disposition his father wanted to make of his money, as contained on page 27 of the brief of evidence, and the testimony of all other witnesses, who were heirs at law of said deceased, in regard to conversations or transactions had with him in regard to the deposition he desired to make of his money, or intended to make of it. This motion was based upon the ground that these witnesses were interested in the estate of said deceased, and could not be permitted to testify as to conversations or transactions had with him, he having since died.

An assignment of error upon the admission of evidence, which does not literally or in substance set forth the evidence referred to, is without merit and cannot be considered by this court. *Rucker v. State*, 97 Ga. 205, 22 S. E. 921; *Denton v. Ward*, 112 Ga. 532, 37 S. E. 729.

[7] 5. It is complained in the fourth ground of plaintiff's amendment to his motion for new trial that the court erred in admitting in evidence, over objection of the plaintiff, a promissory note, dated January 12, 1920, due November 15, 1920, for the principal sum of \$500, signed by John Crozier, Sr., and Jack Crozier, and payable to the order of Wilkes Goldman. The objection to the admission of this testimony was that it did not elucidate any issue involved in the trial of this case, and because said note was in no way involved in the gift which the plaintiff was claiming, but was made by his brother and father, and under no theory could the same be relevant or admissible in this case. What has been said in the second and third sections of this opinion disposes of this objection, if this testimony was in fact irrelevant; but we are of the opinion that the same was relevant to the issue being tried. The plaintiff not only asserted that his father had given him this certificate of deposit, but had also given him this note to be delivered to his mother as a gift. This evidence illustrated the reasonableness of the plaintiff's claim and testimony.

Doubtful evidence is to be admitted rather

than excluded. The current of authority in this state is to admit it, leaving its weight and effect to be determined by the jury. *Dalton v. Drake*, 75 Ga. 115 (3); *Thompson v. Thompson*, 77 Ga. 692, 700, 3 S. E. 261; *S. F. & W. Ry. Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

[8] 6. In the fifth ground of this amendment it is complained that the court erred in charging the jury as follows:

"I charge you that if you believe, by a preponderance of the evidence, that the deceased * * * gave to Mr. Dick Crozier (John Crozier, Jr.) the certificate of deposit either actually or symbolically, that it was done by Mr. Goldman in contemplation of death, when he was in peril of death, during his last illness, and intended by him to be an absolute gift only in the event of death, and that * * * Mr. Goldman died without revoking such gift from himself to Mr. Crozier, then the title would vest in Mr. John Crozier, and it would be your duty to find for John Crozier. On the other hand, if you do not believe that the deceased * * * gave to Dick Crozier the certificate of deposit in fee simple, that he delivered it to him either actually or constructively, that it was not done by Mr. Goldman in contemplation of death, when he was in peril of death during his last illness, that he intended it as a gift, and that it was accepted by Dick Crozier, then it would be your duty to find for Mr. Goldman, the administrator of the estate of Wilkes Goldman."

The error alleged in this charge is that it is confusing, vague, indefinite, and not a clear statement of the law. It is further alleged that the use of two negatives in the last sentence of this charge gives to it an entirely different meaning from that intended to be conveyed, making the instructions in this part of the charge conflict with that contained in the first sentence thereof.

[9] There is no difficulty about the portion of the charge embraced in the first sentence of the above extract. Counsel for plaintiff lays great stress upon the second sentence, which embraces, as he alleges, a confusing, vague, and indefinite statement of the law. He further contends that his client was made the victim of two negatives used in the second sentence of the excerpt. The use of "not" in the third clause of this sentence was inaccurate; but it could not have misled the jury. When the court's charge respecting an issue in a case is substantially correct, mere lack of verbal precision, which could not mislead the jury, is not ground for new trial. *Southern Ry. Co. v. Merritt*, 120

Ga. 409, 47 S. E. 908; *Savannah Electric Co. v. Mullikin*, 126 Ga. 722, 55 S. E. 945.

When the entire charge of the court is considered, the erroneous use of this negative could not mislead or confuse the jury.

[3] 7. In the sixth ground of this amendment it is complained that the court erred in charging the jury as follows:

"I charge you that if you believe * * * that the deceased, * * * not in contemplation of death, gave to Dick Crozier the certificate of deposit, that it was delivered to * * * Crozier, either actually or constructively, and by * * * Crozier so accepted as a gift * * * from Goldman, then I charge you that the title would have passed into Mr. Crozier, and it would be your duty to find for Mr. Crozier, and * * * the donor would have no right to revoke the gift. On the other hand, if you do not believe that * * * Goldman gave the certificate of deposit to * * * Crozier, that he delivered it, and that Crozier accepted it, both recognizing it as a gift, and that it should pass title to * * * Crozier, or, if you should believe the certificate was delivered to * * * Crozier for safe-keeping, for other uses than his own, and that it was not the intention to pass the fee-simple title to * * * Crozier, then you would not be authorized to find for Mr. Crozier, but it would be your duty to find for the administrator."

The error assigned is that this charge presents an issue for the jury to pass upon which is not made by the pleadings nor by the evidence in the case, there being no contention in either that the gift referred to was not made in contemplation of death, and no issue being made as to the right of the donor to revoke the gift.

A charge on an issue not made by the pleadings will not be cause for new trial where it appears that the charge given had a tendency to benefit rather than injure the complaining party. *Palmour v. Roper*, 119 Ga. 10, 45 S. E. 790. This charge corrected any error in the charge dealt with in the next preceding section of this opinion, and presented to the jury a theory upon which the plaintiff might recover, although the jury should find that the gift was not made in contemplation of death, and although they might find that the donor had undertaken to revoke the gift after he had made it. Being favorable to the plaintiff, rather than hurtful; it furnishes no cause for the grant of a new trial.

Judgment affirmed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 169)

BERRY v. STATE. (No. 2893.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

1. Statutes \S 138(1), 154—Act held not unconstitutional as amending or repealing act on the same subject without referring to it and describing the amendment.

Section 34 of the act of August 16, 1919, entitled "An act to regulate banking in the state of Georgia; to create the department of banking of the state of Georgia; to provide for the incorporation of banks, and the amendment, renewal, and surrender of charters; to provide penalties for the violations of laws with reference to banking and the banking business; and for other purposes," is not in conflict with article 3, \S 7, par. 17, of the Constitution of this state, which declares that "No law, or section of the Code, shall be amended or repealed by mere reference to its title, or to the number of the section of the Code, but the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made," on the ground that said act amends or repeals the act of the General Assembly of this state, approved August 14, 1914, entitled, "An act declaring it a misdemeanor to draw and utter any check, draft, or order when the drawer has not at the time sufficient funds to meet the same, provided such drawer does not deposit with the drawee sufficient funds to meet the same within thirty days; providing punishment therefor, and for other purposes," it being claimed that the former act amended or repealed the latter act without any reference to the title of the latter and without distinctly describing the latter act, as well as the alteration to be made therein.

2. False pretenses \S 14, 49(2), 52—False representation by one giving worthless check for pre-existing debt not proof of intent to defraud; receipt of check in good faith and to injury of person receiving not element of offense of passing worthless check; instruction hypothesizing injury from giving of worthless check for antecedent debt erroneous.

On the trial of the defendant indicted under section 34 of said act of August 16, 1919, a charge to the effect that, if the jury believed from the evidence that the defendant owed the payee of the check the amount thereof, which he had promised to pay him on the day the check was given, and if the jury believed that the defendant had falsely represented to the payee of the check that he had gotten the money with which to pay such payee, and had deposited the same in the bank on which the check was drawn, and that the defendant then gave to the payee the check described in the indictment, knowing at the time that his representation of having made a deposit in said bank was false, and that when he made and delivered the check he knew he had not funds in said bank, or credit with said bank, for the payment thereof on presentation, and if the jury believed from the evidence that the defendant gave the payee the check with intent to defraud, and the payee received it in good

faith, and acted upon it to his injury, then the jury would be authorized to convict the defendant, was erroneous, (1) because it was an inaccurate statement of the law, in that the false representation by the defendant made to the payee of such check given for a pre-existing debt that the drawer had gotten the money with which to pay such pre-existing debt, and had deposited the same in bank on which such check was drawn, was not proof of an intent on the part of the defendant to defraud the payee, when such false representation was not then made for the purpose of obtaining from the payee of the check any money or other thing of value; and (2) because the receipt of such check by the payee in good faith, and to his injury, does not constitute an element of the crime for which the defendant was tried, and there was no evidence on which to base that portion of the charge that the payee was injured by the giving of said check.

3. Sufficiency of evidence.

A new trial is granted in this case, because the verdict is not supported by the evidence.

(Additional Syllabus by Editorial Staff.)

4. Statutes \S 138(1), 154—Constitutional provision as to amendments or repeals by reference to title held inapplicable to implied amendments or repeals.

Const. art. 3, \S 7, par. 17, providing that no law shall be amended or repealed by mere reference to its title, etc., but that the amending or repealing act shall distinctly describe the law to be amended or repealed and the alteration to be made, refers only to express amendments or repeals, and has no reference whatever to implied amendments or repeals.

5. False pretenses \S 39—After state makes case by showing giving of worthless check with knowledge of lack of funds, defendant has burden of negating intent to defraud.

Under Acts 1919, p. 220, \S 34, relative to the passing of worthless checks, the state makes a case by showing the making or delivery of a check, and knowledge on the part of defendant of the want of sufficient funds to the drawer's credit to meet it, and the burden is then on defendant to negative intent to defraud.

6. False pretenses \S 39—Presumption of intent to defraud by giving worthless check rebutted when state's evidence shows there was no such intent.

The presumption of an intent to defraud arising under Acts 1919, p. 220, \S 34, from the making, delivering, etc., of a worthless check, is rebuttable, and is destroyed, and there can be no conviction where the state's own evidence shows there was no intent to defraud.

7. False pretenses \S 14—Intent to "defraud" by giving worthless check without actual defrauding sufficient.

Under Acts 1919, p. 220, \S 34, relative to the passing of worthless checks with intent to defraud, an intention to defraud is sufficient, and the payee need not be actually defrauded; "defraud" meaning to deprive of some right, interest, or property by deceitful device, to cheat

or overreach, or to deprive of a right by withholding from another by indirection or device that which he has a right to claim or obtain.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, De-fraud.]

8. Novation —4—Acceptance of check not novation.

Under Civ. Code 1910, § 4314, providing that bank checks are not payment until paid, the acceptance of a check for a pre-existing debt did not amount to a novation of the original contract.

Error from Superior Court, Seminole County; W. C. Worrill, Judge.

W. M. Berry was convicted of giving a worthless check, and he brings error. Reversed.

W. M. Berry was indicted for giving a worthless check, and was convicted. He moved for a new trial, which was refused, and this is the error assigned.

On September 19, 1921, P. L. Watts loaned W. M. Berry \$48 to pay in part a fine imposed upon him at Crawfordville, Fla. Berry came back to Brinson, Ga. On September 20, 1921, Watts went to Iron City, Seminole county, Ga., and asked Berry to pay him. Berry said that he and his father would go out in the country and get the money. Upon the evening of that day Watts went back to Iron City, saw Berry, and asked him to pay back the \$48 which he had paid for Berry in Florida. Berry said that he had gotten the money for Watts, had it in the bank, and would bring it to him the next morning. Watts said to Berry, "If you have the money in the bank, just give me a check for the money, and it will save you the trip to my house." Berry said, "All right." Watts wrote the check, and Berry signed it. Watts testified that he believed that Berry had the money in the bank as he said he had, and so accepted the check. Watts took the check back to Brinson, Ga., and deposited it in the bank, and it came back unpaid. Watts then gave it to his agent, J. C. Robinson, for collection. Robinson went to Iron City to see Berry to collect the amount of this check. Berry did not pay it. Robinson presented the check to the Seminole Bank at Iron City for payment, which was refused by the bank. At the time Berry gave his check he had no account with the Seminole Bank, and had never had such account. He had made no arrangement of any sort with the bank to pay this check before it was presented, and had arranged for no credit with that bank. He asked the cashier to let him know when the check came in, as he had given it, and wanted to protect it. When the check came the cashier of the bank notified him, but Berry did nothing about it, and the bank sent the check back. The cashier notified him that

this check had come some time between 2 and 4 o'clock, and returned it after 4 o'clock. This check was as follows:

"Seminole Bank. Iron City, Georgia, 9/20/21. Pay to the order of P. L. Watts forty-eight and no/100 dollars (\$48.00). [Signed] W. M. Berry."

This check bore the indorsement of Watts, various banks, and an indorsement, "No account, Seminole Bank."

The defendant introduced no evidence, but he stated that Watts loaned him \$48 to pay a fine at Crawfordville, Fla., and that he told Watts that he and his father would get up the money and pay him when they got back to Iron City. The following day Watts came to Iron City, and he told him that they had arranged to get the money, when Watts told him if that was the case, to give him a check, and they could put the money in the bank and the check would be paid. He had never had any money in the Seminole Bank since it was organized.

J. E. Drake, and W. V. Custer, both of Bainbridge, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold and E. C. Hill, both of Atlanta, for the State.

HINES, J. (after stating the facts as above). [1,4] 1. It is urged by counsel for the defendant that section 34 of the act of August 16, 1919 (Ga. Laws 1919, pp. 135, 220), is in conflict with article 3, § 7, par. 17, of the Constitution of this state, which provision is fully set out in the first headnote, because this act amends or repeals the act of August 14, 1914 (Ga. Laws 1914, p. 86), which makes "it a misdemeanor to draw and utter any check, draft, or order when the drawer has not at the time sufficient funds to meet the same, provided such drawer does not deposit with the drawee sufficient funds to meet the same within thirty days." The act of 1919 does not refer to the act of 1914. The act of 1919 is a general law regulating banking in this state, creating the department of banking, providing for the incorporation of such banks, the amendment, renewal, and surrender of their charters, and providing penalties for the violation of laws with reference to banking and the banking business. It is unnecessary for us to determine whether the act of 1919 amends or repeals the act of 1914; but, assuming that it does either, it does not collide with the above constitutional principle. If one thing is settled by the decisions of this court, it is that this provision of our state Constitution refers alone to express amendments or repeals of sections of the Code or of statutes, and has no reference whatever to implied amendments or repeals of either. *Peed v. McCrary*, 94 Ga. 488, 21 S. E. 232; *Swift v. Van Dyke*, 98 Ga. 725, 26

S. E. 59; *Edalgo v. So. Ry. Co.*, 129 Ga. 266, 58 S. E. 846; *Nolan v. Central Ga. Power Co.*, 134 Ga. 201(3), 67 S. E. 656; *Silver v. State*, 147 Ga. 162, 93 S. E. 145. At this late day the above ruling ought to command the universal recognition of the bar of this state.

[2, 3] 2. Errors are assigned upon the instruction of the court to the jury of which the substance is set forth in the second headnote of this opinion. The alleged errors are: (a) That this charge is contrary to law, contrary to the evidence, and that there is no evidence that the payee of the check had been injured by the receipt thereof, the evidence showing that the check was given for a pre-existing debt. We think that the reference in this instruction to the alleged false representation of the drawer that he had gotten up the money and deposited it in the bank on which the check was drawn to meet the same was inaccurate under the facts of this case. Such false representation did not tend to establish the intent of the defendant to defraud the payee, as will be more fully dealt with in the next division of this opinion. The reference in this charge to the fact that the payee had acted to his injury in receiving the same is without evidence to support it. Under certain circumstances this instruction would be accurate; but, under the facts of this case, it was harmful to the defendant.

3. It is contended by counsel for the defendant that the verdict is without evidence to support it. This raises the question of the proper construction of section 34 of this act of 1919. This section is as follows:

"Any person who, with intent to defraud, shall make, or draw, or utter, or deliver any check, draft, or order for the payment of money upon any bank, or other depository, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has not sufficient funds in or credit with such bank, or other depository, for the payment of such check, draft or order in full upon its presentation, shall be guilty of a misdemeanor. The making, drawing, uttering, or the delivering of such check, draft or order as aforesaid, shall be prima facie evidence of intent to defraud. The word 'credit' as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of such check, draft or order."

The gravamen of this offense is the "intent to defraud." The means of effecting this intent to defraud is by making, drawing, uttering, or delivering any check, draft, or order for the payment of money upon any bank, or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in, or credit with, such bank, or other depository, for the payment of such check, draft, or order in full upon its presentation. The making, drawing, uttering, or delivering of such check, draft, or order is

prima facie evidence of intent to defraud. The word "credit" as used in this act means an arrangement or understanding with the bank or depository for the payment of such check, draft, or order.

[5, 6] Under this act the state can always prove a case by showing the following facts: (1) The making, drawing, uttering, or delivering any check, draft, or order for the payment of money upon any bank or other depository; and (2) knowledge on the part of the defendant, at the time of the making, drawing, uttering or delivering of either of said instruments, that the maker or drawer did not have sufficient funds in, or credit with, such bank or other depository for the payment of such instrument in full upon its presentation. Upon proof of the above facts the presumption arises that the making, drawing, uttering, or delivering of either of such instruments was done with intent to defraud. The burden would then be upon the defendant to establish that such instrument was not made, drawn, uttered, or delivered with intent to defraud. This presumption is a rebuttable one. The defendant would be relieved of this burden if it should appear from the evidence introduced by the state that he was not actuated by an intent to defraud in making, drawing, uttering, or delivering any one of such instruments. The presumption in this case is similar to the presumption of malice in homicide cases, in which it has been held that the presumption may be negatived by the proof submitted by the state. *Futch v. State*, 90 Ga. 472, 16 S. E. 102; *Green v. State*, 124 Ga. 343, 52 S. E. 431; *Mann v. State*, 124 Ga. 760, 53 S. E. 324, 4 L. R. A. (N. S.) 934. In this case, if the evidence introduced by the state negatifies the presumption of an intent to defraud on the part of the defendant, he should not have been convicted.

[7] Does the giving of a check in payment of an antecedent debt due by the maker to the payee, with a false statement by the maker that he had the money in the bank to meet the same, when by this statement the maker did not deprive the payee of any right, did not procure anything of value from the payee by making such statement, and did not appropriate anything belonging to the payee wrongfully, constitute an offense under this statute? What does the language "with intent to defraud" mean? The payee need not be actually defrauded. The intention to defraud is sufficient. Webster defines the word "defraud" as follows:

"To deprive of some right, interest, or property by a deceitful device; to cheat; to overreach."

The Encyclopedia Dictionary defines the term as meaning:

"To deprive of a right, by withholding from another, by indirection or device, that which he has a right to claim or obtain."

The meaning of this term is largely influenced by the sense in which it is used, or by the subject to which it relates. It has been defined as meaning to cheat, as to defraud a creditor, to defeat or frustrate wrongfully, to deprive another of a right, either by obtaining something by deception or artifice, by appropriating something wrongfully, or by taking something wrongfully without the knowledge or consent of the owner, to deprive or withhold from another that which justly belongs to or is due him, to deprive of something dishonestly, to injure by embezzlement, to overreach, and to rob. 18 C. J. 468. In construing statutes we just generally give to words their ordinary signification. Civil Code, § 4, par. 1.

[8] By giving this check the defendant did not obtain from the payee any money, property, or other thing of value. He did not deprive the payee of any right. Bank checks are not payment until themselves paid. Civil Code, § 4314. The acceptance of this check by the payee did not amount to a novation of the original contract. The purpose of the defendant in giving this check was not to deprive the payee of any right, money, property, or other thing of value, and he did not intend to defraud the payee in giving the same. His evident purpose was to escape the importunate duns of his creditor, and to get a temporary respite therefrom.

Where a defendant was prosecuted for procuring credit by giving a mortgage, representing at the time that the mortgaged property was unincumbered, which representation was false, this court held that he could not be convicted, unless it was shown that, in consequence of such misrepresentation, the mortgagee had been in fact defrauded, and that in extending the credit upon the faith of such misrepresentation he had sustained loss. *McGee v. State*, 97 Ga. 199, 22 S. E. 589; *Berry v. State*, 97 Ga. 202, 23 S. E. 833; *Rucker v. State*, 114 Ga. 13, 39 S. E. 902. The giving of a check on a bank in payment of merchandise, without any representation by the drawer that he had funds in the bank upon which the check is drawn, or that the check would be paid by the bank on presentation, the drawer knowing he had no funds in the bank, did not of itself constitute the offense of cheating and swindling under our law prior to the act of 1914. *Williams v. State*, 10 Ga. App. 395, 73 S. E. 424; *Ganey v. State*, 10 Ga. App. 777, 74 S. E. 286. Under the law prior to the act of 1914 there must have been pecuniary loss. *Busby v. State*, 120 Ga. 858, 48 S. E. 314; *Hay v. State*, 7 Ga. App. 407, 66 S. E. 984; *Foster v.*

State, 8 Ga. App. 119, 68 S. E. 739; *Jacobs v. State*, 4 Ga. App. 510, 61 S. E. 924; *Godard v. State*, 2 Ga. App. 154, 58 S. E. 304.

Then came the act of 1914, which makes it a misdemeanor for any person to draw and utter any check, draft, or order for a present consideration upon a bank, person, firm, or corporation, with which said drawer has not at the time sufficient funds to meet such check, draft, or order, and thereby obtain from another money, or other thing of value, or induce such person to postpone any remedy he may have against such drawer, unless such drawer deposit with the drawee, within 30 days after giving such instrument, funds sufficient to meet the same, together with accrued interest. Under this act the Court of Appeals held that a defendant could not be prosecuted for giving a postdated check, although given for a present consideration. *Neidlinger v. State*, 17 Ga. App. 811, 88 S. E. 687. Then the Legislature passed the act of 1919, the thirty-fourth section of which is set out above. This section is much broader than the act of 1914. It makes it unlawful for any person, with intent to defraud, to make, draw, utter, or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker has not sufficient funds in, or credit with, such bank or other depository, for the payment of such instrument, and constitutes the making, drawing, uttering, or delivering of such instrument prima facie evidence of intent to defraud. This act still makes the intent to defraud an essential element of the crime defined in this section thereof. Without such intent no crime is committed; and, where the evidence introduced by the state negatives the presumption created by this section, there can be no conviction.

The Court of Appeals has held that the act of 1919 does not cover a postdated check accepted by the payee with knowledge that the paper constitutes nothing more than a promise that the drawer will have in the bank the funds necessary to meet it. *Strickland v. State* (Ga. App.) 110 S. E. 89.

The evidence for the state disclosing that there was no intent to defraud the payee of any right, property, money, or other thing of value, the defendant should not have been convicted, although he falsely stated before he gave his check that he had put funds in the bank to meet the same. The court erred in not granting a new trial.

Judgment reversed.

All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 202)

(111 S.E.)

WOODLAND v. WOODLAND (four cases).
(Nos. 2864-2867.)

(Supreme Court of Georgia. April 11, 1922.)

(Syllabus by the Court.)

1. Divorce \S 332—Foreign divorce, awarding custody of children, conclusive as to fitness at the time, but not conclusive for all time.

"A decree of divorce in another state, in which the custody of the child is awarded to the father, is conclusive as between the parties to the decree as to his right and fitness for such custody at that time, but is not conclusive for all time. In a subsequent proceeding by habeas corpus for the possession of the child, between the parties to the decree, evidence as to the unfitness of the father will be confined to matters transpiring subsequently to the decree."

2. Habeas corpus \S 99(2, 3)—Trial judge has wide discretion as to custody of minors.

In habeas corpus cases the trial judge has a wide discretion, with legal limits, as to the custody of minor children; the paramount consideration being the welfare and happiness of the minors.

3. Habeas corpus \S 99(2)—Award of custody of minors to mother as against father held not abuse of discretion.

Under the evidence in the present case, there was no abuse of discretion in awarding the minors to the mother.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Two habeas corpus proceedings, by Robert E. Woodland against Florence Linder Woodland and by Florence Linder Woodland against Robert E. Woodland. Judgment for Florence Linder Woodland in each case, and Robert E. Woodland brings error, and defendant in error files a cross-bill of exceptions in each case. Affirmed on main bills, and cross-bills dismissed.

Reuben R. Arnold, Lowry Arnold, Edward C. Hill, and Herman B. Evins, all of Atlanta, for R. E. Woodland.

Len B. Guillebeau, of Atlanta, for F. L. Woodland.

HILL, J. Robert E. Woodland and Florence Linder Woodland were married in January, 1917, at Tampa, Fla. Two children were born of this marriage, a boy, John Gayton Woodland, in December, 1917, and Margaret Means Woodland, a girl, was born June 13, 1919. The plaintiff and the defendant lived together as husband and wife until March, 1920, when they separated. The controversy in the present case is over the possession and custody of the two children. It appears from the record that, while the children were in the custody of their mother at her home at Cape May, N. J., they were kidnapped and taken from their mother on July 7, 1921. After a period of search, the boy was located in a boarding house in the city of Atlanta,

where he had been placed by his father. The mother filed a petition for habeas corpus against her husband, seeking to recover the custody of the minor son. Subsequently to the filing of this suit, and before the trial of the case, the mother, by the aid of detectives, located the girl in the possession of two people living in Battery Park, Va. She went to Virginia, secured possession of the minor, and brought her to Atlanta, where the husband filed his petition for habeas corpus against his wife for the custody of the little girl. In his petition, and also in his answer to the petition of Mrs. Woodland, Mr. Woodland, the husband, claimed the right to the custody of both children under a decree of a Florida circuit court, a copy of which was set out in the brief of the evidence. Both of these cases, involving the same issues, were tried together by Judge Pendleton, of the superior court of Fulton county, who, after hearing evidence and argument in the case, awarded the custody of both children to the mother. To each of these judgments the plaintiff in error excepted, on what amounts to the usual general grounds, and also upon the ground that the trial court did not give full weight and credit to the decree of the Florida court, which had awarded the children to the father; the mother not having been present at the trial, and having left the state taking the children with her. The cross-bill of exceptions assigns error on allowing the decree of the Florida court in evidence upon various grounds. In the view we take of this case, the controlling question is whether the judgment of the lower court, awarding the children to the mother, is contrary to the evidence and without evidence to support it.

[1] In the case of *Milner v. Gatlin*, 139 Ga. 109, 76 S. E. 860, it was held:

"A decree of divorce in another state, in which the custody of the child is awarded to the father, is conclusive as between the parties to the decree as to his right and fitness for such custody at that time, but is not conclusive for all time. In a subsequent proceeding by habeas corpus for the possession of the child, between the parties to the decree, evidence as to the unfitness of the father will be confined to matters transpiring subsequently to the decree."

In *Milner v. Gatlin*, 143 Ga. 816, 85 S. E. 1045, L. R. A. 1916B, 977, Presiding Justice Evans, delivering the opinion of the court in a case somewhat similar in its facts to the present case, said:

"The act of 1913 provides that in all cases of contest between the parents of children, for their custody, 'there shall be no prima facie right to the custody of such child or children in the father, but the court hearing such issue of custody may exercise its sound discretion, taking into consideration all the circumstances of the case, as to whose custody such child or children shall be awarded, the duty of the court

being in all such cases, in exercising such discretion, to look to and determine solely what is for the best interest of the child or children and what will best promote their welfare and happiness, and make award accordingly.' This enactment applies to situations growing out of the domestic relation of husband and wife, as unaffected by any final divorce proceeding. Where there has been a divorce decree, in which disposition of the child has been made, that decree (where it is not successfully attacked for fraud in its procurement, under circumstances above pointed out) is binding on the parties, so as to conclude their respective rights to the custody of the children at the time of its rendition. As to conditions subsequently occurring, the judge of a habeas corpus court has full discretion in awarding the custody of the child, and in exercise of such discretion he may look to the circumstances relating to the child's ordinary comfort and contentment, its intellectual and moral development, and award the custody to either of the parents, according as it may be to the best interest of the child."

[3] In the instant case there had been no decree of divorce in the Florida court or elsewhere, so far as the record discloses. But subsequently to the rendition of the Florida decree new conditions had occurred, which changed the status of the children. The evidence shows that the two children were kidnapped and taken away from their mother while she living at Cape May, N. J., by persons who subsequently were identified as the brother of Mr. Woodland and a woman who claimed to be his wife, and the little girl, who was only about two years old, was placed with the brother and the woman with whom he was living as his wife in Battery Park, Va. Mrs. Woodland testified:

"When I first saw Margaret again, it was when I found her at Battery Park, Va., last week. I found her at a neighbor's house. Mr. Guillebeau and the sheriff and prosecuting attorney of that county went with me. We found her with dirty clothes—very few clothes, and they were dirty. She had one little waist, panties, and apron; no shoes and stockings. As to her condition—she was dirty, wet, smelly; her body was dirty, smelled nasty, as though she had not washed in several weeks. That was at Battery Park last Tuesday or Wednesday. The little undergarment was wet, nasty, and dirty. She had lost her good training and good habits. When she went to the table, she started to eat with her hands, a thing she never did when I had her. She complained of being hungry. We took her to a neighbor's house, and she ate a lot of crackers and milk, like she was starved. At Battery Park I saw the woman I mentioned about Cape May, and talked with her. I do not know how she started the conversation, but the gist of it was she was the woman that took them from me that morning, supposedly to the beach. She admitted she took them to the beach, and said a strange man that she had never seen before had taken them away from her on the beach, and she went to the house and got her things and started from Cape May. She said little Margaret was placed in her arms, and he paid her \$10 a week to take charge of Margaret. As to whether she named

the party who placed Margaret in her arms—she said her father did, the father of Margaret. She said her father put her in her arms at Norfolk, Va. I did not see this woman when I first stopped there. She wore a dirty black dress, and was slovenly and dirty looking. Her hair was hanging down, and her waist seemed three or four inches apart. She had dirty bedroom slippers, and looked like a tramp. At least 25 people, both men and women, in that town, talked to me about the character of these folks. As to the general character of these people in that community—just low-down common people. * * * Their general character or reputation at that place is bad. The sheriff turned Margaret over to me. The commonwealth attorney was out there. He directed the sheriff to turn the child over to me. I gave her something to eat, and took her to the hotel and bathed her. Then I brought her here. * * * As to the provision I can make for them if the children are awarded to me—I have a home. It is in trust to me. It won't be given me as long as I am married to Mr. Woodland. After a divorce it is mine. That home is at Cape May, N. J. I have a permanent income of about \$2,000 a year. I will inherit about \$80,000 at my mother's death. As to the status of that property—she cannot dispose of the principal. It is to go to me. If I die first, it goes direct to the children. It will be mine in fee simple at her death. I have an uncle at Cape May, who has rendered me financial assistance. He is very fond of the children, and has always done everything he could to help them, and to help me when in any need at all. He has given me quite a little money, he is my great-uncle. He is a retired manufacturer, and has—I do not know what his property is worth, but he is very wealthy. I have been forced to spend about \$3,000 in this search for my children. My uncle has helped me with that. He will help me more, if it is necessary. I have cared for the children to the best of my knowledge; tried to raise them and train them as they should be raised and trained and taught; done everything in my power for them. I have never known Mr. Woodland to go to church but once, and that was before we were married, and he went to get the minister to come and marry us. He said paid ministers are hypocrites."

There was other evidence showing that during the few months that the father had the custody of the little boy, who was about four years old, he kept him in a boarding house in Atlanta on South Ashby street, and none of the people with whom they boarded were related to him. On the trial of the case the father testified that if the children were awarded to him he could place them in this boarding house in Atlanta, and that that was the only home he could offer them. He also testified that he had no property, real or personal, except a few hundred dollars, and that he had no income, except his salary as a ticket-seller at the terminal station in Atlanta, and he also stated that, if he should become too ill to work, or should lose his position for any reason, that the children would become objects of charity so far as he was concerned. But he also stated, if he

should lose his position, he could get another one. He stated that his salary was \$205 per month for a 30-day month, and that if the children were awarded to him he would take them to 263 South Ashby street and place them there with friends, and that the mother and daughter of the household would look after them, and that he would simply board them out there. In addition to the above evidence, it was shown by a witness, who knew Mrs. Woodland at Cape May, that she had a good reputation and also the reputation of being "a good mother." There were a number of witnesses who also testified as to the good character of the father.

[2] Under this evidence, including the decree from the circuit court of Florida, as applied to the ruling in the Milner Case, supra, we think that the court below did not err in awarding the children to the mother. In habeas corpus cases the trial judge has a wide discretion, within legal limits, as to the custody of minor children; the paramount consideration being the welfare and happiness of the minor. *Lamar v. Harris*, 117 Ga. 993, 44 S. E. 866; *Hammond v. Murray*, 151 Ga. 816, 108 S. E. 203 (4); *Hollenbeck v. Glover*, 128 Ga. 52 (3), 57 S. E. 108. In view of the whole record and the evidence in this case, we are of the opinion that the court did not abuse his discretion in awarding the children to the mother.

The court allowed in evidence, over objection, a copy of the decree of the circuit court of Florida awarding the children to the father; and we cannot say that the trial court did not give full faith and credit due to that decree, as contended by the plaintiff in error. In view of the ruling made in the case of *Milner v. Gatlin*, 143 Ga. 816, 85 S. E. 1045, L. R. A. 1916B, 977, and of the evidence in this case showing that the status of the children had materially changed subsequently to the rendition of the decree in the Florida case, we are of the opinion that the court did not err in awarding the children as he did. In the above view, it is unnecessary to consider the question as to whether or not the decree in the Florida case was null and void for the reasons assigned by the defendant in error in the cross-bill of exceptions.

Judgment affirmed, on both main bills of exceptions. Cross-bills dismissed.

All the Justices concur.

(153 Ga. 127)

MORGAN v. MORGAN. (No. 2910.)

(Supreme Court of Georgia. March 18, 1922.)

(Syllabus by the Court.)

DIVORCE §§211, 223—Allowance of temporary alimony and counsel fees on conflicting evidence not abuse of discretion.

The evidence being conflicting, the judge did not abuse his discretion in allowing as tem-

porary alimony the sum awarded to the plaintiff for her support and for counsel fees.

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Action between E. O. Morgan and Minnie Morgan. Judgment for the latter, and the former brings error. Affirmed.

Jere M. Moore, of Montezuma, for plaintiff in error.

Jule Felton, of Montezuma, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent because of sickness.

(153 Ga. 201)

HOWELL v. STATE. (No. 2852.)

(Supreme Court of Georgia. April 11, 1922.)

(Syllabus by the Court.)

I. Courts §§217—Jurisdiction of Court of Appeals to determine constitutional questions stated.

"Under the constitutional amendment of 1916, defining the jurisdiction of the Supreme Court and the Court of Appeals of this state (Ga. L. 1916, p. 19; Park's Code Supp. 1917, §§ 6502, 6506), the Court of Appeals has jurisdiction to decide questions of law that involve the application, in a general sense, of unquestioned and unambiguous provisions of the Constitution to a given state of facts, and that do not involve the construction of some constitutional provision directly in question and doubtful either under its own terms or under the decisions of the Supreme Court of the state or of the United States, and that do not involve the constitutionality of any law of the state or of the United States or any treaty." *Gulf Paving Co. v. City of Atlanta*, 149 Ga. 114, 99 S. E. 374.

2. Courts §§217—Objection to evidence because premises searched contrary to Constitution does not deprive Court of Appeals of jurisdiction.

On the trial of one indicted for a violation of section 22 of the act approved March 28, 1917 (Acts Ex. Sess. 1917, p. 7), in unlawfully and knowingly permitting and allowing on his premises and having or possessing or locating thereon an apparatus for the distilling and manufacturing of contraband liquors as specified in that act, the court permitted the sheriff and others to testify that they found on the premises of the accused an apparatus for the manufacture of such liquors as charged in the indictment. Such evidence was objected to by the accused on the ground that the witnesses searched his premises without a warrant, contrary to the provisions of the federal and state Constitutions guaranteeing the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, and that no search warrant shall issue, but upon probable cause supported by oath, etc. It appeared that the

witnesses had no such warrant. *Held* that, in view of the decision above cited, the point raised by the objection to the testimony referred to does not give the Supreme Court jurisdiction of the case, but jurisdiction thereof is vested in the Court of Appeals, to which court the case must be transferred.

Error from Superior Court, Glascock County; E. T. Shurley, Judge.

Jesse Howell was convicted of an offense, and he brings error. Transferred to the Court of Appeals.

L. D. McGregor, of Warrenton, for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

FISH, C. J. Transferred to the Court of Appeals. All the Justices concur.

(28 Ga. App. 591)

HOWELL v. STATE. (No. 13262.)

(Court of Appeals of Georgia, Division No. 1.
April 14, 1922.)

(Syllabus by the Court.)

1. Criminal law §200(1)—Conviction for intoxication, manifested by profane language, etc., not bar to prosecution for using profane language, etc.

Upon the trial of one charged with using obscene, profane, and vulgar language in the presence of a female, a special plea in bar by the defendant that he was acquitted at a prior term of the court of the charge of being in an intoxicated condition upon a public street or highway, "said drunkenness and intoxication being caused by the excessive use of wines, brews, liquors, and opiates, and was made manifest by boisterous and indecent condition and acting, and by vulgar, profane, and unbecoming language and loud and violent discourse," and that both charges grew out of one and the same transaction, and that "he has already been placed in jeopardy," is without merit, and was properly stricken on motion of the state. Nor did the court err in overruling the ground of the amendment to the motion for a new trial which complained of such ruling. See, in this connection, *McIntosh v. State*, 118 Ga. 543, 42 S. E. 798, and citations.

2. Jury §127, 132—Challenge to polls must be made before jury sworn, unless cause unknown; burden on challenging party to show cause unknown until jury sworn.

A challenge to the polls must be made before the jury is sworn, unless the cause of challenge be unknown until afterwards; and the burden of affirmatively showing this fact is upon the plaintiff in error. *Schnell v. State*, 92 Ga. 459 (2), 17 S. E. 986; *Wells v. State*, 102 Ga. 658, 659, 29 S. E. 442. Under the above ruling and the facts of the instant case, this court cannot hold that the trial judge erred in overruling the defendant's challenge to a certain juror upon the panel that tried him.

3. Criminal law §822(1)—Exceptions to be considered in connection with whole charge.

The several exceptions to excerpts from the charge of the court, when considered in connection with the charge as a whole, are without substantial merit.

4. Criminal law §935(1)—New trial properly denied, when verdict authorized.

The verdict was authorized by the evidence, and the court did not err in refusing the grant of a new trial.

Error from City Court of Blackshear; R. G. Mitchell, Jr., Judge.

Jesse Howell was convicted of an offense, and he brings error. Affirmed.

Jas. R. Thomas, of Jesup, for plaintiff in error.

S. Thos. Memory, Sol., of Blackshear, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 439)

CANNON v. STATE. (No. 13207.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Criminal law §938(1) — New trial not granted for cumulative evidence to impeach only witness on vital point.

The alleged newly discovered evidence is merely cumulative and impeaching, the only effect of which would be to impeach the witnesses for the state; and it is settled by a number of decisions of this court that, even "though the witness sought to be impeached by newly discovered evidence was the only witness against the prisoner upon a vital point in the case, if the sole effect of the evidence would be to impeach the witness a new trial will not be granted." *Key v. State*, 21 Ga. App. 795 (1), 95 S. E. 269, and citations.

2. Criminal law §1156(2)—Verdict supported by evidence not disturbed, when new trial refused.

The verdict is not without evidence to support it, and the trial judge having exercised the discretion which the law vests in him alone on motions for new trial, where there is a conflict in the evidence, by declining to grant a new trial, this court must of necessity hold that there is no merit in the general grounds of the motion for a new trial.

Error from Superior Court, Harris County; Geo. P. Munro, Judge.

Bud Cannon was convicted of an offense, and he brings error. Affirmed.

T. T. Miller and Geo. C. Palmer, both of Columbus, for plaintiff in error.

C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 429)

WELLS v. CHAMBERS et al. (No. 12914.)

(Court of Appeals of Georgia, Division No. 2
April 1, 1922.)

(Syllabus by the Court.)

1. Executors and administrators \S 35(19) — Appeal lies from order dismissing petition to remove administrator.

Chambers and others filed a petition in the court of ordinary to remove Wells as administrator and revoke his letters of administration. The court of ordinary dismissed the petition, and Chambers appealed the case to the superior court. The judge of the superior court did not err in refusing to dismiss the appeal on the ground that certiorari from the decision of the court of ordinary was the only remedy. Civ. Code 1910, \S 4999; Wash v. Wash, 145 Ga. 405 (1), 89 S. E. 364; Pierce v. Felts, 148 Ga. 809, 92 S. E. 541.

2. No error committed.

After a careful consideration of the record in this case, this court is of the opinion that there was evidence to sustain the verdict in favor of the petitioners, that there was no error in the admission of the evidence objected to, and that the charge of the court was full and clear, and was not erroneous for any reason assigned. The court did not err in refusing to grant a new trial.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Proceeding by H. G. Chambers and others for the removal of C. F. Wells, administrator. Judgment for the petitioners in the superior court on certiorari, and the administrator brings error. Affirmed.

R. B. Blackburn, of Atlanta, for plaintiff in error.

Bond Almand and Branch & Howard, all of Atlanta, for defendants in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 452)

HAYES v. STATE. (No. 13226.)

(Court of Appeals of Georgia, Division No. 1
April 11, 1922.)

(Syllabus by the Court.)

Criminal law \S 1160—Verdict, supported by evidence and approved, not disturbed.

The special grounds of the motion for a new trial are without merit. There is evidence

to support the verdict, which has the approval of the trial judge, and, as no error of law appears, this court is powerless to interfere.

Error from City Court of Alma; Andrew J. Tuten, Judge.

Action between Albert Hayes and the State. Judgment for the State, and Hayes brings error. Affirmed.

I. J. Bussell, of Alma, for plaintiff in error.

H. L. Causey, Sol., of Alma, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 459)

HILL v. STATE. (No. 13242.)

(Court of Appeals of Georgia, Division No. 1
April 11, 1922.)

(Syllabus by the Court.)

1. Refund of costs.

Under the ruling in Smith v. State, 117 Ga. 18, 43 S. E. 440, the request that cost be refunded to counsel for the plaintiff in error is refused.

2. Criminal law \S 822(6)—Instruction as to shooting with gun loaded with powder and shot not erroneous, in connection with entire charge.

When considered in connection with the entire charge, the court did not err in charging as complained of in the first special ground of the motion for a new trial, nor in instructing the jury as follows: "I charge you, if you believe the defendant shot Scott Casey with a gun, and that the gun was loaded with powder and shot, that shot, in law and in contemplation of law, are balls, and if you believe they were shot, that would be, in contemplation of law, balls, and you would be authorized to convict him."

3. Sufficiency of evidence.

The evidence supports the verdict.

Error from Superior Court, Warren County; E. T. Shurley, Judge.

Dolly Hill was convicted of an offense, and brings error. Affirmed.

B. F. Walker, of Wrens, for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 441)

J. J. WHITTEN & SON v. ROGERS et al.
(No. 13211.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)*

1. Courts \S 189(14), 217—No writ of error lies from city court, and it has no power to grant a new trial, unless jury of 12 is provided in all cases or on demand of either party.

Where an act creating a city court at any other place than Atlanta or Savannah does not provide for a jury of 12 in all cases, or for such a jury upon demand by either party to a case, whether civil or criminal, the court is not a constitutional city court, and has no power to grant new trials, and a writ of error does not lie from it to the Court of Appeals. *Monford v. State*, 114 Ga. 528, 40 S. E. 798; *Welborne v. State*, 114 Ga. 793, 40 S. E. 857; *Ash v. People's Bank of Oliver*, 149 Ga. 713, 101 S. E. 912.

2. Courts \S 189(14), 217—No writ of error lies from city court of Claxton, and it has no power to grant a new trial, where state has no right to jury of 12.

It is provided in the act creating the city court of Claxton (Acts 1919, p. 451, \S 14) that either party in a civil case, or the defendant in a criminal case, can on demand have a trial by a jury of 12. Under the provisions of the act the state, in a criminal case, cannot on demand have a jury of 12. It follows, from the ruling in the preceding paragraph, that the city court of Claxton is not a constitutional city court, and has no power to grant new trials, and a writ of error does not lie from it to the Court of Appeals.

Error from City Court of Claxton; E. O. Elmore, Judge.

Action between J. J. Whitten & Son and W. B. Rogers and others, administrators. Judgment for the latter, and the former bring error. Writ of error dismissed.

Anderson & Hodges, of Claxton, for plaintiffs in error.

S. T. Brewton and J. Saxton Daniel, both of Claxton, for defendants in error.

BROYLES, C. J. Writ of error dismissed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 466)

TILLMAN v. STATE. (No. 13276.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)*

- Criminal law \S 935(1)—New trial properly denied when conviction authorized.

The defendant was indicted for murder and convicted of voluntary manslaughter. The evidence amply authorized the conviction, and the

only special ground of the motion for a new trial, which complains of the admission of evidence, is without merit. It was not error to overrule the motion for a new trial.

Error from Superior Court, Candler County; R. N. Hardeman, Judge.

Herbert Tillman was convicted of voluntary manslaughter, and he brings error. Affirmed.

C. W. Turner, of Metter, for plaintiff in error.

Walter F. Grey, Sol. Gen., of Swainsboro, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 324)

BUSH v. AMERICAN MILLS CO.
(No. 13092.)(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)*(Syllabus by the Court.)*

- Sales \S 353(1)—Petition in seller's action for buyer's refusal to accept not demurrable.

The petition as amended was not subject to any of the demurrers, general or special, interposed, and the court did not err in overruling the demurrers.

Error from Superior Court, Muscogee County; Geo. P. Munro, Judge.

Action by the American Mills Company against C. P. Bush. Judgment for plaintiff, and defendant brings error. Affirmed.

The petition alleged (1) that defendant was indebted to plaintiff in the sum of \$1,713.20 besides interest; (2) that plaintiff's representative sold defendant 100 coils of $\frac{5}{16}$ inch Bagdad cotton rope for $49\frac{1}{2}$ cents a pound on two orders, one for 50 coils to be shipped on October 30, 1920, and the other for 50 coils to be shipped November 30, 1920; (3) that the orders were written on forms prepared for that purpose, and signed by the initials of plaintiff's representative, and duplicates given to defendant, and that copies thereof were attached as exhibits; (4) that plaintiff thereafter acknowledged receipt of such orders by a letter directed to the C. P. Bush Hardware Company under which name the goods were sold to defendant; (5) that the rope was so sold at $49\frac{1}{2}$ cents a pound, and its aggregate weight was 2,461 pounds, making \$1,713.20; (6) that the orders were not signed by defendant, but that thereafter defendant addressed communications to plaintiff, copies of which were attached, requesting that the orders be canceled, and thereby acknowledged and recognized such orders, and that plaintiff declined to cancel the orders,

and defendant declined to receive the goods, and notified plaintiff not to ship them, and that if shipped they would not be accepted; (7) that after defendant refused to accept the goods, etc., plaintiff caused them to be stored as defendant's property and for its account, and that they were still so stored and held; (8) that such orders and defendant's acknowledgment thereof was a contract whereby plaintiff contracted to sell and defendant to buy 100 coils of $\frac{5}{16}$ inch Bagdad cotton rope at $49\frac{1}{2}$ cents a pound, 50 coils to be shipped on October 30th and 50 on November 30th, and that the aggregate weight of such 100 coils was 2,461 pounds, which at $49\frac{1}{2}$ cents a pound equals \$1,713.20, in which sum defendant was indebted to petitioner with interest; (9) that defendant having refused to permit shipment of the goods, and having notified plaintiff that they would not be accepted, and the goods having been stored as defendant's property, defendant became and was indebted to plaintiff in such sum, which sum, or any part thereof, he refused to pay. The first of defendant's letters mentioned in the petition and attached thereto as an exhibit read as follows:

"You have our order on file for 100 coils $\frac{5}{16}$ cotton rope, one-half to be shipped October 30th and the other to be shipped November 30th. Owing to the failure of the cotton crop in this section, we will be unable to use this rope, and request that you cancel and acknowledge receipt."

The second letter was in part as follows:

"In reply to yours of the 12th, regarding the 100 coils of $\frac{5}{16}$ rope we canceled. * * * This privilege of cancellation we always reserve, as same as you do. * * * We are compelled to cancel and positively will not receive the rope if shipped."

By amendment plaintiff alleged that no verbal or written orders other than those referred to were given plaintiff by defendant. It also set out the letter acknowledging the order, and further alleged that by a custom and usage in the business of buying and selling rope the phrases "coils of cotton rope" and "tubes of cotton rope" meant the same thing, and such custom and usage was known to both parties and became a part of the contract; that according to the custom and usage of such business rope was bought and sold by the pound, and that when a figure was placed beneath or alongside of the word "price," it represented the price in cents per pound, and according to such custom and usage a coil or tube of rope meant a coil or tube varying in weight from 20 to 35 pounds, and that such custom was known to both parties, and became a part of the order; and that the coils of rope ordered by defendant had an average weight per coil of 24.61 pounds and an aggregate weight of 2,461 pounds.

Defendant demurred generally on the grounds that no cause of action was set out;

that the petition showed on its face that there had never been any binding contract; that defendant's letters did not constitute an acknowledgment in writing of such orders; that they did not state what price was to be paid or what kind of rope was to be purchased, and that the alleged orders did not show the price to be paid; that the alleged order showed that no price was fixed, and that the allegation of the petition that they were written on forms prepared for such purposes was shown to be untrue by the orders because no price was set out therein, and the copies of the letters written by defendant did not show what price was to be paid or what kind of rope was purchased or contracted for; that the petition did not show that the facts met the requirements of the statute of frauds, and no facts were alleged which would take the alleged contract out of the statute of frauds; that the petition showed that the amount sued for was more than \$50, and it was not alleged that any writing was signed by defendant sufficient to bind him; that the allegations were too indefinite, because the kind of rope was not definitely stated in defendant's letters, the price of the rope was not stated in the orders, the kind of rope was not set out in the letters, and the price was not set out therein. He demurred specially to paragraph 2 on the grounds that the name of plaintiff's representative was not stated, that the orders attached as exhibits did not show the price of the rope to be $49\frac{1}{2}$ cents a pound, and that the allegations therein were conclusions of the pleader; to paragraph 3 on the grounds that the exhibits did not show that the orders were written out, in that the price per pound was not set forth in the orders, that the orders alleged to have been written out were different from those set out in the paragraph, and that the exhibits attached were not such as to bind defendant, because defendant did not sign them, and did not acknowledge them in writing, as the letters did not show the price to be paid or the kind of rope; to paragraph 4 for failure to set forth the letters or the substance thereof; to the same paragraph because from the petition and the exhibits it nowhere appeared that defendant agreed in writing to purchase any rope or to pay $49\frac{1}{2}$ cents a pound therefor, and because it nowhere appeared therefrom that defendant agreed to purchase 2,461 pounds at any price; to the same paragraph on the grounds that the allegations that defendant acknowledged the orders in writing and that defendant recognized the giving of the orders were conclusions, and that the exhibits attached showed that defendant did not acknowledge the orders in writing and recognize the orders, and showed that defendant did not become bound by them or any writing, and did not in writing agree to purchase any rope or pay any specified price or purchase any specific num-

ber of pounds; to paragraph 8 on the grounds that the allegations as to defendant's acknowledgment of the orders and that he contracted to buy Bagdad cotton rope were conclusions, that the exhibits and petition did not show that defendant ever agreed in writing to buy any such rope or pay any specific price or purchase any number of pounds, and because the facts set forth and the exhibits attached did not show that defendant ever signed any writing that would bind him and take the contract out of the statute of frauds; and to paragraph 9 because the allegations as to the purchase of the goods was a conclusion of the pleader. The amendment to the petition also amended Exhibits A and B (the orders). Exhibit A as amended was as follows, Exhibit B being the same except as to date of shipment:

Exhibit A

American Mills Company, Economy Products.

Atlanta, Georgia, U. S. A., 5/24/1920.

Please enter our order and ship as follows:

To C. P. Bush & Co., Columbus, Ga.

Quantity.

Article.

Price.

50 coils $\frac{5}{16}$ Bagdad Cot. Rope 49 $\frac{1}{4}$

Ship Oct. 30, less Frt.

Seller's responsibility ceases on delivery to transportation company, whether sold f. o. b. shipping point or delivered. Delivery as near date specified as possible. Unless otherwise provided goods are sold f. o. b. shipping point. This order not subject to countermand. Seller's willingness to tender f. o. b. any unspecified quantities on delivery date shall be a fulfillment of his contract and purchase price shall be due with addition of subsequent accrued charges. Subject to acceptance at home office, Atlanta, Ga. Each invoice to stand as a separate sale. This agreement expressing the entire contract between parties.

Sold by A.A.B.

—Statement by editor.

B. H. Chappell and A. W. Cozart, both of Columbus, for plaintiff in error.

Battle & Arnold, of Columbus, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 446)

OLIVER v. BULLOCK. (No. 13222.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Receivers §210—Cannot sue outside state of appointment except when statutory receiver vested with title.

A chancery receiver has no extraterritorial jurisdiction or power of action, and therefore cannot bring suit in a foreign state or jurisdiction. Nor can a statutory receiver institute suit in a foreign state, unless the statute under which he is appointed vests in him title to the property of the insolvent corporation which he represents.

The principles of comity between states do not apply to such a case.

2. Receivers §210—Held not authorized to sue in another state.

Under the foregoing rulings and the facts of the instant case, the plaintiff's petition failed to set forth a cause of action, and the court erred in not dismissing it on general demurrer.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by S. H. Bullock, receiver, against Edgar J. Oliver. Judgment for plaintiff, and defendant brings error. Reversed.

This is a suit by S. H. Bullock, as receiver for a banking corporation of the state of Florida, against Edgar J. Oliver, to recover an assessment upon 23 shares of stock. The defendant was a resident of Chatham county, Ga., and the suit was brought in the superior court of that county. The material portions of the Florida statute (Rev. Gen. St. 1920, § 4162) under which the receiver was appointed and upon which this action is predicated, is as follows:

"On becoming satisfied, * * * upon * * * satisfactory evidence thereof, that any bank * * * doing business in this state, under the state laws, has become insolvent and is in default, * * * the rights, privileges and franchises shall be subject to be forfeited, and the State Comptroller may forthwith designate and appoint a receiver to take charge of the assets and affairs of such bank. * * * Such receiver, under the direction and supervision of the comptroller, shall take possession of the books, records and assets of every description of such bank * * * and in his name shall sue for and collect all debts, dues and claims belonging to it, and, upon the order of the court of competent jurisdiction may sell or compound all bad or doubtful debts * * * on such terms as the court shall direct; and may, if necessary to pay the debts of such bank, * * * sue for and enforce the individual liability of the stockholders. Such receiver shall pay all money received by him to the State Treasurer to be held as a special deposit for the use and benefit of the creditors. * * * The comptroller, immediately upon appointing such receiver, shall serve notice upon the president, or upon any vice president or cashier * * * or other person having the charge or management of any such bank, * * * informing him or them in such notice of his action in appointing such receiver, and notifying him or them or it that he would apply on a date therein named, not to exceed ten days from the date of service of such notice, to some circuit judge having jurisdiction over the same, for an order confirming his action and the appointment of a receiver for such banking institution; and such bank * * * may, at such hearing, contest before such circuit judge the rightfulness and legality of such action of the comptroller in appointing such receiver."

And further (section 4128):

"Stockholders of every banking company shall

be held individually responsible equally and ratably and not for one another for all contracts, debts and engagements of such company to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares."

The petition alleged that the receiver, in pursuance of his statutory authority, ordered a 100 per cent. assessment or levy against the stockholders of the insolvent bank, which was for the full amount of their statutory liability on the stock, and that the defendant, by reason of the provisions of the statute and the assessment against him and the other stockholders, is liable to the plaintiff, as receiver, for the benefit of the creditors of the insolvent bank, in the sum of \$2,300.

The defendant demurred both generally and specially to the petition. The court overruled the demurrer, and the defendant excepted.

Oliver & Oliver, of Savannah, for plaintiff in error.

Eugene Pollard, of Savannah, for defendant in error.

BROYLES, C. J. (after stating the facts as above). [1, 2] As we view this case, it is only necessary to consider the general demurrer, for in our opinion the petition failed to set forth a cause of action. The suit was brought in a court of this state by a receiver appointed under and by virtue of a statute of a sister state—Florida—and his appointment confirmed by a court of competent jurisdiction of that state. Such a receiver is without authority to enforce his rights beyond the jurisdiction of the court appointing him. The defendant in error contends that such is not the true rule, and cites, among other authority, in support of this contention, section 9, Civil Code of Georgia 1910, which is as follows:

"The laws of other states and foreign nations shall have no force and effect of themselves within this state, further than is provided by the Constitution of the United States, and is recognized by the comity of states. The courts shall enforce this comity, until restrained by the General Assembly, so long as its enforcement is not contrary to the policy or prejudicial to the interests of this state."

We cannot agree with this contention. This court, notwithstanding this statute, has announced in plain and unambiguous language that it will not recognize the extraterritorial force of a decree of a foreign state appointing a receiver. See *Seaboard Air Line Ry. v. Burns*, 17 Ga. App. 1 (2), 86 S. E. 270, where it was said:

"The plaintiff was a resident of Alabama. The decree rendered by the United States District Court in Missouri, appointing a receiver for the defendant, had no extraterritorial force, and the plaintiff was not bound by it. *Linville v. Hadden*, 88 Md. 594, 41 Atl. 1097, 43 L. R. A. 222. The appointment of a receiver, of its

own force, gives the receiver the right to take possession of property; but it confers upon him no power to compel the recognition of that right outside the jurisdiction of the court making the appointment. High on Receivers, §§ 47, 241." (Italics ours.)

The rule is stated in 4 High on Receivers, § 239, p. 271, as follows:

"Upon the question of the territorial extent of a receiver's jurisdiction and powers, for the purpose of instituting actions connected with his receivership, the prevailing doctrine, established by the Supreme Court of the United States and sustained by the weight of authority in various states, is that the receiver has no extraterritorial jurisdiction or power of official action, and cannot, as a matter of right, go into a foreign state or jurisdiction and there institute a suit for the recovery of demands due to the person or estate subject to his receivership. His functions and powers, for the purposes of litigation, are held to be limited to the courts of the state within which he was appointed, and the principles of comity between nations and states, which recognise the judicial decisions of one tribunal as conclusive in another, do not apply to such a case, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction." (Italics ours.)

In *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, the Supreme Court of the United States held:

"He [the receiver] has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

Mr. Justice Wayne, who delivered the opinion in the Booth Case, gave the following reasons for refusing to recognize the power of a receiver in foreign jurisdictions:

"We think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may

be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver."

The soundness of this ruling was recognized, and it was followed in *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; *Great Western Mining Co. v. Harris*, 198 U. S. 561, 575, 25 Sup. Ct. 770, 49 L. Ed. 1163; *Keatley v. Furey*, 226 U. S. 399, 403, 33 Sup. Ct. 121, 57 L. Ed. 273; *Sterrett v. Second Nat. Bank*, 248 U. S. 73, 39 Sup. Ct. 27, 63 L. Ed. 135.

Likewise, many of the state courts refuse to recognize upon the ground of comity a foreign receiver suing upon a stockholder's liability. In *Stockbridge v. Beckwith*, 6 Del. Ch. 72, 33 Atl. 620, it was held:

"A receiver appointed in Maryland cannot sue in Delaware to recover a debt due the corporation which he represents, from a resident of the latter state."

To the same effect see *Hunt v. Whewell*, 122 Wis. 33, 99 N. W. 599, 601; *Moreau v. Du Bellet* (Tex. Civ. App.) 27 S. W. 503; *Ayres v. Siebel*, 82 Iowa, 347, 47 N. W. 989; *Murtey v. Allen*, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779; *New Haven Co. v. Linden Co.*, 142 Mass. 349, 7 N. E. 773; *Fowler v. Lamson*, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163.

However, the defendant in error contends that the decisions cited above do not apply to the instant case, because the receiver in each of those cases was a *chancery receiver* whereas the receiver in the present case is a *statutory* one. We cannot concur in this contention. The statute (hereinbefore set out) under which the receiver in this case acts shows clearly that he is a *chancery receiver*, appointed by virtue of a statute. By the express terms of the statute the comptroller appoints a person to act as receiver, but a court of competent jurisdiction must confirm the appointment. Therefore, until the appointment is confirmed, the person named as receiver by the comptroller is not in fact a receiver. He derives his power to act from the court confirming his appointment, for the statute expressly provides that:

"Upon the order of the court of competent jurisdiction he may sell or compound all bad or doubtful debts"

—and that:

"On like order he may sell all the real and personal property of such bank * * * on such terms as the court shall direct."

A majority of the cases which we have hereinbefore cited deal with receivers similar to the instant one now before us. In the *Sterrett* Case, *supra*, the receiver was ap-

pointed by virtue of an Alabama statute, but, under that statute, as under the statute now in question, the receiver must act under the direction of the court. In the *Hale* Case, *supra*, the proceedings were instituted under a Minnesota statute.

The main (and it might be said the only real) exception to the general rule that a receiver cannot sue in a foreign jurisdiction is where he is vested with title to the assets of the insolvent corporation which he represents. But this exception applies only to *statutory* receivers. Title may be vested in him either by the statute under which he is appointed or by some deed or other conveyance. See *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337; *Keatley v. Furey*, *supra*; *Great Western Co. v. Harris*, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163, *supra*. However, even if it be conceded that the receiver in the case at bar is a statutory receiver, the facts of the case do not bring it within the exception. The statute under which the receiver in the instant case was appointed does not vest in him title to the property. On the contrary, it prescribes that all money received by him shall be deposited with the State Treasurer as a special deposit for the benefit of creditors. In fact, paragraph 10 of the petition expressly alleges that this suit is brought for the benefit of creditors of the insolvent bank. In *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725, where it appeared that a receiver appointed by a Tennessee court for an insolvent corporation was authorized by his appointment to collect, take possession of, preserve, and care for the assets of the corporation, and dispose of the same under the order of the court, and was directed to prosecute suits in the courts of Massachusetts for the purpose of recovering from the promoters of the corporation assets which it was claimed they had unlawfully withdrawn, it was held that none of the proceedings in Tennessee operated as an assignment to the receiver of the choses in action in litigation, and therefore that the receiver could not sue thereon in his own name in Massachusetts. In the instant case it is not necessary to decide whether the receiver had authority to bring the suit in his own name.

None of the other reasons advanced by the defendant in error why the judgment of the trial court overruling the general demurrer should be affirmed contain substantial merit; and it follows, from what has been said that the court erred in refusing to dismiss the petition upon the general demurrer interposed.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 463)

VELLIS v. STATE. (No. 13294.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)***Criminal law** \Leftrightarrow 202(3)—Conviction for possessing liquor does not bar prosecution for selling same liquor.

A plea of guilty and the imposition of a sentence, under an indictment for having alcoholic liquors in possession, is no bar to a trial on a separate indictment, charging the same persons with selling such liquors.

Error from Superior Court, Fulton County; Jno. D. Humphries, Judge.

George Vellis was convicted of selling liquor, and he brings error. Affirmed.

McClelland & McClelland and Tillou Von Nunes, all of Atlanta, for plaintiff in error.

Jno. A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BLOODWORTH, J. In the city court of Atlanta the plaintiff in error pleaded guilty to and was sentenced under an accusation dated November 1, 1921, which charged that on October 31, 1921, he "did have, control and possess spirituous and intoxicating liquors." In the superior court of Fulton county he was subsequently placed on trial under an indictment which was returned on the 7th day of November, 1921, and which charged a sale of liquor to a named person on October 29, 1921. He filed a plea of former jeopardy, which is in part as follows:

"This defendant having been placed in jeopardy upon the same offense as charged in this indictment in the criminal court of Atlanta, which said court, at said time, had jurisdiction of said offense, this defendant pleads said former jeopardy in bar and [of] further prosecution on said indictment, and prays this court that this his plea be sustained, and he be discharged from any other or further prosecution or liability in said case, that the charge in said accusation upon which he was tried in the criminal court of Atlanta on November 1, 1921, is general in its allegations, and he cannot be placed in jeopardy on a charge of the same character and for the same offense, where the commission was prior to November 1, 1921, the date of said accusation."

Under the laws of Georgia, selling intoxicating liquor is a different and distinct offense from having, controlling, and possessing intoxicating liquors. This case is controlled in principle by the ruling in the case of Phillips v. State, 27 Ga. App. 1 (1), 107 S. E. 343 (1). The court did not err in striking the plea of former jeopardy.

2. The motion for a new trial contains the

general grounds only, and the evidence amply supports the verdict.
Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 470)

WILLIAMSON v. STATE. (No. 13305.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)*

1. **Criminal law** \Leftrightarrow 762(3)—Larceny \Leftrightarrow 40(6), 72—Instruction as to variance held not confusing or misleading; instruction as to variance held not to invade province of jury and express opinion on the facts; no fatal variance because of difference of one letter in mark on bale of cotton.

The excerpt from the charge of the court of which complaint is made in the motion for a new trial is not erroneous.

2. **Criminal law** \Leftrightarrow 935(1)—New trial properly denied when evidence sufficient.

There is ample evidence to support the verdict, and the motion for a new trial was properly overruled.

Error from Superior Court, Toombs County; R. N. Hardeman, Judge.

Emory Williamson was convicted of carrying away cotton with intent to steal it, and he brings error. Affirmed.

C. W. Sparks and A. C. Saffold, both of Vidalia, for plaintiff in error.

Walter F. Grey, Sol. Gen., of Swainsboro, for the State.

BLOODWORTH, J. [1, 2] Only the first headnote needs elaboration. The indictment in this case charged in part that the accused—

"did wrongfully and fraudulently take and carry away, with intent to steal the same, one certain bale of short staple cotton, being bale No. 39, marked 'F. G. C. Co., to D. C. Co.,' being the property of Dixie Cotton Company, a corporation under the laws of Georgia, and of the value of \$154, and being in the custody and control of the Georgia and Florida railroad at Normentown, Ga., and the United States Railroad Administration."

The proof showed that the bale of cotton was really marked "F. G. Co. to D. C. Co." The judge charged the jury:

That, if they believed "that the defendant took the bale of cotton described in this indictment, and it was in the custody and control of the railroad company as alleged, and it was the property of the Dixie Cotton Company as alleged, and he took it and carried it away with intent to steal the same, yet if the jury should believe that the words of description on the

bale of cotton varies with that in the indictment to the extent that the letter 'C' was not on the bale of cotton in the words 'F. G. C. Co.,' that would not amount to a fatal variance, and the jury would be authorized to convict, in the event they should find all of the material allegations, as I have defined to you in this indictment, to be true."

This charge is alleged to be erroneous because:

(a) "Said charge was confusing and misleading."

(b) "The court entered the province of the jury and expressed an opinion on the facts in said case, and on what had or had not been proven."

(c) "The court in said instructions took from the jury the right to find and determine the question as to whether or not there was a fatal variance between allegata and the proof."

(d) "The court in the instructions herein set out charged the jury that as matter of law there was not a fatal variance between the allegata and the proof."

For none of the foregoing reasons was the charge erroneous. See, in this connection, *Bernhard v. State*, 76 Ga. 613 (5); *Warren v. State*, 12 Ga. App. 695 (3), 78 S. E. 202; *Robinson v. State*, 27 Ga. App. 770, 100 S. E. 922; *Adams v. State*, 21 Ga. App. 152, 94 S. E. 82; *Ayers v. State*, 3 Ga. App. 305 (1), 59 S. E. 924; *Rivers v. State*, 57 Ga. 28.

Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 438)

MERTINS v. GAVALOS. (No. 13112.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

Certiorari §60—Should be dismissed when no answer filed and order extending time or requiring answer not applied for.

It appearing that the trial magistrate failed to answer the writ of certiorari on the third Monday in May, as directed by the writ issued from the superior court of Richmond county, or at any time during the term of said court to which it was returnable, and it appearing that no further time for answering was given, and that the plaintiff in certiorari applied for no order granting the trial magistrate additional time in which to answer or requiring him to answer the writ, the judge of the superior court erred in refusing to dismiss the certiorari upon proper motion of defendant in certiorari so to do. Civ. Code 1910, § 5195; *Henry v. American Ry. Exp. Co.*, 25 Ga. App. 646 (1), 104 S. E. 16; *Carroll v. Upchurch*, 25 Ga. App. 646, 104 S. E. 16; *J. M. High Co. v. Ga. Ry. & Power Co.*, 12 Ga. App. 505, 77 S. E. 588; *Fain v. Shy*, 115 Ga. 765, 42 S. E. 94.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action between E. C. Mertins and George Gavalos. Judgment for the latter on certiorari, and the former brings error. Reversed.

P. H. Rowe, of Augusta, for plaintiff in error.

W. Inman Curry, of Augusta, for defendant in error.

BLOODWORTH, J. Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 467)

WHITE v. STATE. (No. 13291.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Criminal law §1103 — Brief of evidence containing objections, rulings, colloquies, etc., insufficient.

An examination of what purports to be a brief of the evidence in this case will clearly show that there was no bona fide effort to make "a condensed and succinct brief of the * * * testimony," as required by section 6093, Civil Code 1910. What purports to be such brief of evidence contains objections to the admission of evidence, rulings of the court on various questions, colloquies between court and counsel, and other immaterial matter. Because of the lack of a proper brief of the evidence this court cannot consider any of the questions raised in the motion for a new trial, which depend for a determination on a consideration of the evidence. *Phillips & Son v. Bagwell Motor Car Co.*, 22 Ga. App. 488 (2), 96 S. E. 334, and cases cited; *Trueheart v. State*, 13 Ga. App. 661 (2), 79 S. E. 755, and cases cited.

2. Other grounds without merit.

There is no merit in any ground of the motion for a new trial not disposed of above.

Error from Superior Court, Hart County; W. L. Hodges, Judge.

Action between J. P. White and the State. Judgment for the State, and White brings error. Affirmed.

Alex S. Johnson, of Royston, for plaintiff in error.

A. S. Skelton, Sol. Gen., of Hartwell, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 462)

CASON v. STATE. (No. 13267.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)*

1. Criminal law \S 636(8)—When verdict received in accused's absence invalid stated.

Before a verdict received in the absence of the accused will be held to be invalid, it is incumbent upon the accused to show that he was in custody of the law at the time the waiver was made, that he made no waiver of his right to be present, and that he did not authorize his counsel to make such waiver for him, and, if an unauthorized waiver has been made by counsel, that he has not ratified the same or allowed the court to act upon the waiver of counsel after he has notice that the same has been made." *Cawthon v. State*, 119 Ga. 395 (9), 46 S. E. 897.

2. Criminal law \S 954(1)—Motion to set aside verdict properly overruled, when it did not show that defendant did not authorize counsel to waive presence or ratify his waiver.

In the instant case the record shows that pending the trial, and in the presence of the accused, counsel for the accused consented for the jury to return a sealed verdict and to disperse. The court then announced that no other case would be taken up that day, whereupon the sheriff removed the defendant and the other prisoners to the jail. Subsequently on the same day the jury sent word to the court that they had reached a verdict, and they were thereupon brought into the courtroom. Upon inquiry by the court, counsel for the defendant announced that he waived the presence of the defendant and the call of the jury. The verdict was then received. All of these proceedings occurred on December 5, 1921. On December 24, 1921, the accused filed a motion to set aside and vacate the verdict, on the ground that it was a nullity, as it was received in his enforced absence. It is not alleged, however, in the motion, that the accused did not authorize his counsel to waive his right to be present at the reception of the verdict, or that (conceding that the waiver by counsel was not authorized by the accused) the accused had not ratified such waiver. It follows from these facts and the foregoing ruling that the court did not err in overruling the motion to set aside the verdict.

Error from City Court of Dublin; S. W. Sturgis, Judge.

Arthur Cason was convicted of an offense, and he brings error. Affirmed.

C. S. Loden, of Macon, and W. A. Dampier, of Dublin, for plaintiff in error.

Wm. Brunson, Sol., of Dublin, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 475)

DRAKE v. STATE. (No. 13327.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)*

1. Criminal law \S 958(2) — New trial not granted for newly discovered evidence, when ignorance of evidence before trial not shown.

The court did not err in overruling those grounds of the motion for a new trial which were based upon alleged newly discovered evidence; it not appearing by affidavit of the accused and his counsel that they did not know of the existence of such evidence before the trial. *Park's Ann. Code*, \S 6086.

2. Criminal law \S 1160—Verdict authorized by evidence and approved by trial judge not disturbed.

The verdict was authorized by the evidence, and, having been approved by the trial judge, and no error of law appearing, this court is without authority to interfere.

Error from Superior Court, Seminole County; W. C. Worrill, Judge.

Action between Tom Drake and the State. Judgment for the State, and Drake brings error. Affirmed.

John E. Drake and W. V. Custer, both of Bainbridge, for plaintiff in error.

B. T. Castellow, Sol. Gen., of Cuthbert, and R. R. Arnold and E. C. Hill, both of Atlanta, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 483)

REDD v. STATE. (No. 13287.)(Court of Appeals of Georgia, Division No. 1.
April 13, 1922.)*(Syllabus by the Court.)*

1. Criminal law \S 1044—Exceptions to prejudicial remarks not considered without motion for mistrial.

Exceptions to prejudicial remarks made by the court upon the trial of a criminal case, or like remarks made by the solicitor general in his argument to the jury, cannot be considered by this court, unless a motion for a mistrial based thereon was made and denied. *Stapleton v. State*, 19 Ga. App. 36 (13), 90 S. E. 1029; *Gilbert v. State*, 25 Ga. App. 334 (2), 103 S. E. 694.

(a) Under this ruling, grounds 5 and 6 of the amendment to the motion for a new trial raise no question for determination by this court.

2. Remaining grounds do not show error.

None of the remaining grounds of the amendment to the motion for a new trial shows material error.

3. Criminal law §1160—Verdict supported by evidence and approved by trial judge not disturbed.

There was some slight evidence which authorized the verdict, and, the finding of the jury having been approved by the trial judge, this court is without authority to interfere. *Lacount v. State*, 25 Ga. App. 767, 104 S. E. 920.

Error from Superior Court, Wilkes County; E. T. Shurley, Judge.

Action between Al Redd and the State. Judgment for the State, and Redd brings error. Affirmed.

C. A. Picquet and H. A. Woodward, both of Augusta, and Colley & Colley, of Washington, Ga., for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 463)

HARRIS v. STATE. (No. 13268.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(Syllabus by the Court.)

Intoxicating liquors §236(5)—Evidence held insufficient to support conviction.

The defendant was charged with violating the prohibition statute. The evidence shows that at the house where the defendant lived, which was occupied also by other people, the officers found two pints of whisky concealed in a piano. The defendant was not at home, but was away at work at the time of the search. At the time of the search there were other people present in the house, and there is undisputed evidence that one of the other persons at the house on the same day was in possession of whisky and was engaged in the illicit sale of whisky. The evidence was not sufficient to authorize the defendant's conviction. It was error to overrule the motion for a new trial.

Error from City Court of Dublin; S. W. Sturgis, Judge.

C. L. Harris was convicted of violating the prohibition statute, and he brings error. Reversed.

W. A. Dampier, of Dublin, for plaintiff in error.

Wm. Brunson, Sol., of Dublin, for the State.

LUKE, J. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 457)

COLLINS v. MYERS. (No. 13236.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(Syllabus by the Court.)

1. Pleading §417 — Plaintiff attempting to amend to meet ruling on demurrer cannot claim amendment unnecessary.

A plaintiff who submits to a ruling that his petition is subject to general demurrer, and that unless, within a designated time, it be so amended as to show a cause of action, the case on a named date will be dismissed, and who thereupon, in an effort to meet the ruling, amends his petition, will not thereafter be heard to say that the amendment was unnecessary. And this is true although he may have excepted to the ruling. Where a plaintiff is not satisfied with such a ruling, he should stand upon his petition as drawn, refuse to amend, and allow his case to be dismissed, and except to that judgment. *Rome Railroad Co. v. Thompson*, 101 Ga. 26, 28 S. E. 429; *Glover v. S. F. & W. Railway Co.*, 107 Ga. 34(3), 43(3), 32 S. E. 876; *Farrer v. Edwards*, 144 Ga. 553(1), 87 S. E. 777; *Clark v. Long*, 25 Ga. App. 807, 808, 102 S. E. 654, and citations; *McConnell v. Block Co.*, 26 Ga. App. 550(1), 106 S. E. 617, and citations.

2. Exception not considered.

Under the foregoing ruling and the facts of the instant case, this court cannot consider the plaintiff's exception to the ruling that the petition as drawn was subject to the general demurrer interposed.

3. Pleading §225(1)—When amendment pursuant to court's ruling did not show fact required by ruling, amendment properly disallowed, and petition properly dismissed.

The court ruled that unless within a designated time the petition was amended to show a certain specified fact, the case would be dismissed on a certain date. The plaintiff, within the time named, submitted an amendment to the petition. This amendment, however, did not show the fact required to be shown by the order of the court, and therefore it was not error to disallow the amendment and to dismiss the case. *Clark v. Ganson*, 144 Ga. 544, 87 S. E. 670; *Speer v. Alexander*, 149 Ga. 765, 102 S. E. 150.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by J. S. Collins against Sigo Myers. Judgment for defendant, and plaintiff brings error. Affirmed.

Lawrence & Abrahams and Geo. H. Richter, all of Savannah, for plaintiff in error.

Jacob Gazan, of Savannah, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 437)

EDWARDS et al. v. DORSEY, Governor.
(No. 12752.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)***Ball §58—Offense punishable by law must be described; description of offense held insufficient.**

While it is not necessary that the offense named in a recognizance be stated with the same degree of particularity as required in an indictment, or that it be set out specifically or in detail, "the offense described in the recognizance must be one punishable by law," and where it is not, the recognizance is void. The recognizance in the instant case charged the accused with the offense of "shooting," and having failed to set out specifically or in substance an "offense committed against the laws of this state," or "an indictable one," or "one punishable by law," or to describe the offense with which the accused stands charged "with sufficient clearness to show of what offense he is in fact accused," it is void, and all proceedings based thereon are nugatory. For this reason the trial judge erred in overruling the motion in arrest of judgment based on such a bond, and the judgment of the lower court must be reversed. See *Nicholson v. State*, 2 Ga. 365; *Vaughan v. Candler*, 113 Ga. 11, 38 S. E. 352.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by H. M. Dorsey, Governor, against Allen Edwards and others. Judgment for plaintiff, and defendants bring error. Reversed.

Porter & Mebane, of Rome, for plaintiffs in error.

E. S. Taylor, Sol. Gen., of Summerville, and Jas. F. Kelly, of Rome, for defendant in error.

BLOODWORTH, J. Judgment reversed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 501)

GRESHAM v. STATE. (No. 13233.)(Court of Appeals of Georgia, Division No. 1.
April 14, 1922.)*(Syllabus by the Court.)***1. Criminal law §822(1)—Charges to be considered in the light of the entire charge and the facts of the case.**

When the exceptions to the charge of the court are considered in the light of the entire charge and the facts of the case, no harmful error is shown.

2. Criminal law §1160—Verdict supported by evidence and approved by trial judge not disturbed.

The defendant's conviction was authorized by the evidence; and, the finding of the jury having been approved by the trial judge, and no material error of law appearing, this court is without authority to interfere.

Bloodworth, J., dissenting.

Error from Superior Court, Cobb County; D. W. Blair, Judge.

W. A. Gresham was convicted of an offense, and he brings error. Affirmed.

Mozley & Gann and Anderson & Roberts, all of Marietta, for plaintiff in error.

Jno. S. Wood, Sol. Gen., of Canton, and Lindley W. Camp, of Marietta, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE J., concurs.

BLOODWORTH, J., dissents.

(28 Ga. App. 314)

HEALD v. FIDELITY & DEPOSIT CO. OF MARYLAND. (No. 13075.)(Court of Appeals of Georgia, Division No. 1.
March 7, 1922.)*(Syllabus by the Court.)***Bridges §20(6)—Petition in action on bridge contractor's bond held subject to demurrer.**

The court did not err in sustaining grounds 9 and 10 of the demurrer to the petition, and dismissing the petition.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by C. L. Heald against the Fidelity & Deposit Company of Maryland. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

The petition alleged that the Cornell-Young Company contracted with the county of Thomas to construct a concrete bridge across the Ochlocknee river; that, pursuant to the contract and under section 389 of the supplement to Park's Annotated Code, it executed a bond obligating itself for the payment of all just claims for materials furnished for the purpose of the contract, a copy of which was thereto attached; that defendant was the surety thereon; that the Cornell-Young Company entered on petitioner's land and took therefrom 799 tons of building sand, especially adapted to use in concrete work and of the kind and character necessary for such construction and used it in the construction of such bridge; that it was of the value of \$519.35; that such company also entered on plaintiff's land and cut

therefrom and used in the work of constructing the bridge 14 pine trees of the value of \$14; that under the contract such company was to furnish at its own expense all materials used; that petitioner made demand on the county commissioners for payment, and they refused to make payment or to bring suit on the bond; and that the action was brought within 12 months from the date of the completion of the work and its acceptance by the proper public authority and more than 90 days after such completion and acceptance. By amendments plaintiff added allegations that the sand was taken from the bed of the river on lot No. 14, in the Thirteenth district of Thomas county, and lots Nos. 361 and 362, in the Seventeenth district, and that the trees were cut from lot No. 361; that the sand and trees were so taken on or about January 1, 1920; and that the trees were furnished and accepted under an implied contract to pay plaintiff the market value and were so accepted by the Cornell-Young Company under the direction of their agent therein named and were so furnished and accepted for the purpose of completing such contract in accordance with its terms and were so used.—Statement by editor.

J. M. Austin and H. H. Merry, both of Thomasville, for plaintiff in error.

Titus & Dekle, of Thomasville, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 460)

KING v. STATE. (No. 13244.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Sufficiency of evidence.

The conviction of the offense of larceny was authorized by the evidence.

2. Criminal law §1064(4)—Grounds of motion not showing objections to evidence insufficient.

The special grounds of the motion for a new trial, based upon the court's rulings upon the admissibility of evidence, do not show what objections were urged at the time to the evidence complained of. These grounds of the motion for a new trial fall within the rulings announced in *Wynne v. State*, 123 Ga. 566(1), 51 S. E. 636, and *McKee v. Hurst*, 21 Ga. App. 571(2), 94 S. E. 886.

3. No error committed, and new trial properly denied.

The charge of the court was full and fair and adjusted to the evidence. There is no merit in the assignments of error attacking the

charge. It was not error to overrule the motion for a new trial.

Error from Superior Court, Fulton County; D. W. Blair, Judge.

J. M. King was convicted of larceny, and he brings error. Affirmed.

Irene L. Bell, Ernest C. Bell, and Tillon Von Nunes, all of Atlanta, for plaintiff in error.

John A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 428)

CHATHAM MOTOR CO. v. COMMERCIAL CREDIT CO. (No. 12998.)

(Court of Appeals of Georgia, Division No. 2.
April 1, 1922.)

(Syllabus by the Court.)

1. Pleading §193(9), 307—Copy of collateral agreement referred to in note sued on need not generally be attached; reference in note to conditional sale agreement held not to show necessity for attaching copy as exhibit.

In a suit on a promissory note which contains an unconditional and unequivocal promise to pay, but which contains also a reference to a collateral agreement, it is not necessary to plead the collateral agreement by attaching a copy of it to the petition where it does not appear from the reference to it in the note that it is such an agreement as would vary or affect the terms of the note.

(a) Where the reference to a collateral agreement in a promissory note was as follows: "This note, including all installments thereof of even date herewith, is identified with conditional sale agreement covering a certain motor vehicle and certain personal property and equipment thereon"—it did not appear therefrom that the agreement referred to was such an agreement as varies the terms of the note; and therefore the trial court did not err in overruling the demurrer based on the ground that the collateral agreement referred to in the note sued on was not pleaded by being attached to the petition. See, in this connection, *Pyron v. Ruchs*, 120 Ga. 1060 (6), 1065, 48 S. E. 434.

2. Appeal and error §264, 267(1), 270(2)—When no exception taken to judgment denying new trial or to verdict and judgment they cannot be reviewed.

A motion to dismiss the plaintiff's petition was made at the trial of the case, on the ground that the suit was brought on a promissory note that did not express the entire contract between the parties. The motion was overruled, and a motion for a new trial was made and overruled and within 30 days from the date of the order refusing to dismiss the petition a bill of ex-

ceptions was presented and certified. No exception having been taken to the final judgment overruling the motion for a new trial, or to the verdict and judgment as originally rendered, the only question that can be considered by this court is the judgment overruling the motion to dismiss the petition.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by the Commercial Credit Company against the Chatham Motor Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Robt. L. Colding, of Savannah, for plaintiff in error.

Ulmer & Bright, of Savannah, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 473)

SOWELL v. STATE. (No. 13337.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Criminal law \S 304(2)—Larceny \S 30(5)—Indictment held to sufficiently describe cow stolen.

The indictment sufficiently described the cow alleged to have been stolen.

2. Sufficiency of evidence.

There is evidence to support the verdict.

Error from Superior Court, Screven County; H. B. Strange, Judge.

W. M. Sowell was convicted of stealing, and he brings error. Affirmed.

Boykin & Hollingsworth, of Sylvania, for plaintiff in error.

A. S. Anderson, Sol. Gen., of Millen, for the State.

BLOODWORTH, J. The indictment, in this case charged that the accused did "take and steal and carry away one red brindle cow, white belly and white face with a butt head, helper, same being the property of Mrs. J. H. Harris, of the value of \$20." The defendant demurred on the ground that the indictment did not sufficiently describe "the kind of cow or helper he is charged with stealing." The demurrer was overruled, and exceptions pendente lite were filed. The case proceeded to trial, a verdict of guilty was rendered and a motion for a new trial was overruled.

[1] 1. The court properly overruled the demurrer. The description of the cow alleged

to have been stolen was sufficient. In *Gibson v. State*, 7 Ga. App. 692 (1, 2), 67 S. E. 838, this court held that—

"In an indictment for cattle stealing, the following description of the animal alleged to have been stolen is sufficient, namely: 'One cream-colored Jersey cow, of the personal goods of [the prosecutor], and of the value of \$40.' It is a matter of common knowledge, of which the court will take judicial cognizance, that a cow is a female animal, is a horned animal, and has cloven hoofs, and that the larceny of a cow is therefore within the purview of section 159 of the Penal Code" (Penal Code of 1910, § 156).

It is also a matter of common knowledge that a helper is a young cow. See *Adams v. State*, 22 Ga. App. 786, 97 S. E. 201.

[2] 2. "In this case the motion for a new trial contained only the usual general grounds. There was some slight evidence authorizing the verdict; and, the verdict having been approved by the trial judge, under the repeated and uniform rulings of this court and of the Supreme Court a reviewing court is powerless to interfere. When the verdict is apparently decidedly against the weight of the evidence, the trial judge has a wide discretion as to granting or refusing a new trial; but whenever there is any evidence, however slight, to support a verdict which has been approved by the trial judge, this court is absolutely without authority to control the judgment of the trial court." *Toole v. Jones*, 19 Ga. App. 24, 90 S. E. 732. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 472)

YOUNG v. STATE. (No. 13314.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. No error in charge.

Under the facts of this case the special grounds of the motion for a new trial show no error that would require the grant of a new trial, either because of the failure of the judge to charge or in the excerpt from the charge of which complaint is made.

2. Criminal law \S 911, 1156(1), 1189—Trial judge has discretion respecting new trials; Court of Appeals without discretion to grant new trial.

"Under the facts as disclosed by the record, this court cannot say that the verdict of the jury is without support from the testimony or so far contrary to it as to authorize this court to determine that the trial judge abused his discretion in refusing to grant a new trial. The law allows him to refuse to grant new trials in the exercise of a legal discretion, but it does

not give this court any discretion in the matter. It can only grant new trials when errors of law have been committed, or when the trial judge has abused his discretion in refusing a new trial." *Smith v. State*, 91 Ga. 188 (1), 17 S. E. 68; *Bradham v. State*, 21 Ga. App. 510, 94 S. E. 618. See cases cited.

Error from City Court of Wrightsville; S. W. Sturgis, Judge.

Action between T. I. Young and the State. Judgment for the State, and Young brings error. Affirmed.

B. B. Blount, of Wrightsville, for plaintiff in error.

W. O. Brinson, Sol., of Wrightsville, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 390)

MIXON v. SAVANNAH & A. RY.
(No. 11838.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1922.)

(Syllabus by the Court.)

1. Duty of railway respecting crossings.

The Supreme Court, in answer to a certified question in this case propounded by the Court of Appeals, held as follows: "The provisions of section 2673 of the Civil Code of 1910 'apply to a railroad company where the public road is crossed only by an excavation made for the purpose of laying therein, across such public road, a railroad track of the company, and before any railroad track has been laid and before the work of constructing the railroad is completed across such public road.'" 111 S. E. 197.

2. Railroads §95(1)—Statutory duty of railroad crossing highway applicable to excavation by independent contractor.

Where a railroad company employs another to make an excavation across a public road, for the purpose of being thereafter used by the railroad company in constructing therein a railroad, and where the person so employed is not subject to the immediate direction and control of the railroad company, but is an independent contractor, the railroad company is nevertheless liable for any injuries received by a person injured while traveling along such public road as a proximate result of the negligence of such independent contractor in failing to keep the road in good order where crossed by the excavation. The wrongful act or negligence of such employee or independent contractor in failing to keep the public road in good order where crossed by such excavation, made for the purpose of constructing the railroad, being an act in violation of a duty imposed upon the railroad company by statute, as contained in Civil Code 1910, § 2673, codifying an act of

1888 (Ga. Laws 1888, p. 216), the railroad company is not absolved from liability upon the ground that the alleged tort was committed, not by the railroad company, but by its employee or independent contractor. Civil Code 1910, § 4415 (4). The statute imposing such duty upon the railroad company reads as follows: "All railroad companies shall keep in good order, at their expense, the public roads or private ways established pursuant to law, where crossed by their several roads, and build suitable bridges and make proper excavations or embankments, according to the spirit of the road laws." Civil Code 1910, § 2673.

3. New trial §39—In action for injuries on highway, where crossed by excavation, error in instruction held to require new trial.

This being a suit against the railroad company by a person alleged to have been injured while traveling along a public highway, by virtue of the alleged negligence of such independent contractor in failing to keep the highway in good order where such excavation made by such independent contractor crossed the public highway, and the trial court having failed to properly instruct the jury in accordance with the above rulings, it was error to overrule the plaintiff's motion for a new trial, excepting to the verdict and judgment rendered for the defendant.

Error from Superior Court, Jefferson County; R. N. Hardeman, Judge.

Action by J. K. Mixon against the Savannah & Atlanta Railway. Judgment for defendant, and plaintiff brings error. Reversed, in conformity to Supreme Court's answers to certified questions (111 S. E. 197).

W. L. Phillips, W. T. Revell, and Frank Hardeman, all of Louisville, for plaintiff in error.

Hitch & Denmark, of Savannah, and Phillips & Abbot, of Louisville, for defendant in error.

STEPHENS, J. Judgment reversed.

JENKINS, P. J., and HILL, J., concur.

(28 Ga. App. 496)

PORCHER v. HARVLEY. (No. 12934.)

(Court of Appeals of Georgia, Division No. 2.
April 13, 1922.)

(Syllabus by the Court.)

Appeal and error §733—Assignment of error on judgment as contrary to law held too general to support writ of error.

This was a case raised by an affidavit of illegality filed to the levy of an execution involving questions both of law and fact, and by consent it was tried by the judge without a jury, and a judgment rendered in favor of the execution. There was no motion for a new trial, and a direct exception was taken in the bill of exceptions by the following assignment of error: "The said judge and court, sitting with-

out the intervention of a jury as aforesaid, then and there entered a judgment against the illegality and in favor of the execution, to which said decision and order Mary Porcher, now the plaintiff in error, then and there excepted and now excepts [excepts to?] the same as error, as being contrary to law, and says that said judge and court should have then and there entered up a judgment in favor of the illegality and against the execution in said case." *Held*, under repeated decisions of this court and the Supreme Court, such an assignment of error is too general. It should have stated wherein such judgment was contrary to law. The motion to dismiss the writ of error because there is no sufficient specific assignment of error is sustained. *Lyndon v. Ga. Ry. & Electric Co.*, 129 Ga. 353, 58 S. E. 1047, and decisions cited; *Patterson v. Beck*, 133 Ga. 701, 66 S. E. 911, and cases cited in the opinion; *Kimball v. Williams*, 108 Ga. 812, 33 S. E. 994; *Lamar, etc., Co. v. Sou. School Book Co.*, 18 Ga. App. 850, 90 S. E. 174; *Joiner v. Stovall*, 12 Ga. App. 19, 76 S. E. 753.

Error from City Court of Douglas; T. N. Henson, Judge.

Proceeding on an affidavit of illegality filed by Mary Porcher to execution in favor of Mrs. H. M. Harvley. Judgment sustaining the execution, and Porcher brings error. Writ of error dismissed.

R. A. Moore, of Douglas, for plaintiff in error.

Casey Thigpen and L. E. Heath, both of Douglas, for defendant in error.

HILL, J. Writ of error dismissed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 469)

MILLER v. STATE. (No. 13304.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Criminal law §938(1) — New trial not granted for newly discovered impeaching cumulative evidence not likely to change result.

The alleged newly discovered evidence is cumulative and impeaching, and would not likely produce a different result upon another trial.

2. Homicide §317—Failure to show that gun was likely to produce death not ground for new trial.

The defendant was indicted and convicted of assault with intent to murder. The ground of the motion for a new trial which complains that it was not shown that the shotgun with which the prosecutor was shot was a weapon likely to produce death is without merit.

3. Rulings on evidence.

The ground of the motion for a new trial which complains of the court's ruling upon the

admissibility of evidence falls within the rule announced in *Wynne v. State*, 123 Ga. 566 (1), 51 S. E. 636.

4. Sufficiency of evidence and denial of new trial.

Upon conflicting evidence the jury were authorized to return a verdict of guilty. It was not error for any reason assigned to overrule the motion for a new trial.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Jack Miller was convicted of assault with intent to murder, and he brings error. Affirmed.

Titus & Dekle, of Thomasville, for plaintiff in error.

O. E. Hay, Sol. Gen., of Thomasville, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 476)

PLUMMER v. STATE. (No. 13328.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Criminal law §829(3)—Instruction in language of statute defining offense not required where indictment followed statute and was quoted in the charge.

Plaintiff in error was indicted for shooting at another. The trial resulted in a verdict of guilty. A ground of the motion for a new trial alleged that "the court erred in omitting to charge the jury section 115 of the Criminal Code of the State of Georgia of 1910, under which the defendant was indicted." The indictment was practically in the language of the Code, contained a statement of every material element necessary to constitute the crime charged, and was "full and minute in setting forth the acts laid to the prisoner's charge." In his instructions to the jury the judge quoted the material parts of the indictment, and told them that, if the allegations of the indictment were made out beyond a reasonable doubt, they would be authorized to find a verdict of guilty. Having thus instructed the jury, it was not necessary for the judge to charge them further in the exact language of the statute. *Smith v. Smith*, 63 Ga. 170 (14).

2. No error in stating contentions.

For no reason assigned did the judge err in stating the contentions of the state, as complained of in the second ground of the amendment to the motion for a new trial. See, in this connection, *Brown v. State*, 6 Ga. App. 356, 64 S. E. 1119; *Allen v. State*, 18 Ga. App. 4 (2), 88 S. E. 100; *Allen v. State*, 27 Ga. App. 625, 110 S. E. 627; *Pritchett v. State*,

92 Ga. 66 (7), 18 S. E. 536; City & Suburban Ry. Co. v. Findley, 76 Ga. 311.

3. Criminal law \S 1172(7)—Instruction in alternative as to reasonable doubt from evidence of alibi or other evidence held favorable to accused.

The court charged the jury as follows: "But aside from that feature of the law of alibi, even though it does not establish the alibi to your reasonable satisfaction on the general case, the general consideration of the case, it is your duty to consider his plea of alibi and all the evidence relative to the alibi with all the other evidence in the case, and if the evidence as to alibi, or any other evidence in the case, generates a reasonable doubt as to his guilt, then you would find him not guilty." This portion of the charge is alleged to be error "because the court used the preposition 'or' when he should have used the conjunction 'and.'" There is no merit in this exception. The charge as given was more favorable to the accused than if the court had charged as contended for in this ground of the motion for a new trial.

4. Criminal law \S 935(1)—New trial properly denied when evidence sufficient and no error committed.

There is evidence to support the verdict; no error of law is shown to have been committed upon the trial of the case, and the motion for a new trial was properly overruled.

Error from Superior Court, Bibb County; Malcolm D. Jones, Judge.

Henry Plummer was convicted of shooting at another, and he brings error. Affirmed.

John R. Cooper and W. O. Cooper, Jr., both of Macon, for plaintiff in error.

C. H. Garrett, Sol. Gen., of Macon, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 350)

STOUFER v. MISSENHEIMER. (No. 12865.)

(Court of Appeals of Georgia, Division No. 1. March 8, 1922. Rehearing denied April 11, 1922.)

(Syllabus by the Court.)

Overruling of certiorari not error.

This case has before been here for review, and is reported in 26 Ga. App. 554, 106 S. E. 560. The court did not err in overruling and denying the certiorari.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between W. B. Stoufer and R. J. Missenheimer. Judgment for the latter, and the former brings error. Affirmed.

Morris Macks, J. O. Wood, and S. A. Massell, all of Atlanta, for plaintiff in error.

McCaullum & Sims, of Atlanta, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 465)

SHEALEY v. STATE. (No. 13275.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(Syllabus by the Court.)

No harmful error, and evidence sufficient.

The evidence authorized the verdict, and none of the grounds of the amendment to the motion for a new trial shows harmful error.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action between Gus Shealey and the State. Judgment for the State, and Shealey brings error. Affirmed.

Wallis & Fort, of Americus, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 500)

TOWNS v. STATE. (No. 13208.)

(Court of Appeals of Georgia, Division 1. April 14, 1922.)

(Syllabus by the Court.)

1. Criminal law \S 101(5)—Order transferring case to county court results in automatic transfer, and deprives superior court of jurisdiction.

When a judge of the superior court passes an order which is placed on the minutes of the court, transferring a case from that court to a county court, the case becomes immediately and automatically, for all jurisdictional purposes, a case pending in the county court, and the superior court has no further jurisdiction over it. Coleman v. State, 94 Ga. 87, 21 S. E. 124; High v. Candler, 103 Ga. 86, 28 S. E. 377; Hunley v. State, 105 Ga. 636, 639, 31 S. E. 543; Gordon v. State, 106 Ga. 121, 122, 32 S. E. 32; Cook v. State, 10 Ga. App. 580, 73 S. E. 861.

2. Criminal law \S 576(1)—Defendant should be acquitted when not tried for two terms after transfer to county court.

Under the foregoing ruling the instant case was pending in the county court of Putnam

county at the February, 1921, term of that court when the defendant's demand for trial was made; and, it appearing that the defendant was not tried either at that or the next succeeding term thereafter, and that at both terms there were juries impaneled and qualified to try him, the trial court erred in overruling his motion, subsequently made, to absolutely discharge and acquit him of the offense charged in the indictment. See in this connection *Meger v. State*, 21 Ga. App. 139 (1), 94 S. E. 82, and citations.

3. Error in overruling certiorari.

It follows from the foregoing ruling that the judge of the superior court erred in overruling the certiorari.

Error from Superior Court, Putnam County; James B. Park, Judge.

Action between Man Towns and the State. Judgment for the State, and Towns brings error. Reversed.

Callaway & De Jarnette, of Eatonton, for plaintiff in error.

Doyle Campbell, Sol. Gen., and A. Y. Clement, both of Monticello, for the State.

BROYLES, C. J. Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 458)

HUDSON v. DEVLIN. (No. 13239.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Appeal and error \Leftarrow 1064(4)—Death \Leftarrow 18(3)—“Or” in statute construed to mean “and”; error in charging in alternative held harmless.

The court erred in charging that under our law a mother has a right to recover for the tortious homicide of her minor child if she was dependent upon the child for support, “or” if the child contributed to the mother's support. The court should have used the word “and,” instead of the word “or.” It is true that the word “or” is so used instead of the word “and” in the statute (Ga. Laws 1887, p. 43; Civ. Code 1910, § 4424), but it should be construed to mean “and.” *Clay v. Central R. Co.*, 84 Ga. 345 (1), 10 S. E. 967; *Central of Georgia Railway Co. v. Swann*, 19 Ga. App. 691, 91 S. E. 1068, and citations. However, this error was harmless, since the petition alleged that the deceased minor child contributed to the plaintiff's support, and that the plaintiff was dependent upon the child for support, and the undisputed evidence affirmatively showed that the plaintiff was dependent upon the deceased child for support “and” that the child contributed to the plaintiff's support. *Middle Georgia & Atlantic Ry. Co. v. Barnett*, 104 Ga. 582 (3),

586, 30 S. E. 771. This charge was not error for any other reason assigned.

(a) The above ruling also disposes of the second ground of the amendment to the motion for a new trial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Or.]

2. Death \Leftarrow 23—Contributory negligence of deceased no defense.

In a suit for damages for a tortious homicide, mere contributory negligence on the part of the deceased does not bar a recovery by the plaintiff. Civ. Code 1910, § 4426; *Tift v. Jones*, 74 Ga. 469 (6); *Christian v. Macon Railway & Light Co.*, 120 Ga. 314 (1), 47 S. E. 923. Therefore the refusal to give the requested charge, and the charge that was given in lieu thereof, as set out in the third ground (erroneously numbered 4 in the record) of the amendment to the motion for a new trial, were not error.

3. Trial \Leftarrow 191(6)—Charge that facts constitute negligence properly refused, when statute does not so declare.

It is not error to refuse to charge the jury that certain enumerated facts constitute negligence, where the law does not declare them to be negligence. *Western & Atlantic R. Co. v. Casteel*, 138 Ga. 579 (1); 75 S. E. 609, and citation. Under this ruling the court did not err in refusing to give the requested charge set forth in ground 4 of the amendment to the motion for a new trial. Nor was the charge given in lieu of it error for any reason assigned.

4. Appeal and error \Leftarrow 302(4)—Grounds of motion for new trial, not stating wherein portions of charge were erroneous, insufficient.

The fifth and sixth grounds of the amendment to the motion for a new trial complain respectively of a certain portion of the charge of the court, but it is not stated in either ground wherein the portion of the charge excepted to was error. Therefore neither of these grounds raises any question for determination by this court.

5. Appeal and error \Leftarrow 1064(1)—Instruction as to driver's freedom from negligence harmless, where his negligence was not imputable to deceased or plaintiff.

Under the facts of the case any negligence of the owner and driver of the automobile could not be imputed to the deceased or to the plaintiff. It follows that the following charge, even if error, was harmless: “Look to the evidence, and find who was negligent, and the court charges you that it would not be negligent for a person to park his automobile on the side of a road; that is, on the right-hand side of the road in the direction in which the person is traveling.”

6. Trial \Leftarrow 18—Whether mistrial granted because plaintiff sobbed or fainted is in court's discretion.

It was not error to overrule the defendant's motion for a mistrial, based upon the fact that the plaintiff had fainted in the presence of the jury and was in their presence carried from the courtroom, and upon the further fact

that she had previously sobbed during the trial. In the matter of declaring a mistrial based upon such grounds the trial court had a broad discretion, and it does not appear that this discretion was abused.

7. Appeal and error ¶230 — Constitutional question cannot be first raised in motion for new trial.

The constitutional question raised in the ninth ground of the motion for a new trial refers to the constitutionality of a statute of this state, and as it was raised for the first time in the motion for a new trial, and was not made in any way pending the trial, it cannot be considered by this court. *Hendry v. State*, 147 Ga. 260 (8), 93 S. E. 413; *Starling v. State*, 149 Ga. 172, 99 S. E. 619. See also *McClelland v. State*, 27 Ga. App. 783, 110 S. E. 245.

8. New trial ¶70—Properly denied when verdict authorized by evidence.

The verdict was authorized by the evidence, and the overruling of the motion for a new trial was not error.

Error from City Court of Macon; Will Gunn, Judge.

Action by Mrs. L. G. Devlin against C. N. Hudson. Judgment for plaintiff, and defendant brings error. Affirmed.

John P. Ross, of Macon, for plaintiff in error.

Walter De Fore and Jas. C. Estes, both of Macon, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 484)

BAZEMORE v. STATE. (No. 13336.)

(Court of Appeals of Georgia, Division No. 1. April 18, 1922.)

(*Syllabus by the Court.*)

Criminal law ¶129(1)—Exceptions pendente lite not considered without assignment of error in main bill.

The only question argued in the brief of counsel for the plaintiff in error is that raised by the exceptions pendente lite. There is, however, in the main bill of exceptions no assignment of error upon either the exceptions pendente lite or the judgment complained of therein. This court, therefore, cannot consider the exceptions pendente lite.

Error from Superior Court, Screven County; H. B. Strange, Judge.

Action between J. A. Bazemore and the State. Judgment for the State, and Bazemore brings error. Affirmed.

Boykin & Hollingsworth, of Sylvania, for plaintiff in error.

A. S. Anderson, Sol. Gen., of Millen, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 456)

GEORGIA R. R. v. LA PRADE. (No. 13230.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(*Syllabus by the Court.*)

New trial ¶71—Properly denied, when verdict supported by evidence and approved by trial judge.

There was a conflict in the evidence as to whether the railroad company exercised that degree of care and diligence that would overcome the presumption raised by the statute upon proof that the mule in question was killed by the running of the railroad company's trains. There was some evidence to authorize the verdict, and the verdict has the approval of the trial judge. It was not error to overrule the motion for a new trial.

Error from Superior Court, Wilkes County; E. T. Shurley, Judge.

Action by H. V. La Prade against the Georgia Railroad. Judgment for plaintiff, and defendant brings error. Affirmed.

Cumming & Harper, of Augusta, and W. A. Slaton, of Washington, Ga., for plaintiff in error.

C. E. Sutton, of Washington, Ga., for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 416)

TWILLEY & HODGES v. MIDDLE GEORGIA BANK et al. (No. 12770.)

(Court of Appeals of Georgia, Division No. 2. April 1, 1922.)

(*Syllabus by the Court.*)

1. Banks and banking ¶224—Return of service on bank held to show good service prima facie.

A return of service by a sheriff upon a summons of garnishment directed to a banking corporation, in terms as follows: "I have this day served summons of garnishment based on the within affidavit and bond on Middle Georgia Bank, service perfected by serving said summons on E. W. Ingram, the agent and person in charge of said bank"—shows, prima

facie, good and valid service against the corporation. *North Ga. Banking Co. v. Fancher*, 23 Ga. App. 683 (1), 99 S. E. 229.

2. Banks and banking — 224—Corporations — 509(8)—Return of service on corporation must show that corporation was served, and that person served was agent in charge; presumption in favor of return on traverse; presumption overcome by showing some other person in charge of office and business; that cashier only officer present not inconsistent with testimony that president was in charge; president presumed to be in charge of office and business.

The rule as to service of garnishment on corporations is not the same as to service of ordinary suits against them. Prior to the act of 1885 (Ga. L. 1884-85, p. 99; Civil Code 1910, § 5270), service of a garnishment on a corporation could be perfected only by serving its president, if a resident of this state (*Steiner v. Central R.*, 60 Ga. 552; *Brigham v. Port Royal Ry.*, 74 Ga. 365), but under the provisions of that statute such service may be made by serving the agent in charge of its office or business. *Burnett v. Central of Ga. Ry. Co.*, 117 Ga. 521, 522, 48 S. E. 854, 97 Am. St. Rep. 175. Where service of garnishment on a corporation is perfected on a person other than its president, the return itself must indicate (as was done in this case) that the corporation itself was served, and that the person representing the corporation in the service was the agent in charge of its office or business. *Southern Ry. Co. v. Hagan*, 103 Ga. 564, 29 S. E. 760; *Hargis v. East Tenn., etc., Ry. Co.*, 90 Ga. 42, 15 S. E. 631; *North Ga. Banking Co. v. Fancher*, supra. On an issue made by a traverse to such a return, where the garnishee bank denies that the person served was in fact the agent in charge of its office and business, the presumption of law is in favor of the return (*Denham v. Jones*, 96 Ga. 130, 23 S. E. 78); but the burden assumed under the traverse is carried and the adverse presumption overcome when it is made to appear that some person other than the one served was and remained actually in charge of the office and business at the time the service was made. In the instant case, under the agreed statement of facts, there was uncontroverted testimony to the effect that the president of the bank had active personal charge of its office and of its business, and that he remained in charge at the time the attempted service upon the cashier was made. While it appears that when the sheriff sought to serve the garnishment on the bank through its cashier, he (the cashier) was the only officer then "present" in the banking house, his mere presence, in the absence of any sort of evidence going to show that he was then clothed with or was assuming to exercise the powers and authority prima facie belonging to the president, is in no wise inconsistent with the testimony contained in the agreed statement to the effect that the president, although temporarily absent from the banking house, continued in charge of its office and business. This, for the reason that, under the rule adopted in this state, the president of a chartered bank is the alter ego of the corporation, and is

the only person who by virtue of his office and as a matter of law is presumed to be in charge of its office and business. *Third Nat. Bank v. McCullough*, 108 Ga. 249, 250, 33 S. E. 848; *Park v. Cordray*, 20 Ga. App. 35, 92 S. E. 394; *North Ga. Banking Co. v. Fancher*, supra (2). The statement contained in the agreed statement of facts, to the effect that at the time the service was made the president continued in charge of the bank's office and business, is uncontradicted by any such proof as was made in *Central of Ga. Ry. Co. v. Ellis*, 17 Ga. App. 536, 87 S. E. 815, in which case it was held to have been affirmatively shown that the subordinate chief clerk, during the absence of his superior "agent," was in complete charge and control of the office and business of the corporation.

Error from Superior Court, Putnam County; J. B. Park, Judge.

Proceedings on an affidavit of illegality filed by the Middle Georgia Bank and others to an execution in favor of Twilley & Hodges. Judgment against the plaintiffs in *fi. fa.*, and they bring error. Affirmed.

Middle Georgia Bank interposed an affidavit of illegality to the levy of an execution issued on a default judgment which Twilley & Hodges obtained against it as garnishee. The sheriff's entry of service made on January 4, 1921, is in terms as follows:

"I have this day served summons of garnishment based on the within affidavit and bond on Middle Georgia Bank, service perfected by serving said summons on E. W. Ingram, the agent and person in charge of said bank."

All issues of fact raised by the traverse to the sheriff's return are settled by an agreed statement, the material parts of which are as follows:

"That B. W. Hunt is the president of Middle Georgia Bank, and that he was president of Middle Georgia Bank on the 4th of January, 1921; that said B. W. Hunt resided in Eatonton, Putnam county, Ga., on the 4th day of January, 1921; * * * that said B. W. Hunt is usually present in Middle Georgia Bank during banking hours; * * * that said B. W. Hunt, as president of Middle Georgia Bank, has the same duties, obligations, and powers as the presidents of other state banks in Georgia have who live in the county or district where the corporation is doing business; * * * that B. W. Hunt, if sworn, would say that he was the agent and person in charge of said bank on January 4, 1921; * * * that E. W. Ingram was the cashier" and "a director in Middle Georgia Bank on the 4th of January, 1921; * * * that a summons of garnishment directed to Middle Georgia Bank was in fact served on said E. W. Ingram; * * * that E. W. Ingram was the only officer of said Middle Georgia Bank present in said bank, when said summons was served."

The case was submitted to the judge of the superior court under this statement of facts, with the agreement of counsel:

"That the only question involved in this case is a matter of law, to wit, whether service of the summons of garnishment directed to Middle Georgia Bank, served on E. W. Ingram as the agent and the person in charge of the office and place of business of said bank, was in fact and in law good service on Middle Georgia Bank."

The trial judge held that the alleged service on the bank was void.

R. O. Jenkins, of Eatonton, for plaintiffs in error.

Jos. B. Duke, of Eatonton, for defendant in error.

STEPHENS, J. Judgment affirmed.

JENKINS, P. J., and HILL, J., concur.

(28 Ga. App. 442)

BROWN v. STATE. (No. 13215.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(Syllabus by the Court.)

1. Intoxicating liquors §137—Conviction of having apparatus for manufacturing of whisky on premises warranted when any part of such apparatus found.

Where any apparatus used to make whisky, or any part of such apparatus, is found in a person's possession or control upon his premises, he may lawfully be convicted of knowingly having upon his premises an apparatus for the manufacturing and distilling of whisky; and in the instant case the court did not err in so charging. *Strickland v. State*, 25 Ga. App. 1, 102 S. E. 883.

2. Criminal law §828—Failure to charge on circumstantial evidence without request not error when evidence not wholly circumstantial.

There being direct evidence that some portions of an apparatus used to make whisky were found on the defendant's premises, and that such premises were in his actual possession, his conviction did not depend entirely upon circumstantial evidence, and it was not error, in the absence of a timely and appropriate written request, for the court to omit to instruct the jury upon the law of circumstantial evidence.

3. Remaining grounds of motion.

The remaining grounds of the amendment to the motion for a new trial show no material error.

4. Verdict authorized by evidence.

The verdict was authorized by the evidence, and it was not error for any reason assigned to overrule the motion for a new trial.

Error from Superior Court, Bulloch County; H. B. Strange, Judge.

Wesley Brown was convicted of an offense, and he brings error. Affirmed.

Fred T. Lanier, of Statesboro, for plaintiff in error.

A. S. Anderson, Sol. Gen., of Millen, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 465)

BROWN v. STATE. (No. 13277.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(Syllabus by the Court.)

1. Special grounds of motion without merit.

There is no merit in either of the special grounds of the motion for a new trial.

2. Criminal law §1156(1), 1189—Court of Appeals without discretion to grant new trial unless error committed.

While the law allows the trial judge to refuse or grant new trials in the exercise of a legal discretion, it gives the Court of Appeals no discretion in the matter, and this court can only grant new trials when errors of law have been committed, or when the trial judge has abused his discretion in refusing a new trial. In this case the evidence authorized the verdict, and no error of law appears.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action between Lucile Brown and the State. Judgment for the State, and Brown brings error. Affirmed.

Wallis & Fort, of Americus, for plaintiff in error.

Jule Felton, Sol. Gen., of Montezuma, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 809)

LAWSON v. BULCKEN. (No. 13060.)

(Court of Appeals of Georgia, Division No. 1. March 7, 1922.)

(Syllabus by the Court.)

Landlord and tenant §169(3) — Petition is tenant's action for injuries properly dismissed on general demurrer.

The court did not err in sustaining the general demurrer to the petition and dismissing the case.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Anna Lawson against Edward Bulcken. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

The petition alleged that defendant owned a certain house and lot and plaintiff occupied it as his tenant, paying the rent to one W. F. Constantine, defendant's duly authorized agent; that steps led from the kitchen door to the back yard, and were the only means of ingress to such yard; that the base of the kitchen door was a door plate or sill about 8 or 10 inches above the top step, and was necessarily used in going between the yard and the kitchen; that the second step was missing, having rotted away, and that plaintiff, on each occasion she paid the rent to Constantine, twice each month for three months before the injury, complained about the step and asked him to have it fixed, but he failed and neglected to fix the steps until after the injury; that there were several partly rotten boards in the kitchen floor leading up to the door plate or sill; that the top step and the third step were rotten near the ends, and the door plate or sill was loose or wabby, and it was badly worn and partly broken, "the part broken being the little, thin door steps about 2 inches wide and one-fourth inch thick and 2½ feet long which lays on the inside edge and along the top of said door plate and sill," and the fastenings at the ends of the door plate "that were not visible to petitioner" were loose and worn, allowing it to wobble; that such condition of the door plate and kitchen floor boards would have been disclosed upon a proper inspection of the rear steps and in replacing the missing step if the owner or his agent had made such repairs; that after plaintiff was hurt defendant had two new steps put on, and also replaced three defective floor planks in the kitchen leading up to the door plate or sill; that plaintiff did not know, and in the exercise of ordinary care could not have known or discovered, the defective condition of the door plate or sill, or that the floor boards in the kitchen were defective or partly rotten; that except for the missing step the steps appeared to be safe for use, and plaintiff frequently did use the steps in safety by stepping over the hole left by the missing step; that, as plaintiff was leaving the kitchen door as usual, the door plate or sill gave under her weight, and caused her right foot to slip and throw her body forward and down the steps, causing her right leg to go into such hole; that as a result she suffered a very serious injury to her right knee therein described; that it was necessary for her to secure the services of a physician, to whom she became indebted in the sum of \$35; that at the time of the injury plaintiff was earning \$5 a week washing and \$10 a week selling lunches, and on account of the injury had been unable to do any

work, and had lost \$255 for the loss of her time for 17 weeks, and would not be able to again do such work, and that her earning capacity had been permanently reduced at least one-half, if not totally destroyed; that plaintiff was in good bodily health, and 35 years old, and had a reasonable expectancy of life of about 30 years at the time she was hurt, and that she had her husband's consent to make money and keep it as her separate estate and property; that it was defendant's duty to repair the premises on notice of their unsafe condition, and to make proper inspection, and that he failed to do so, or to make necessary repairs; that plaintiff did not know, and could not have discovered in the exercise of ordinary care, the defective condition causing the injury, and was in the exercise of all ordinary care and caution; that defendant was indebted to plaintiff in the sum of \$10,000, and that he negligently caused the injuries by his negligence in failing to repair the steps after being duly notified that they were broken, and requested to repair them, in failing to inspect the premises and steps, door sill or plate after being notified that the steps were broken, and in failing to discover the defective condition of, and to repair, the step, door plate or sill after notice that the step was broken, and in failing to make a proper inspection of the steps, door sill or plate, and all parts thereof connected with the use of the steps, after being notified that "said rear steps were broken, and requesting they be repaired." The quoted parts were inserted by amendment.—Statement by editor.

Ralford Falligant, of Savannah, for plaintiff in error.

Shelby Myrick, of Savannah, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 444)

BLALOCK v. BARRETT. (No. 13219.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Pleading \S 360(4)—Error to strike entire plea when good in part.

Part of the defendant's plea was good as against a general demurrer and the trial judge erred in striking the entire plea on oral motion, and the judge of the superior court erred in overruling the certiorari.

(Additional Syllabus by Editorial Staff.)

2. Pleading \S 8(16)—Plea of duress must set forth facts showing legal duress.

Where duress is pleaded as a defense to an action on a contract, facts sufficient to show duress in law must be set forth in the plea.

3. Contracts §95(3)—What threats amount to duress stated.

Mere empty threats, or a threat for which there is no ground, do not constitute duress, and the threat must be sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness, and it must appear that the person uttering the threat had the power to make it effective.

4. Bills and notes §104—Plea that notes were given as result of threats held not to show duress.

A plea alleging that plaintiff gave defendant, an employee of a dealer in cotton futures, an order for cotton futures which caused him loss, and then denied that he had given such order, and threatened to report defendant to his employer if he did not sign notes for the amount of the loss, but not alleging that plaintiff could have made his threat effective, or even that defendant feared that plaintiff could or would cause him to lose his position, did not show duress in law.

5. Bills and notes §476(1)—Plea of want of consideration held insufficient.

A plea alleging that the notes sued on were without consideration of any sort whatsoever to defendant was properly stricken on motion as insufficient.

6. Bills and notes §92(1)—Not necessarily without consideration because no benefit flows to maker.

A note is not necessarily without any consideration because no benefit flows to the maker thereof.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Dennis Blalock against J. R. Barrett. Judgment for plaintiff, and certiorari overruled, and defendant brings error. Reversed.

Barrett sued Blalock in the municipal court of Atlanta upon a series of promissory notes. Blalock in his plea admitted the execution of the notes, but set up the following three defenses to the suit: First, that he executed the notes under duress; second, that "the said notes are without consideration of any sort whatsoever to this defendant"; and, third, that if the notes had any consideration it was an illegal one, based upon the sale of cotton futures. Upon oral motion of the plaintiff the entire plea was stricken, and a verdict for the plaintiff was directed. Certiorari was sued out, the certiorari was overruled, and the defendant brought the case to this court.

Bryan & Middlebrooks and Chauncey Middlebrooks, all of Atlanta, for plaintiff in error.

Napier, Wright & Wood and A. W. Long, all of Atlanta, for defendant in error.

BROYLES, C. J. (after stating the facts as above). [2, 3] It is well settled that,

where duress is pleaded as a defense to an action on a contract, facts sufficient to show duress in law must be set forth in the plea, and that mere empty threats do not amount to duress. *Bond v. Kidd*, 1 Ga. App. 801, 57 S. E. 944; *Bond v. Kidd*, 122 Ga. 812, 50 S. E. 934; *Carswell v. Hartridge*, 55 Ga. 412. The threat must be sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness. *United States v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457. And it must appear that the person uttering the threat had the power to make it effective. *Wilkerson v. Hood*, 65 Mo. App. 491; *Horton v. Bloedorn*, 37 Neb. 666, 56 N. W. 321; *Wilkerson v. Bishop*, 7 Cold. (Tenn.) 25. And a threat for which there is no ground does not constitute duress, as the person threatened, if of ordinary intelligence and firmness, could not be put in fear thereby. *Knapp v. Hyde*, 60 Barb. (N. Y.) 80; *Preston v. Boston*, 12 Pick. (Mass.) 12.

[4] In the instant case the defendant's plea of duress was as follows:

"This defendant avers that when the said notes were signed this defendant was a telegraph operator in the employ of S. C. Baker, manager for Robert Moore & Co., that the said S. C. Baker was handling future cotton contracts, and that the said Dennis Barrett had been dealing with S. C. Baker and Robert Moore & Co. in cotton futures; that the said Dennis Barrett, on or about July 20, 1912, came into the office of S. C. Baker, but S. C. Baker was not there, and the said plaintiff then requested this defendant to ask S. C. Baker to place an order for cotton futures for the plaintiff. And, after plaintiff's order was given by defendant to said S. C. Baker, the market price of cotton dropped, and said order for cotton futures occasioned plaintiff a financial loss to the amount of said notes. And defendant charges that plaintiff then came to defendant and denied that he (plaintiff) had instructed defendant to place said order for cotton futures, and threatened to report said conduct of defendant to said S. C. Baker if he did not sign the notes set out in plaintiff's petition, for the purpose of reimbursing plaintiff for his loss in said fall in market for cotton futures, and threatened to cause this defendant's discharge from the employment of S. C. Baker unless the defendant would sign the notes referred to in plaintiff's petition. This defendant did, and he executed the said notes under threats and duress on the part of the plaintiff."

It appears from this plea that the alleged duress consisted of Barrett's threat to report Blalock to his employer and to cause him to be discharged from his position. It is not, however, alleged in the plea that Barrett could have made this threat effective, or even that Blalock feared that Barrett could or would cause him to lose his position.

[5, 6] Under the authorities cited above, we think that the plea failed to set forth facts

showing duress in law, and that it was not error to strike this portion of the plea, on oral motion of the plaintiff. We think also that the portion of the plea alleging that the notes sued upon "are without consideration of any sort whatsoever to this defendant" was insufficient in law, and was properly stricken on oral motion. A note is not necessarily without any consideration because no benefit flows to the maker thereof.

[1] It is our opinion, however, that the portion of the plea which alleged that the notes sued upon were founded upon an illegal consideration, in that they were given in a transaction involving the sale of cotton futures, was sufficient to withstand an oral motion to strike, and therefore that the trial judge erred in striking the entire plea, and that the judge of the superior court erred in overruling the certiorari. Where any part of a plea is good, it is error to strike the entire plea upon oral motion. See, in this connection, *Hudson v. Hudson*, 119 Ga. 637 (1), 46 S. E. 874.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 497)

ATKINSON NOVELTY CO. v. E. L. PRINCE & SON. (No. 12859.)

(Court of Appeals of Georgia, Division No. 1.
April 14, 1922.)

(Syllabus by the Court.)

1. Sufficiency of answer.

The court did not err in overruling the general and special demurrers interposed to the original answer of the defendant, or in thereafter refusing to strike, on oral motion, an amendment filed to the original answer.

2. Trial \S 171—Refusal to direct verdict not error.

Under repeated rulings of the Supreme Court and this court it is never error to refuse to direct a verdict.

3. Lotteries \S 12, 14—Punch board held "gambling device"; sale void when gambling device included free of charge.

A punch board containing holes which the player may punch on payment of 10 cents, where he may obtain an article of value if the number on the slip of paper in the hole punched corresponds to the number of the article, but otherwise receives nothing, is a gambling device; and a sale and delivery of an assortment of goods which includes free of charge such a board is a violation of section 397 of the Penal Code of 1910, and therefore void; and, under the evidence submitted upon the trial of the instant case, the court did not err in directing a verdict for the defendant, who was

sued upon open account for the price of the goods.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gambling Devise.]

Error from Superior Court, Fannin County; D. W. Blair, Judge.

Action by the Atkinson Novelty Company against E. L. Prince & Son. Judgment for defendant, and plaintiff brings error. Affirmed.

Wm. Butt, of Blue Ridge, for plaintiff in error.

T. A. Brown and B. L. Smith, both of Blue Ridge, for defendant in error.

LUKE, J. [1-3] This is a suit upon an open account. The defendant filed a plea denying general liability, and also a special plea in which it alleged that the account sued upon was for a certain punch board, and that the sale of the same was illegal and void, in that it involved the sale of property which was to be used in the hazarding of money and was a gambling scheme. The plaintiff demurred both generally and specially to the defendant's answer. The defendant thereupon filed an amendment to its answer, setting forth more fully the reasons why the contract was illegal and void. The plaintiff moved to strike the amendment upon the ground that it was insufficient in law. The court overruled the demurrers and refused to sustain the oral motion to strike the amendment. The case proceeded to trial, and upon the conclusion of the evidence both parties litigant moved the court to direct a verdict, and the court directed a verdict for the defendant. The plaintiff in due time sued out a writ of error to this court, assigning error upon the overruling of its demurrers, upon the refusal of the court to strike the amendment to the defendant's answer, and to the refusal of the court to direct a verdict in its favor, and to the order directing a verdict for the defendant.

The third headnote alone needs elaboration. The evidence introduced upon the trial shows that, in addition to the assortment of goods, the sale included a device for the distribution of the goods called a punch board. This board was two feet square, and in it were many holes. In each of these holes was a small strip of paper containing a number. These holes were covered, but the cover was so designed as to indicate exactly the location of each hole. A small peg was used to punch the cover of the holes. Ten cents a punch was charged, and the number on the slip of paper in the hole punched indicated whether or not the customer was rewarded with a prize. The prizes consisted of guns, revolvers, cigarette

cases, watches, silver, charms and leather fobs. These articles ranged in value from \$1 to \$40.

It is well settled that a contract of sale made in violation of a criminal statute is void and unenforceable. *Small Grain Distilling Co. v. Davis*, 11 Ga. App. 116, 74 S. E. 897. This rule is so well established that any further citation of authority is deemed unnecessary. We come, therefore, directly to the controlling question in the case, whether, under the evidence submitted upon the trial, the sale was in violation of the law of this state. Section 397 of the Penal Code of 1910 declares:

"If any person, either by himself or his agent, shall sell or offer for sale, or procure for or furnish to any person any ticket, number, combination or chance, or anything representing a chance, in any lottery, gift enterprise, or other similar scheme or device, whether such lottery, gift enterprise, or scheme shall be operated in this state or not, he shall be guilty of a misdemeanor."

Clearly, we think, a punch board, as included in the sale in the instant case, is a gambling device and falls with the provisions of the above Code section. The incentive prompting any one to take a punch was the chance of getting something of more value than the cost of the chance. The amount of the winner's gain or loser's loss would make no difference, if the chance to win more than was invested was present. It is this chance to get something of more value than the amount invested that characterizes the device as a gambling one. Even if every punch had entitled the customer to a prize of the value of 10 cents—the price of a punch—so that there would have been no chance for the patron to lose, this would not purge the enterprise of its chance characteristics, because the chance to win more than invested yet remained.

While it is true that neither the Supreme Court nor this court has held that a punch board is a gambling device, we find that it has been so held in other jurisdictions. In the case of *State v. Turlington*, 200 Mo. App. 192 (2), 204 S. W. 821, it was held:

"Although patrons of punch board, as condition precedent, were required to purchase a 8-cent post card for 5 cents, there was present the element of chance, the possibility of receiving a knife worth 50 cents or \$1.50, in addition to post card, and the device was a 'gambling device.'"

In the case of *Commonwealth v. Gritten*, 180 Ky. 446 (2), 202 S. W. 884, it was held:

"A punch board containing holes which the player on the purchase of a post card may punch and obtain certain articles of value corresponding to the numbers indicated by the board is a machine ordinarily used for gambling purposes."

And in *Grove Manufacturing Co. v. Jacobs*, 117 Me. 163, 103 Atl. 14, a case directly in point, it is ruled:

"Action on the case brought by plaintiff to recover for the sale and delivery of an assortment of goods containing various kinds of articles to the amount of \$49. In addition to the assortment of goods, the sale includes a device for the distribution of the goods called a punch board. *Held*: From the evidence presented, there can be no question of doubt but that the device described and sold to defendant comes fully within the ban of the statutes of the state of Maine as a gambling device, and that no recovery can be had for the price of same."

The statutes upon which the above cases are predicated were not any broader, if as broad and comprehensive, as our own statute upon which we base our ruling in the instant case.

The mere fact that no charge was made for the punch board is insufficient to defeat the purposes of the statute prohibiting the sale of gambling devices. It was the punch board feature that caused the sale, and the plaintiff was fully cognizant that it was to be used by the defendant in disposing of the articles in question. The disposition of the articles through the medium of the punch board was a direct appeal to the gambling instinct which, it is said, possesses every man in some degree, and it is the temptation to gratify the instinct that our statute is aimed at; and therefore the mere fact that the punch board was included in the assortment of goods purchased free of charge shows conclusively a subterfuge or scheme to thwart the beneficent objects and purposes of the law designed to suppress the sale of gambling devices—a thing which the law does not permit of.

It follows from what has been said that the court did not err in directing a verdict for the defendant.

Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 474)

HIGHTOWER v. STATE. (No. 13318.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)*

Criminal law §1064(7)—Complaint of charge not reviewed, when not embraced in motion for new trial as transmitted to Court of Appeals.

The defendant was convicted of a violation of the prohibition law. The motion for a new trial, as transmitted to this court, contained only the usual general grounds. Counsel for the plaintiff in error in their brief insist only (as to the general grounds) that the evidence was insufficient to convict the accused of having whisky in his possession. The evidence amply authorized the jury to find that the defendant did have whisky in his possession. The argument in the brief of counsel for the plaintiff in error, that the court erred in its charge to the jury, cannot be considered, as no amendment to the motion for a new trial is specified as a material part of the record to be transmitted to this court, and no such part of the record was transmitted.

Error from City Court of Macon; Will Gunn, Judge.

Tom Hightower was convicted of a violation of the prohibition law, and he brings error. Affirmed.

O. J. Wimberly and C. A. Cunningham, both of Macon, for plaintiff in error.

Roy W. Moore, Sol., of Macon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 472)

CORDELL v. STATE. (No. 13315.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)*

1. Criminal law §1036(2)—Propounding of question by court not considered without objection.

A ground of the amendment to the motion for a new trial complains that the court propounded a certain question to a witness and permitted the witness to answer it. However, it is stated in this ground that no objection was made to the admission of this testimony. The ground, therefore, raises no question for the consideration of this court.

2. Criminal law §938(1)—Newly discovered cumulative and impeaching evidence not ground for new trial.

The alleged newly discovered evidence is merely cumulative and impeaching in its character, and the court did not err in overruling the special ground of the motion for a new trial based thereon.

3. Criminal law §935(1)—New trial properly denied when verdict authorized.

The verdict was authorized by the evidence, and it was not error to overrule the motion for a new trial.

Error from Superior Court, Wheeler County; Eschol Graham, Judge.

Action between E. C. Cordell and the State. Judgment for the State, and Cordell brings error. Affirmed.

Burch & Pierce, of Alamo, for plaintiff in error.

M. H. Boyer, Sol. Gen., of Hawkinsville, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 464)

DURHAM v. STATE. (No. 13271.)(Court of Appeals of Georgia, Division No. 1
April 11, 1922.)*(Syllabus by the Court.)*

1. Criminal law §918(10, 11)—Prejudicial remarks of court not ground for new trial unless mistrial asked.

"Prejudicial remarks of the court in the presence and hearing of the jury are not ground for a new trial, unless a motion to declare a mistrial on that ground has been made and refused." *Harrison v. State*, 20 Ga. App. 157 (6), 160 (6), 92 S. E. 970, 971, and cases cited. This ruling disposes of the special ground of the motion for a new trial.

2. Sufficiency of evidence.

The evidence amply authorized the verdict.

Error from Superior Court, Whitfield County; M. O. Tarver, Judge.

Action between Preston Durham and the State. Judgment for the State, and Durham brings error. Affirmed.

J. O. Mitchell, of Dalton, for plaintiff in error.

Joe M. Lang, Sol. Gen., of Calhoun, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 438)

ROME RY. & LIGHT CO. v. SPRATLING.
(No. 13205.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)*

1. Appeal and error \S 1050(1)—Judgment not reversed for admission of evidence admitted elsewhere without objection.

Under the particular facts of the case the admission of evidence as complained of in the first ground of the amendment to the motion for a new trial does not require a reversal of the judgment below. Moreover, substantially the same evidence was admitted elsewhere without objection.

2. Admission of evidence not error.

The admission of the evidence as complained of in the second ground of the amendment to the motion for a new trial was not error.

3. Documentary evidence held admissible.

The documentary evidence set forth in the third ground of the amendment to the motion for a new trial was admissible for what it was worth, and its admission was not error for any reason assigned.

4. Excerpts from charge do not require new trial.

In view of the small amount of the verdict, the excerpts from the charge of the court which are complained of in the fourth and fifth grounds respectively of the amendment to the motion for a new trial, even if erroneous, do not require another trial of the case.

5. Ground expressly abandoned.

The sixth ground of the amendment to the motion for a new trial is expressly abandoned in the brief of counsel for the plaintiff in error.

6. Trial \S 295(1)—Charges to be considered in light of facts and entire charge.

Neither of the excerpts from the charge of the court which are complained of in grounds 7 and 8 respectively of the amendment to the motion for a new trial, when considered in the light of the entire charge and the facts of the case, shows reversible error.

7. Ground of motion without merit.

There is no merit in the ninth ground of the amendment to the motion for a new trial.

8. New trial \S 71—Properly denied when finding authorized by evidence.

The conflicts in the evidence were settled by the jury, and their finding was authorized by the evidence, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by W. J. Spratling against the Rome Railway & Light Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lamar Camp and L. A. Dean, both of Rome, for plaintiff in error.

Porter & Mebane, of Rome, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 479)

PERSONS v. STATE. (No. 13339.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)*

- Criminal law \S 1160—Denial of new trial on conflicting evidence not disturbed.

This case is here upon the sole assignment of error that the evidence did not authorize the verdict. There was evidence in the case which would have authorized the acquittal of the defendant, but the truth of the transaction is for determination by the jury. There also being evidence which would authorize the defendant's conviction, and that conviction having the approval of the trial judge, we cannot set aside the judgment overruling the motion for a new trial.

Error from Superior Court, Houston County; Malcolm D. Jones, Judge.

A. E. Persons was convicted of an offense, and he brings error. Affirmed.

Oliver C. Hancock, of Macon, for plaintiff in error.

O. H. Garrett, Sol. Gen., of Macon, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 497)

LINEBERGER et al. v. SWAIN.

(No. 12987.)

(Court of Appeals of Georgia, Division No. 2.
April 13, 1922.)*(Syllabus by the Court.)*

1. Appeal and error \S 773(2)—Failure to serve brief not ground for dismissal.

The failure to serve counsel of the opposite party with the brief of counsel for the plaintiff in error, as required by the rule of this court, is not ground for dismissal of the writ of error. It may subject counsel to penalty for contempt of court. *Seaboard Air Line Ry. v. Peoples*, 9 Ga. App. 477, 71 S. E. 758.

2. No error and evidence sufficient.

No error of law is assigned, and the verdict is supported by some evidence.

Error from City Court of Tifton; Jas. H. Price, Judge.

Action between O. B. Lineberger and others and O. J. Swain. Judgment for the latter, and the former bring error. Affirmed.

B. C. Williford, of Tifton, for plaintiffs in error.

John P. & Dewey Knight, of Nashville, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 477)

WOMACK v. STATE. (No. 13329.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(Syllabus by the Court.)

1. Denial of continuance not abuse of discretion.

Under all the particular facts of the case, it is not made to appear that the court abused its discretion in overruling the motion for a continuance.

2. Grounds of motion without merit.

The second and third grounds of the amendment to the motion for a new trial are without merit.

3. Mistrial properly denied.

The court did not err in overruling the motion to declare a mistrial.

4. Exclusion of evidence not error.

It was not error to exclude the evidence set forth in the fifth ground of the amendment to the motion for a new trial.

5. Charge not prejudicial.

The court's charge upon the good character of the defendant, even if not authorized by the evidence or the defendant's statement to the jury, was not prejudicial to him, but distinctly favorable.

6. Other charges not erroneous.

The other excerpts from the charge of the court complained of are not erroneous for any reason assigned.

7. Charge as to penalties not error.

The recharge by the court (made at the request of the jury) upon the subject of the penalties for the offenses involved, was not error for any reason assigned.

8. Criminal law §935(1)—New trial properly denied when verdict authorized.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Bibb County; Malcolm D. Jones, Judge.

L. E. Womack was convicted of an offense, and he brings error. Affirmed.

Jno. R. Cooper, W. O. Cooper, Jr., Daisey Churchwell, and Dean Newman, all of Macon, for plaintiff in error.

O. H. Garrett, Sol. Gen., of Macon, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 436)

GARRETT v. CITY OF ATLANTA.
(No. 12398.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(Syllabus by the Court.)

Failure to prove venue.

"Where one is on trial in the recorder's court of a municipality for violation of an ordinance of the city, it is essential that the venue should be proved by direct or sufficient circumstantial evidence that the crime was committed within the limits of the municipality. And where it is not so proved, and the writ of certiorari is sued out, and the petition therefor contains the distinct allegation, as provided in the act approved August 21, 1911 (Acts 1911, p. 149), relating to practice in courts of review, that there was a failure to prove the venue, and there is a proper assignment of error thereon, it is error for the judge of the superior court to overrule the certiorari, though it does not appear that the distinct question as to the venue was raised in the recorder's court." *Garrett v. City of Atlanta*, 152 Ga. —, 110 S. E. 886, decided February 16, 1922.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

S. A. Garrett was convicted of violating a municipal ordinance of the City of Atlanta, and certiorari was overruled by the superior court, and he brings error. Reversed, in conformity to Supreme Court's answers to certified questions. 152 Ga. —, 110 S. E. 886.

Jas. C. Davis, of Atlanta, for plaintiff in error.

J. L. Mayson and Jesse M. Wood, both of Atlanta, for defendant in error.

LUKE, J. The above ruling was made in answer to a question certified by this court to the Supreme Court. The question showed that the accused was tried and convicted in the recorder's court of the city of Atlanta for violation of a certain ordinance of the city; that upon the trial the undisputed evidence showed that the alleged offense was committed "on West Peachtree street, at the intersection of Simpson street." This was the only evidence as to where the alleged offense was committed. The accused made no point,

until after he had been adjudged guilty by the recorder, that the venue had not been proved, and he raised the question specifically for the first time in his petition for certiorari. The certiorari was sanctioned, but on the hearing thereof it was overruled by the judge of the superior court.

The answer of the Supreme Court being that the venue of the alleged offense was not proved, the judgment of the judge of the superior court overruling the certiorari must be reversed.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J.,
concur.

(28 Ga. App. 432)

ENGLISH et al. v. ROSENKRANTZ.
(No. 10528.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

I. Decision of Supreme Court on certiorari conformed to.

An opinion in this case was rendered by this court, affirming the judgment of the superior court on both the main and the cross bill of exceptions. See *English v. Rosenkrantz*, 28 Ga. App. 234, 105 S. E. 729. A writ of certiorari was granted by the Supreme Court, and upon a hearing of the cause that court affirmed the ruling of this court as to the cross-bill of exceptions, and reversed our ruling as to the main bill of exceptions, holding that "it was error to overrule the demurrer to the petition as amended." For the full opinion, see 152 Ga. —, 111 S. E. 198. Under this ruling the judgment formerly rendered by this court must be vacated, and the judgment of the superior court is reversed upon the main bill of exceptions, and affirmed upon the cross-bill.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Reble Rosenkrantz against J. W. English and others. Judgment for plaintiff, and defendants bring error, and plaintiff brings a cross-bill of exceptions. Former judgment (28 Ga. App. 234, 105 S. E. 729) vacated, and judgment of the Superior Court reversed on the main bill of exceptions, and affirmed on the cross-bill in conformity to the decision of the Supreme Court on certiorari. 152 Ga. —, 111 S. E. 198.

Brewster, Howell & Heyman, of Atlanta, for plaintiffs in error.

V. A. Batchelor and King & Spalding, all of Atlanta, for defendant in error.

BLOODWORTH, J. Reversed on main bill of exceptions, and affirmed on cross-bill.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 437)

PRUITT v. HULSEY. (No. 12954.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

No error committed, and new trial properly denied.

The defendant did not sustain his plea of non est factum to the note sued upon. The evidence fully authorized the verdict. The several assignments of error upon the admission of testimony, and the criticism urged as to the charge of the court, upon a careful examination of the record, are without merit. It was not error to overrule the motion for a new trial. See, in this connection, *Morris v. Battey* (Ga. App.) 110 S. E. 342, and cases cited.

Error from City Court of Hall County; W. B. Sloan, Judge.

Action by J. M. Hulsey against G. D. Pruitt. Judgment for plaintiff, and defendant brings error. Affirmed.

Ed. Quillian and W. N. Oliver, both of Gainesville, for plaintiff in error.

Charters, Wheeler & Lilly, of Gainesville, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J.,
concur.

(28 Ga. App. 441)

WILLIAMS et al. v. SWIFT & CO.
(No. 13212.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

Verdict properly directed.

This was a suit on three promissory notes, and, under the facts of the case, it was not error to direct a verdict in favor of the plaintiff for the full amount sued for, less attorney's fees, or thereafter to overrule the defendants' motion for a new trial.

Error from Superior Court, Wheeler County; Eschol Graham, Judge.

Action by Swift & Co. against W. W. Williams and others. Judgment for plaintiff, and defendants bring error. Affirmed.

W. B. Kent, of Alamo, for plaintiffs in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J.,
concur.

(183 N. C. 425)

(111 S.E.)

KENDALL v. PINNIX REALTY CO.
(No. 416.)

(Supreme Court of North Carolina. April 26, 1922.)

1. Trial \S 139(1)—Nonsuit properly denied, where plaintiff's evidence tended to support cause of action.

Where plaintiff's evidence tended to support the cause of action alleged, a motion to nonsuit was properly denied.

2. Specific performance \S 7—By suing to recover price paid, buyer renounces right to demand performance.

By suing to recover part payment on the price of land, buyer repudiated the contract and renounced his right to demand performance.

3. Vendor and purchaser \S 341(1½)—In action to recover part payment on land purchased by plaintiff and another, latter should be made party.

In an action to recover a part payment on land sold to plaintiff and his father, from both of whom defendant acknowledged receipt of such payment, the father, not having voluntarily abandoned his rights, should be made a party plaintiff, or, if unwilling, a party defendant, under C. S. \S 457.

Appeal from Superior Court, Richmond County; Finley, Judge.

Action by R. A. Kendall against the Pinnix Realty Company. Judgment for plaintiff, and defendant appeals. New trial.

The defendant contracted to sell to the plaintiff and his father, J. A. Kendall, a tract of land situated in Anson county, and executed the following receipt:

"Received of Mr. R. A. Kendall and J. A. Kendall on July 8, 1920, \$500.00, five hundred dollars, as part payment on 121 acres of land of Mr. M. L. Ross place at \$65.00 per acre, 2½ miles north of Polkton on the Polkton graded road.

"Balance of one-half payment to be paid by Jan. 1, 1921, which is \$3,432.50.

"Pinnix Realty Co.,

"J. C. Flowers, Mgr."

Plaintiff alleged that he paid the \$500 named in the receipt, and that the payment was induced by fraud. Denial by the defendant. Issues as to the alleged fraud and damages were answered in favor of the plaintiff, and from the judgment rendered the defendant appealed.

Fred W. Bynum, of Rockingham, for appellant.

J. Chesley Sedberry, of Rockingham, for appellee.

ADAMS, J. [1] Since the evidence for the plaintiff tends to support the cause of action set out in the complaint, the motion to nonsuit was properly denied; but the

rights of all the parties to the contract cannot be determined in a controversy solely between the plaintiff and the defendant.

[2] As we understand the record, the parties admit that as to the defendant the receipt introduced in evidence is a sufficient compliance with the statute of frauds, and that against the defendant specific performance may be enforced. But the plaintiff contends that neither he nor his father is bound by the receipt, and that either of them has the right to repudiate the alleged contract. C. S. \S 988; Burriss v. Starr, 165 N. C. 657, 81 S. E. 929, Ann. Cas. 1914D, 71; Lewis v. Murray, 177 N. C. 17, 97 S. E. 750. Accordingly, the plaintiff prosecutes this suit to recover the amount paid as a part of the purchase price of the land. In doing so he repudiates the contract and renounces his right to demand performance by the defendant.

[3] It will be noted that the defendant acknowledges receipt of the \$500 from both the plaintiff and his father. The latter, who is not a party to the suit, appears to have an equitable interest, and a right to assert it in this action, and it does not appear that he has voluntarily abandoned his rights. Besides, the defendant is entitled to an opportunity to have the entire controversy settled in one action. J. A. Kendall should therefore be made a party. If he is unwilling to become a coplaintiff, summons may be issued against him as a defendant. C. S. \S 457. To this end a new trial is necessary. Let this be certified as provided by law.

New trial.

(183 N. C. 413)

SUMMIT AVE. BLDG. CO. v. SANDERS
et al. (No. 390.)

(Supreme Court of North Carolina. April 26, 1922.)

Evidence \S 444(1)—Parol testimony as to contemporaneous agreement not admissible to vary and contradict written contract.

Testimony as to an oral contemporaneous agreement that written contract for the execution of a lease should not bind lessees unless a hotel corporation was organized within a period of 10 days held not admissible, in the absence of allegations of fraud or mistake, being at variance with and contradicting the terms of the written agreement.

Appeal from Superior Court, Guilford County; Long, Judge.

Action by the Summit Avenue Building Company against J. P. Sanders and another. Judgment for defendants, and plaintiff appeals. New trial.

Civil action to recover damages for an alleged breach of contract, the material parts of which are as follows:

"Greensboro, N. C. Oct. 25, 1919.

"Memorandum of agreement between J. P. Sanders and W. E. Hockett, called the lessees, and Summit Avenue Building Company, called the lessors:

"The lessees agree to form a hotel company, to be known as the North Carolina Hotel Exchange Company, within ten days (10) from this date.

"The lessors agree to lease to said hotel company all that lot and parcel of land in Greensboro, N. C., at the southwest corner of Greene and Washington streets, being about 113.30 feet on the south side of Washington street, and 125 feet on the west side of Greene street, for a period of eight years, at an annual rental of \$6,000.00, payable in advance January 1st of each year, beginning January 1, 1920. First payment to be made by promissory note of said lessees and their associates, payable July 1, 1920, with interest at 8% from January 1, 1920; lease to provide that hotel company, which is the lessee therein, shall have the option at the beginning of the 9th year, to purchase said property and hotel thereon for \$8,775.00, payable, January 1, 1928. This option to be exercised at any time after January 1, 1927, and is conditional on all the terms and conditions of this contract and lease to hotel company being fully performed and complied with.

"It is an essential part of this agreement and to be a condition of said lease, that the lessees of said hotel company cause to be erected on said premises a hotel of in the neighborhood of 200 rooms and to cost approximately \$350,000.00 or more for the building, and to furnish same with furniture and equipment to cost approximately \$100,000.00.

"The note above referred to is to stand as security for the starting of the erection of said hotel on or before July 1, 1920, and in event of failure to start erection of hotel within that time, this agreement and lease thereunder to be and become null and void, but said note, nevertheless, to be paid by the makers thereof to the Summit Avenue Building Company.

"It is understood and agreed that a formal lease is to be executed by the Summit Avenue Building Company to the hotel company embodying the above terms and conditions and further containing the covenants by the lessees to pay all state, county, municipal, or other taxes or assessments against said property or assessments for paving streets or sidewalks adjacent thereto. Said property shall not be used during continuance of lease for any purpose other than hotel purpose, except it may have a barber shop or other stores in hotel building, and in order to entitle the lessee to exercise option and purchase said property at end of the eight years, the hotel as herein above specified, must be fully built and completed during the period of lease."

Plaintiff alleges that the defendants, after entering into the foregoing agreement, failed and refused to perform their part of the con-

tract by declining to form the hotel company and by refusing to execute the rental note as contemplated by the memorandum of agreement. This suit is to recover the sum of \$6,000; plaintiff contending that, under the terms of the contract, said amount was to be paid in any event. From a verdict and judgment in favor of the defendants, the plaintiff appealed.

J. S. Duncan and R. O. Strudwick, both of Greensboro, for appellant.

Cooke & Wyllie and A. L. Brooks, all of Greensboro, for appellees.

STACY, J. The execution of the contract, here sued on, is admitted by the defendants; but they alleged that it was further understood and agreed between the parties, at the time of the making of said memorandum of agreement, that, if the hotel corporation were not organized within the stipulated period of 10 days, "the whole business would be off, and that there should be nothing to it, and that it would not be binding on any one." There is no allegation of fraud or mistake.

It will be observed that this alleged oral contemporaneous agreement is at variance with and contradicts, the terms of the written contract. The defendants, therefore, are not in position to show it by parol evidence. *White v. Fisheries Prod. Co.*, at the present term (N. C.) 111 S. E. 182, and cases there cited. The first year's rent of \$6,000 was to be paid on January 1, 1920. It is true the contract provided that this might be arranged by the execution of an interest-bearing note, payable July 1, 1920; but it was further stipulated that, in the event the undertaking proved to be a failure, nevertheless the rental note in question was to be paid to the plaintiff. The note was not executed, but this was a breach of the agreement by the defendants themselves, and hence they are not in position to take advantage of it. To permit the defendants to show that the entire contract was to become null and void upon their failure to organize the hotel company within the given period of 10 days would be to allow the defendants to annex a condition subsequent to their agreement and in direct contradiction of the express stipulation of the written instrument. This may not be done under our rules of procedure. *Bowser v. Tarry*, 156 N. C. 39, 72 S. E. 74.

The defendants having admitted the execution of the contract, and failing to allege or to show any valid defense to its enforcement, it follows that his honor should have directed a verdict in favor of the plaintiff.

New trial.

(183 N. C. 384)

BERRY et al. v. HYDE COUNTY LAND & LUMBER CO. (No. 10.)

(Supreme Court of North Carolina. April 26, 1922.)

1. Pleading \S 180(2)—Complaint as well as replication held on contract, so that there was no departure.

Complaint as well as replication held to be on contract, so that there was no departure; the allegation in the complaint of wrongful acts being ultimately dependent on whether defendant had complied with its alleged contract.

2. Dismissal and nonsuit \S 58(1)—Departure in pleading not ground for nonsuit.

Departure in pleading is not ground for nonsuit.

3. Damages \S 163(4) — Party alleging has burden of showing the quantum.

Plaintiffs alleging breach of contract and consequential damages to land and crops have the burden of showing the quantum of compensatory damages, if any.

4. Damages \S 217—Jury should be clearly instructed as to measure of damages to land and crops.

On submission of issues of amount of damages to land and crops, the true measure of damages should be set forth with such degree of clearness and certainty that the jury will not be confused or misled.

5. Trial \S 352(1)—Special issue should clearly show whether damages to land to be assessed are permanent or temporary.

A special issue as to what damage, if any, was sustained as to the land by breach of contract, should be framed so as to show definitely whether the damages are permanent or temporary.

Appeal from Superior Court, Hyde County; Allen, Judge.

Action by R. W. Berry and others against the Hyde County Land & Lumber Company. Judgment for plaintiffs, and defendant appeals. New trial.

Plaintiffs were joint owners of a tract of land containing about 525 acres, bounded on the east by the Gibbs canal and on the north by the Poplar Ridge road. Defendant entered into a written agreement with the plaintiffs by which the defendant acquired the right to enter on plaintiffs' land and to widen, deepen, maintain, and use the canal. Plaintiffs gave their consent "for the closing by the proper legal authorities of Hyde county of the public road known as the 'Poplar Ridge road,' leading from the Juniper Bay road to the eastern line of the canal above mentioned, provided the Juniper Bay road shall be established leading from the point on railroad bed to a road where the railroad bed crosses it along said railroad bed to a point on or near said canal on the Murray

farm and thence on the east side of said canal to the point where the Poplar Ridge road above mentioned now crosses the line of said canal, and which by the terms of this agreement is to be closed." Plaintiffs alleged that defendant wrongfully dug the canal to a depth of 8 feet and extended its width to 40 feet across the Poplar Ridge road and obstructed plaintiffs' right of ingress and egress, without providing a pass way to plaintiffs' land; and that defendant has thereby impaired the value of the plaintiffs' land and caused the destruction of their crop. They assess their loss at \$6,465. Defendant denied the material allegations of the complaint and pleaded the contract referred to, and other defenses. Plaintiffs filed a replication alleging a breach of the contract by defendant in failing to construct the road as agreed. The court submitted four issues based upon the contract, the defendant's alleged breach, and damages to the plaintiffs' crops and land, and these issues were answered in favor of the plaintiffs. Judgment, and appeal by defendant.

Mann & Mann, of Swan Quarter, and Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant.

Spencer & Spencer and Clifton Bell, all of Swan Quarter, for appellees.

ADAMS, J. [1,2] The defendant insists that the complaint and the replication are inconsistent; that in the former the cause of action is ex delicto and, in the latter, ex contractu; and that the issues submitted by the court relate, not to the tort, but to the defendant's alleged breach of contract. At the trial the defendant tendered issues drafted upon allegations in tort, and contends here that the plaintiffs have abandoned the cause of action stated in the complaint and now rely solely upon the replication. It is true, as argued by the defendant, that a party may not be allowed in the course of litigation to maintain radically inconsistent positions, or to state one cause of action in the complaint and in the replication another which is entirely inconsistent. C. S. § 525; Lindsey v. Mitchell, 174 N. C. 458, 93 S. E. 955. But in our opinion this principle is not available to the defendant as ground either for a nonsuit or for a new trial. As we understand the contract, the pleadings, and the evidence, particularly the testimony of the defendant's manager, it was in the contemplation of the parties that the defendant should construct or cause to be constructed the road called for in the contract; and the allegation and contention that the defendant wrongfully interfered with the plaintiffs' right of ingress and egress is ultimately dependent on the question whether the defendant complied with its contract as to the construction of the road. In the complaint the

plaintiffs allege that the defendant wrongfully increased the width and depth of the canal and thereby interfered with their right of ingress and egress "without providing plaintiffs with a pass way to their land." Since the plaintiffs expressly agreed to the change in the canal, the allegation, when reasonably construed, appears to mean that the defendant interfered with the right of ingress and egress by failing to construct the road described in the contract. In the determination of this ultimate question it is immaterial, so far as the issues are concerned, whether the alleged cause of action be referred to technically as *ex delicto* or *ex contractu*. We think, therefore, that his honor properly declined to dismiss the action as in case of nonsuit. If there is a variance between the complaint and the replication, such variance may be a proper subject for special instructions, but is not a valid cause for nonsuit. *Edwards v. Erwin*, 148 N. C. 433, 62 S. E. 545, 16 Ann. Cas. 393.

[3-5] The defendant, however, is entitled to a new trial for error in his honor's instructions as to the third and fourth issues. The burden upon each of these issues was on the plaintiffs. Even if the answer to the first and second issues entitled the plaintiffs to nominal damages, still upon them rested the burden of showing by the greater weight of the evidence the quantum of compensatory damages, if any, to which they were entitled. The learned judge who tried the case inadvertently failed clearly to define the rule for the admeasurement of damages as to the crops or the land. For breach of contracts or injuries to property the true measure of damages should be set forth with such degree of clearness and certainty that the jury will not be confused or misled. 17 C. J. 1061; 8 R. C. L. 661; *Coles v. Lumber Co.*, 150 N. C. 190, 63 S. E. 736; *Cherry v. Upton*, 180 N. C. 1, 103 S. E. 912. Neither the instruction concerning "serious damage to the crops" nor the instruction concerning the "material and serious damage or material depreciation of the value of the land" embodies a clear statement of the rule, and it is impossible to know whether the damages were or were not properly awarded. The jury should clearly understand whether the damages to be assessed on the fourth issue are permanent or temporary in character, and in either event the proper rule should be applied. Moreover, the fourth issue should be framed so as to show definitely, as the evidence and pleadings may warrant, whether the damages are permanent or recurring. *Ridley v. R. R.*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; *Parker v. R. R.*, 119 N. C. 686, 25 S. E. 722; *Brown v. Chemical Co.*, 165 N. C. 421, 81 S. E. 463.

It is also doubtful whether the jury comprehended the instruction that his honor in-

tended as to the burden of proof, especially on the fourth issue.

Since a new trial is granted for the reasons assigned, it is unnecessary to discuss the several exceptions relating to the admission and rejection of evidence.

New trial.

(183 N. C. 410)

WINDER v. MARTIN et al. (No. 389.)

(Supreme Court of North Carolina. April 26, 1922.)

Landlord and tenant — §112(2) — Breach of lease waived by accepting rent for a month subsequent to breach.

Breach of a lease by lessee, authorizing forfeiture and re-entry by lessor, is waived by the lessor thereafter with knowledge of the breach, and before commencement of proceeding to evict the lessee, accepting from the lessee the rent for a month subsequent to the breach.

Appeal from Superior Court, Guilford County; Long, Judge.

Summary proceeding in ejectment by John C. Winder against L. H. Martin and another to evict defendants, as tenants, from the premises of plaintiff. From a judgment for defendants, plaintiff appeals. Affirmed.

John A. Barringer and R. M. Robinson, both of Greensboro, for appellant.

Thos. C. Hoyle and F. P. Hobgood, Jr., both of Greensboro, for appellees.

STACY, J. This was a summary proceeding in ejectment, commenced in a court of a justice of the peace, and tried *de novo* on appeal to the superior court of Guilford county. From the judgment of the latter court, the case comes to us for review.

Defendants rented the premises in controversy to be used by them in selling petroleum products, through means of a filling station erected thereon, and for serving the public generally in regard to automobile supplies, etc. The relation of landlord and tenant and the due execution of the lease are admitted. It was stipulated as a condition of the rental contract that the defendants, while occupying said premises and conducting a filling station thereon, should purchase all gasoline, used by them in their business, from the Todd Oil Company, a co-partnership in which the plaintiff was interested; and, upon failure to comply with this provision, the plaintiff reserved the right to "re-enter the said premises and to expel the lessees therefrom without prejudice to other remedies." The jury found that this stipulation, or covenant, was breached by the defendants on October 10, 1921; but his honor entered judgment for the defendants non obstante veredicto, because the plaintiff, or his duly authorized agent, thereafter ac-

cepted and received the rent for said premises for the months of November and December, 1921, and January, 1922.

This action was instituted on November 18, 1921, and tried on appeal in the superior court of Guilford county, January 24, 1922. The rent for November, 1921, was accepted and received after the alleged breach on October 10th and before the institution of this action on November 18th. The December rent and the January rent were received after suit had been filed and during its pendency. Did the plaintiff by the acceptance of rent, under these circumstances, waive the breach as found by the jury? This is the question for decision. It is the generally accepted rule that if the landlord receive rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent. Or, to state the rule differently, it is generally held that the acceptance of rent by the landlord, with full knowledge of a breach in the conditions of the lease, will ordinarily be treated as an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease and demanding a forfeiture thereof. *Moses v. Loomis*, 156 Ill. 392, 40 N. E. 952, 47 Am. St. Rep. 194, and note; 16 R. C. L. 1132 et seq.

But plaintiff contends that the above rule is not applicable to the facts of the instant case, because the rents for the months of December and January were accepted after the institution of the present suit. For this position he relies upon the case of *Palmer v. City Livery Co.*, 98 Wis. 33, 73 N. W. 559, where it was said:

"The question is whether the receipt of the rent by the plaintiffs was, in the circumstances, a waiver of their right to insist on the forfeiture of the lease. It is the settled law, no doubt, that the landlord who, with knowledge of the breach of the condition of a lease for which he has a right of re-entry, receives rent which accrues subsequently, waives the breach, and cannot afterwards insist on the forfeiture. *Gomber v. Hackett*, 6 Wis. 323; *Conger v. Duryee*, 90 N. Y. 594. This is on the ground that the landlord has an election. He may choose whether he will declare the lease at an end, and re-enter at once, or whether he will overlook the breach, and let the lease remain in force. Of course, he cannot do both, for the

two courses lead in opposite directions; and, because the taking of rent which accrues subsequently to the breach is incompatible with a rescission of the lease, it is held that the acceptance of rent, under such circumstances, is clear evidence of an election to have the lease continue in force. The rule, being founded on the exercise of his option by the landlord, can have no place in a situation where no option is afforded him.

"The only question here is whether the rule of election applies, in the facts of this case. Practically the question is whether the plaintiffs were in a situation in which they had a choice. If they had no choice they could be bound by no election. The situation is clear. There was a breach of a condition of the lease which gave the plaintiffs the right of re-entry. They elected to terminate the lease, gave the proper notice, and brought their proper action. They obtained judgment for restitution. The defendant appealed, and gave its undertaking. This undertaking bound it to pay the rent, and gave it the right to remain in possession during the pendency of the appeal. The plaintiffs had no option in the matter. It is clear that from that time the occupation of the defendant was against the consent of the plaintiffs. It was not referable to the lease, but to the situation created by the appeal and undertaking, and could be no proper evidence that the plaintiffs had elected to waive their right to terminate the lease. So, the payment and receipt of the rent are referable to the situation, and not to the plaintiffs' choice. The law does not intend the absurd conclusion that the plaintiffs must forego all rents during the pendency of the appeal, under penalty of forfeiting all their rights in the action. It has been at too much pains to secure such rents to them for that conclusion. That a party abides by a situation in which the law places him is no evidence that the situation is of his choice, nor binding upon him as an election."

But however sound this position may be with respect to the acceptance of the December and January rents, under the circumstances here disclosed, the fact remains that the November rent was accepted after the breach, and with full knowledge thereof, and before suit was brought. This would constitute a waiver of the only breach which has been passed upon by the jury.

"Where forfeiture of a lease is incurred by nonpayment of rent, if the lessor receive from the lessee rent subsequently accruing, the forfeiture is thereby waived." *Richburg v. Bartley*, 44 N. C. 418.

Therefore, under the facts of the instant case, we think the judgment of his honor must be upheld.

No error.

(183 N. C. 406)

ST. SING et al. v. AMERICAN RY. EXPRESS CO. (No. 337.)

(Supreme Court of North Carolina. April 26, 1922.)

1. Commerce — 8(13)—Federal statutes control interstate shipments.

Federal statutes afford exclusive rule of liability in case of loss or damage to interstate shipments.

2. Carriers — 159(2)—Rule requiring written claim for damages within four months, reasonable.

In view of Act Cong. March 4, 1915 (U. S. Comp. St. § 8604a), a rule requiring written notice of claim for damages against a carrier from time of delivery, or in case of loss within four months after a reasonable time for delivery has elapsed, is reasonable and valid.

3. Carriers — 165—Evidence held to show no written statement of claim filed until more than six months from time of shipment and from time when goods should have been delivered.

Evidence held to show no written statement of a claim for loss of goods was filed and nothing that could be considered as a filing until more than six months had elapsed from the time of shipment and from the time when they should have been delivered at destination.

4. Carriers — 159(2)—Claim for goods lost not within exception of statute as to notice.

Where a claim against a carrier was for absolute loss of goods in breach of the contract of carriage, and no notice of the claim was filed within four months, it was not within the proviso of Act Cong. March 4, 1915 (U. S. Comp. St. § 8604a), providing that if the damage complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice or claim, or filing claim shall be required as a condition precedent to recovery.

Appeal from Superior Court, Durham County; Daniels, Judge.

Action by William St. Sing and another against the American Railway Express Company. From judgment of nonsuit, plaintiffs except and appeal. No error, and judgment affirmed.

The action is to recover damages for the value of a package, to wit, a bicycle motor attachment, bought in St. Louis, Mo., and shipped with defendant to plaintiffs at Durham, N. C., under a uniform express receipt and contract of carriage, and which was never delivered to plaintiffs, the consignees. At the close of plaintiffs' evidence, on motion, there was judgment of nonsuit, and plaintiffs excepted and appealed.

J. W. Barbee, of Durham, for appellants.
W. B. Guthrie, of Durham, for appellee.

HOKE, J. There were facts in evidence tending to show that in February, 1920, William St. Sing, the father, ordered for his minor son and coplaintiff, Macon St. Sing, from H. R. Geer, St. Louis, Mo., a bicycle motor attachment, sending the price, \$40, per post office order; that about the time the article should have been received (seven or eight days) plaintiff made inquiry for the package at the express office in Durham, and, being informed that no such package was in hand, plaintiff commenced a correspondence with the vendor at St. Louis, and also took it up with the Post Office Department, thinking the package might have been sent by parcel post, and finally, in September, 1920, plaintiff procured from Geer & Co. the express receipt showing same had been shipped with defendant as common carrier, under a uniform express receipt, containing, among others, the following stipulation:

"7. Except where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, and suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

That as soon as plaintiff obtained receipt, it was exhibited to express agents, who informed plaintiff it would be necessary, in order to file an intelligent statement of his claim, that he should have the invoice. This was procured in about three or four weeks longer, and both left with the company's agents at Durham. The package was never received by plaintiffs or either of them, and no formal or written claim for the loss was ever made or filed with the company or its agents other than leaving with them the express receipt and invoice as stated, and which was in October, 1920.

There was further evidence permitting the inference that the shipment had in the usual course been sent to Richmond and disposed of, as for unclaimed goods, and could not now be recovered; the letter of defendant asserting nonliability on the contract of carriage being as follows:

"Durham, N. C., February 11, 1921.

"Mr. Macon St. Sing, 1016 Holloway Street, Durham, N. C.—Dear Sir: Referring to your claim of \$40.00 account of nondelivery of one motor.

"The motor which the claim agent located in the no mark bureau at Richmond, Va., had been disposed of before we requested it forwarded to this office, and it cannot be recovered.

"In view of the fact that the claim was not presented until October 18, 1920, while shipment was made February 24, 1920, the claim agent instructs that your claim be declined under article 7 of the uniform express receipt. Therefore I am returning to you all papers submitted with your claim and closing my file. It is to be regretted that you did not make claim within the four months and one week time limit.

"Yours very truly, [Signed] C. T. Branson,
Agent."

[1,2] Upon these the facts chiefly relevant, we must approve the ruling by which the judgment of nonsuit has been entered. This being an interstate shipment, the federal statutes applicable and the authoritative decisions thereon afford the exclusive rule of liability in these cases, and by them it is clearly recognized that a rule requiring that the party aggrieved by breach of contract of carriage, and as condition precedent to recovery, shall file with the company a written claim of his damages within four months from time of delivery, or, in case of loss within four months after a reasonable time for delivery has elapsed, is reasonable and valid. *Texas & Pacific Ry. v. Leatherwood*, 250 U. S. p. 478, 39 Sup. Ct. 517, 63 L. Ed. 1096; *Georgia, etc., Railway v. Blish Milling Co.*, 241 U. S. p. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; *Taft v. Railroad*, 174 N. C. p. 211, 93 S. E. 752; *Phillips v. Railroad*, 172 N. C. 86, 89 S. E. 1057; 88, part 1, U. S. Statutes at Large, c. 176, pp. 1196, 1197, and also in U. S. Compiled Statutes 1918, § 8604a; the same being set out in *Mann v. Transportation Co.*, 176 N. C. pp. 104, 105, 96 S. E. 731.

[3] From the facts in evidence it very clearly appears that no written statement has ever been filed with the company or its agents for this claim and nothing that could in any way be considered as a filing, until more than six months had elapsed from the time of shipment and from the time when the same should have been delivered at Durham, the point of destination, and, by the express terms of the contract of carriage entered into between the parties, the plaintiff's right of action is barred.

[4] True, the federal statute above referred to contains the provision:

"That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

But there is no allegation or suggestion that the injury here complained of comes within the purport or meaning of the proviso, but the claim is for absolute loss of goods in breach of the contract of carriage, and disposed of in the usual way after the

time for filing the claim had elapsed, and presents a typical instance, calling for application of the contract stipulation protecting a company from liability.

It may be well to note, also, that there is no claim or suggestion that defendant company has realized any substantial value on sale of goods, or that it is liable for the proceeds on the equitable principle of *indebitatus assumpsit*, a question not now presented or determined; but the action, as stated, is brought for damages suffered by breach of defendant's contract of carriage and against which defendant is protected by plaintiff's failure to file their claim within the time stipulated.

There is no error, and the judgment of nonsuit is affirmed.

Affirmed.

(183 N. C. 785)

STATE v. BARKSDALE. (No. 405.)

(Supreme Court of North Carolina. April 26, 1922.)

Criminal law \Rightarrow 1106(3)—Appeal dismissed for failure to seasonably docket record.

Where defendant was convicted and appealed at the July term, but the record was not docketed, and certiorari was not applied for, upon a filing of a transcript of the record proper on appeal at the fall term, the appeal will be dismissed.

Appeal from Superior Court, Richmond County; Finley, Judge.

B. W. Barksdale was convicted of soliciting orders for intoxicating liquors, and appeals. Appeal dismissed.

See, also, 181 N. C. 621, 107 S. E. 505.

Gibbons & Le Grand, of Hamlet, and Travis & Travis, of Halifax, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

PER CURIAM. Though the defendant was convicted and appealed at July term, 1921, of Richmond, the record was not docketed here, nor was any certiorari applied for, upon a filing of the transcript of the record proper on appeal at the fall term of this court. Indeed the appeal was not docketed here until April 11, 1922. The motion of the Attorney General to dismiss must be allowed. This has been the uniform practice of the court, as was held at this term in *State v. Johnson*, 110 S. E. 782, opinion filed March 1, 1922, where the matter is fully discussed with full citation of authorities.

Indeed this has been the uniform practice in accordance with the rules of the court in both civil and criminal cases. Among the more recent cases are *Howard v. Speight*, 180 N. C. 654, 104 S. E. 35, citing numerous precedents. At last term the same ruling

was reaffirmed in *Buggy Co. v. McLamb*, 182 N. C. 762, 108 S. E. 344; *Kerr v. Drake*, 182 N. C. 765, 108 S. E. 393; *Tripp v. Somersett*, 182 N. C. 768, 108 S. E. 633; and *State v. Satterwhite*, 182 N. C. 892, 109 S. E. 862, in which last case the rule was again reaffirmed with full citation of authorities.

Appeal dismissed.

(183 N. C. 415)

GATEWOOD v. FRY. (No. 413.)

(Supreme Court of North Carolina. April 26, 1922.)

1. Logs and logging ⚡3(11)—Purchaser of timber held under contract entitled to three years to remove it.

Where defendant purchased certain timber and contracted to cut and remove it within three years unless the land was sold to a purchaser desiring to clear it, in which case defendant was to remove his timber from the number of acres such purchaser desired to clear within six months, and the land was purchased by plaintiff, who, although he did not intend to clear it, gave the defendant notice to remove all of his timber, the defendant was entitled to three years within which to remove it.

2. Contracts ⚡213(1)—Time for performance not extended by injunction prohibiting performance.

Where performance is prevented by an injunction, the time limited in the contract is not extended under C. S. § 413, providing that the time of stay by injunction is not part of the time limited for the commencement of an action.

3. Logs and logging ⚡3(15)—Buyer prevented from removing timber held entitled to its full value.

Where a buyer of timber is wrongfully prevented from removing it until the time for removal had expired, he can recover its full value.

4. Set-off and counterclaim ⚡36—Damages to time of trial awarded on counterclaim.

Where a counterclaim arose out of the transaction upon which the complaint was based, the amount due on the counterclaim down to the time of trial was properly awarded.

Appeal from Superior Court, Moore County; Lane, Judge.

Action by W. S. Gatewood against C. O. Fry. From a judgment of nonsuit for plaintiff and judgment for defendant on a counterclaim, plaintiff appeals. Affirmed.

The action was instituted by issuance of summons of date February 24, 1919, which was served on March 4, 1919, and the purpose is to recover damages of defendant for wrongfully cutting timber trees from lands claimed by plaintiff, and to restrain defendant from further cutting till the hearing; an injunction order restraining any further cut-

ting till the final hearing being issued and served on defendant in the cause. There was answer filed denying any wrongful cutting of timber as alleged, and a further answer by way of counterclaim for damages suffered by defendant by reason of wrongful interference with defendant's cutting and carrying off of said timber, alleged by defendant to be in pursuance of his rights of ownership in said timber. At the close of the evidence, on motion, there was judgment of nonsuit as to plaintiff's cause of action, and, on issue submitted as to amount of defendant's counterclaim, there was verdict in defendant's favor for \$350. Judgment on the verdict for defendant, and plaintiff excepted and appealed.

U. L. Spence, of Carthage, for appellant.
H. F. Seawell, of Carthage, for appellee.

HOKE, J. From the facts in evidence it appears that the land and timber thereon belonged to Mrs. Maggie H. Graves, and that on the 17th day of October, 1916, she and her husband, by deed properly proven and registered, conveyed to defendant, C. O. Fry, the merchantable timber on said land, with right to cut and remove same within three years from the date of the instrument, and, as a limitation on this right of three years to cut and remove, the deed contained the following:

"Provided, that the parties of the first part do not sell and convey said lands during said period, and in the event that said parties of the first part sell and convey said lands on which said merchantable timber suitable for making merchantable lumber and cross-ties are located and situated, then and in that event, if the party to whom the parties of the first part sell and convey said lands, desire to use and clear any of said lands for farming purposes, or any other purposes, then he or they are to give the party of the second part, his heirs or assigns, six months notice in writing his or their intention of wanting to use said lands, or the number of acres on said tract of land, and the party of the second part agrees to either cut the remaining said timber situated on said tract of land, or the number of acres indicated, and designated by the said purchaser, which he wants to clear, or to move off of said portion of said tract of land and release all claims and rights to any timber on said lands stipulated and designated in said written notice."

It further appears that on July 17, 1918, Mrs. Maggie Graves and her husband sold said land to plaintiff for \$850, \$100 of which was paid down and balance evidenced by plaintiff's note for \$750, which has not been paid, and said parties executed their bond to make title to said land on payment of purchase price. Proper probate of said paper was had and same put on registry March 10, 1919. On obtaining the bond for title, plaintiff caused a notice to be written and

served on defendant on August 7, 1918, in terms as follows:

"This is to notify you that I have bought the land owned by Mrs. Maggie H. Graves near Bethlehem Church on which you bought her cross-ties, and if you have not already removed all the timber, which you bought from her, which was on this land, you will do so in the next six months, as I shall take charge of this timber and land at that time, and shall not allow any more to be removed by you, as per your contract with Mr. G. C. Graves and Mrs. Maggie H. Graves, as I shall desire to use all of said land for farming purposes and other purposes. This is your notice, as per said contract."

There was also evidence tending to show that defendant could and would have cut and removed all of the timber within the six months after notice given, and, further, that some of the timber had been cut by defendant after expiration of the six months' notice and before injunction order served.

Plaintiff, among other things, testified in effect that he had bought the land on speculation, intending to sell same to the four Diggs boys, and that plaintiff had no intent or purpose to clear any part of the land himself; that the Diggs boys had said that they were going to clear it, but refused to take the land when they found there was a dispute about it, etc.

There was evidence for plaintiff that the value of the timber on the land when time for notice expired was from \$150 to \$225. There was evidence for defendant that the value of the timber on the land at the end of the six months and which defendant was prevented from cutting by restraining order, etc., was from \$700 to \$1,000.

Upon this the testimony chiefly pertinent, the court on motion, as stated, entered judgment of nonsuit as to plaintiff's cause of action, and submitted an issue as to amount of damages suffered by defendant by "reason of matters set up in the answer, and on account of the restraining order and injunction issued in the cause." The jury in response to issue have assessed the damages of defendant at \$350. There was judgment on the verdict, and no reason is shown for disturbing the results of the trial.

[1] From the facts in evidence we are of opinion that plaintiff had acquired no such interest in the timber and had no such purpose concerning the property as gave him the right by six months' notice to terminate or shorten the time for cutting and removing the same, held by defendant under his contract. From a perusal of the stipulation, it is clear that such right is restricted to an owner at the time, whose purpose was to clear and cultivate or improve it, and then only to the extent of the proposed clearing

required for improving. "In case of sale if the persons to whom same is conveyed desire to use or clear same land for farming purposes or any other, notice shall be given of their intention to use same or the number of acres thereof," is the language of the stipulation.

Plaintiff, a witness in his own behalf, testified in effect that he bought and held the land for speculation, and had no intent himself of clearing the same or any part of it; that he had never sold, nor does it satisfactorily appear that he had ever made any binding contract to sell, to the Diggs brothers, nor is there any notice from them of any desire or intent on their part to clear said land. The plaintiff's own testimony shows that his notice is not efficient for the purpose intended, and defendant therefore under his purchase had until October 17, 1919, to cut and remove the timber, and plaintiff's cause of action has been properly dismissed as on judgment of nonsuit.

[2] As to the counterclaim, section 413, Consolidated Statutes, which provides that, when commencement of action is stayed by injunction, the time of the continuance of the injunction is no part of the time limited for the commencement of the action, as its terms clearly import, affects, and is intended to affect only a litigant's right to prosecute an action in court as fixed by the statute and does not as a rule operate to extend or prolong a time limit or a property right as determined by the contract of the parties. 25 Cyc. 1284, citing *Paul v. Fidelity Cas. Co.*, 186 Mass. 413, 71 N. E. 801, 104 Am. St. 594; *Wilkinson v. Fire Insurance Co.*, 72 N. Y. 499, 28 Am. Rep. 166.

[3] Defendant, therefore, being in a position to cut and remove this timber within the time limit of the contract, and his right to do so having been wrongfully stayed by injunction until such time had expired, is entitled to recover the full net value of the timber as damages for such wrongful interference. *Williams v. Parsons*, 167 N. C. 529, 83 S. E. 914.

In the *Williams Case*, just cited, the interference complained of was by conduct in pais; but, as to the award of damages, there is no distinction in principle between that and a case where the wrongful interference was under color of court process, which was procured on a baseless claim.

[4] And the counterclaim being one arising out of the same transaction or growing out of same controversy, it is permissible to ascertain and award the amount down to the time of trial. *Smith v. French*, 141 N. C. 1, 53 S. E. 435.

We find no error in the proceedings, and the judgment for defendant is affirmed.

No error.

(183 N. C. 340)

TYREE v. TUDOR et al. (No. 360.)

(Supreme Court of North Carolina. April 19, 1922.)

1. Master and servant §301(1)—Automobile owner held liable for son's negligence.

Where an automobile owner, knowing the reckless character of his 16 year old son, gave him permission to use the car to convey a young lady to and from a dance, he was liable for his son's negligent driving causing her death.

2. Negligence §93(1)—Guest in automobile requesting driver to increase speed held not negligent.

In an action for the death of an occupant of an automobile, a plea of contributory negligence, alleging that the negligent rate of speed and manner of driving was due to a request of and was approved by the occupant, is insufficient as not showing that the occupant was an employer or had any control over the operation of the automobile.

3. Negligence §122(1)—Defendant has burden of proving contributory negligence.

In an action based on negligence, the defendant has the burden of proving contributory negligence.

4. Negligence §132(5)—Request by guest in automobile to driver held not admissible to show contributory negligence.

In an action for the death of an occupant of an automobile under the plea of contributory negligence, evidence that the occupant requested the driver "to get her home in a hurry" was properly excluded, as not showing that the occupant had any control over the driver or that the request was the proximate cause of the accident.

5. Negligence §93(1)—Remarks of guest in automobile held not proximate cause of accident.

Where a father negligently allowed a son with a reputation for reckless driving to convey a young lady to a dance in the father's automobile, the remarks of the young lady that she liked fast driving and wanted to get home ahead of another car were not the proximate cause of an accident resulting from excessive speeding.

6. Appeal and error §1004(1) — Amount of verdict held not reviewable.

In an action for wrongful death, the amount of the verdict is not reviewable on appeal.

7. Death §99(3)—\$15,000 for death of young girl held not excessive.

A verdict of \$15,000 for the death of a bright 16 year old girl is not so excessive as to be disturbed on appeal.

Stacy and Walker, JJ., dissenting.

Appeal from Superior Court, Forsyth County; Long, Judge.

Action by L. P. Tyree, administrator, against George C. Tudor and others. Judgment for plaintiff, and defendants appeal. Affirmed.

This case was before the court, 181 N. C. 215, 106 S. E. 875, where the facts are fully stated.

Bynum Tudor, son of the defendant Geo. C. Tudor, at the time the plaintiff's intestate was killed in the automobile wreck, was something over 16 years of age, living with his father under his care and custody. The father was the owner of two automobiles kept on his premises and which he permitted his son to drive at his pleasure, sometimes alone and at other times with the family.

On June 19, 1918, at a dance for young people at the Country Club on the concrete road three miles west of Winston, Bynum Tudor invited Ruth Tyree, the plaintiff's intestate, a young girl something under 16 years of age, to go to the dance with him. It is admitted and was in evidence that he first asked his father for the large car (which was the Hudson touring car), but his father directed him to take the Buick Six roadster, which was a small car owned by his father. Just before going to the dance, liquor was secured by Geo. Tudor, an elder brother of Bynum, who was also a minor in the home of his father, which was placed in the Buick roadster. On the night prior to the dance a quart of liquor was in the office of the father, Geo. C. Tudor, and his son Geo. C. Tudor, Jr., stated that it was for the dance. Drinks were given from this liquor to other young men before they went to the dance and also, after their arrival at the dance, Bynum Tudor, who was handing the liquor around to the boys and his brother, put some of the liquor in the punch bowl prepared by chaperones for the young people to drink, and when, during the progress of the dance, Bynum Tudor was requested by one of his friends to walk across the floor, he gave as an excuse that he was too dizzy.

It is also in evidence that just prior to going to the dance, and while the young men were assembling at the drug store, Bynum Tudor, who had purchased bottles to put the liquor in, hearing an automobile backing out of an alley, made the statement that, "If they outrun me to-night, damned if they have not got to go some." After the liquor at his father's house had been secured and put in the automobile, and while the young people were assembling at the drug store, Bynum Tudor, driving his car along the street, saw one of the young men, to whom he called, "I have got it," and taking the young man down on a back street he gave him a drink from the liquor in the car. With the liquor stored away in the automobile, he called at the home of Miss Ruth Tyree and carried her from her father's home to the dance at the Country Club. Her remains torn, bruised, and lifeless were brought back to this home the next day.

During the progress of the dance, Bynum

Tudor, who did not dance, was racing up and down the road extending from Winston to the Country Club at a speed estimated at from 50 to 60 miles an hour, sometimes racing other automobiles and sometimes motorcycles.

It is also in evidence that, about a month prior to this time, Bynum Tudor driving this same car was racing with other cars along the road from the Country Club to Winston; that two weeks prior to this time he had been indicted in Greensboro for violation of the automobile law, and his father had compromised the indictment; that on Sunday, two days prior to this action, he again violated the automobile law by reckless driving on the street in Winston and had been tried the following day in the police courts, and his father had paid the fine, and the very next night his father had permitted him to take the car with this young girl in it to the dance.

It is further in evidence that this dance lasted until about 1 a. m. and Bynum Tudor was one of the last to leave. In this Buick roadster, besides himself as chauffeur, was his older brother George, also a minor, and Miss Ruth Tyree. Another one of the young girls attending the dance testified that just before they started to leave for Winston she came to the car to speak to Ruth Tyree and found the fumes of liquor on him so strong that she shuddered and drew back. Bynum started back to Wilmington driving the car at a speed estimated by witnesses as between 50 and 60 miles per hour with the sparks flying out from the manifold 7 or 8 inches long, passing car after car on this crowded thoroughfare, which was filled with cars coming back to the city, and in a race with Finley Horton, who immediately preceded him to the city, with whom he had made an agreement just before leaving the club to have a race. As the Tudor car approached Lovers' Lane, which was a public road extending from the Country Club, and immediately behind the high-powered car driven by Fin Horton in this race, Bynum turned too quickly in passing Martin Goodman's car, striking the hub caps on the front wheel on the Goodman car, side-swiping, and bending straight the bumper of that car. The Tudor car with its occupants was hurled over a barbed-wire fence, into an adjoining field, the car upside down, himself and brother severely injured, and with the almost lifeless body of Miss Tyree terribly disfigured hanging on the barbed-wire fence. The speed at which he was running when he side-swiped the Goodman car was such that his car cut off 4 locust posts 4 to 6 inches in diameter as it was hurled into the field. The almost lifeless body of Miss Tyree hanging on the strands of the barbed-wire fence was in such a mangled condition that one of the young men fainted in attempting to remove

it, and, when taken to the hospital, where she died almost immediately, her body was in such a horrible condition that the hospital authorities would not permit her parents to see it.

The road was an improved highway 50 feet wide, of which 20 feet in the center was concrete, and 15 feet on each side, where the accident occurred, was a dirt road. Martin Goodman, was driving on the right-hand side of the road and on the concrete near the edge. The Tudor car came up from behind without blowing the horn or giving any signal of its approach, and when it struck the Goodman car was running approximately 60 miles an hour.

Upon this record the jury answered the issues in favor of the plaintiff and assessed the damages at \$15,000. Judgment, and appeal by defendants.

Manly, Hendren & Womble, Parrish & Deal, and Holton & Holton, all of Winston-Salem, for appellants.

O. O. Efird, Jones & Clement, and Swink & Hutchins, all of Winston-Salem, for appellee.

CLARK, C. J. [1] This case was before us, 181 N. C. 215, 106 S. E. 875, upon facts substantially the same as in this appeal, and the court held in a unanimous opinion that—

"Where the owner of an automobile has his son to operate it as his chauffeur, both for business purposes and for the comfort and pleasure of his family, and there is evidence that he has given his permission for his son, just over 16 years of age, to use it in escorting the plaintiff's intestate, a young girl of about the same age, to a dance, it is sufficient upon the question of the fact of the agency of the son that would bind the father for his negligence which proximately caused the death of the plaintiff's intestate when returning from the dance in the automobile."

Also that—

"It was the duty of the father not to intrust the safety of the young girl to his son unless he knew that he was careful and prudent in the operation of the machine, and he is responsible in damages for the death of the [plaintiff's intestate] proximately caused by his son's recklessness in driving the machine while acting as escort."

On this second trial, the evidence was much strengthened for the plaintiff by the testimony that, about a month prior to the time of this occurrence, the chauffeur, Bynum Tudor, had been driving this same car, racing with other cars along this same road between the Country Club and Winston-Salem; that two weeks prior to this time he had been indicted in Greensboro for violation of the automobile law, and his father, Geo. C. Tudor, the defendant, had arranged the indictment; that on Sunday, two days prior to this occurrence, this 16 year old son had

violated the automobile laws by reckless driving on a street in Winston, and on the following day had been tried in the police court, and his father, the defendant, had paid the fine. This was the very day before this lamentable occurrence. The father therefore had full notice of the reckless character of his son as a chauffeur and his unfitness to be trusted in charge of an automobile, especially on an occasion of this kind involving the safety and life of a young girl.

There was, besides, on this trial evidence of liquor being in the car, its distribution by the chauffeur and his older brother, also in the car, and the defendant's brief stresses the evidence that the chauffeur himself (though denied by him under oath) on that occasion was drinking, if not intoxicated. There was much evidence, uncontradicted, of the disregard of the law, not only in reckless driving and speeding far in excess of that forbidden by law, but, according to the brief of defendants' counsel, of a violation of law against driving an automobile while being intoxicated. For these acts of negligence the defendant was responsible both for having placed his son in charge of the car and by reason of his liability for the negligence of his agent.

[2] The plea of contributory negligence is thus set out:

"Said Bynum Tudor undertook to pass one or more of said cars and to reach the home of plaintiff's intestate in advance of her guest, and that the rate of speed at which he was driving and his effort to pass cars were due entirely to the request of plaintiff's intestate; and the said plaintiff's intestate at all times acquiesced in and approved the method and manner of driving of Bynum Tudor, and these defendants plead as contributory negligence in bar of plaintiff's recovery the aforesaid acts and conduct of plaintiff's intestate."

[3, 4] It is not alleged, nor is there any proof tending to show, that the unfortunate victim of this accident was an employer, or had any control whatever, or attempted to exercise, by any act, any control whatever, over the operation of the car. The burden was upon the defendants to sustain the plea of contributory negligence by the greater weight of the testimony, and there is a want of any evidence sufficient to be considered by the jury, who, however, have negatived it. C. S. § 523; Cogdell v. R. R., 132 N. C. 855, 44 S. E. 618 (Walker, J.); Watson v. Farmer, 141 N. C. 454, 54 S. E. 419; Wright v. R. R., 155 N. C. 329, 71 S. E. 308 (Allen, J.). The only proof offered was the testimony of Geo. C. Tudor, Jr., the brother of the chauffeur, that on the way home Ruth Tyree asked Bynum Tudor to "get her home in a hurry in order to get there before Miss McKinsey, because if she did not get home before Miss McKinsey did her mother would think she had been riding after the close of the dance." This was properly excluded by the judge. It did

not show any control of the car, or any request for an excessive speed, or tend to show that the request was the proximate cause of the death of this young girl. It was a perfectly reasonable request and was not competent in any way to support the charge that the deceased was responsible or that the remark caused the occurrence.

But it is said that the following evidence, which was admitted by the court, should have that effect: Gowan Caldwell testified that about three-quarters of an hour before leaving the Country Club for home, while the witness and Bynum were talking in the presence of Ruth Tyree about having a race with John Casper at a very rapid rate of speed, "Ruth said she wanted to go as fast as they had been going," Bynum said, "Let's go now," to which she answered, "No, let's wait until we go home," and Bynum replied that he would run as fast as she wanted to.

That remark, which was no part of the res gestæ (Barker v. Ins. Co., 163 N. C. 175, 79 S. E. 424), though the judge admitted it and the excluded testimony that while in the car on the way home she requested Bynum to "get her home in a hurry to get there before Miss McKinsey did, otherwise her mother would think she had been riding after the close of the dance," is all the evidence offered to place upon the head of this young girl the responsibility of being the cause of this terrible disaster. Neither the plea nor the evidence would have justified the jury to come to such a conclusion. To his credit, the boy himself, did not on his oath make such assertion. On the contrary, in his testimony he swore frankly:

"When I left the Country Club, the reason I had for driving at the rate of speed I did was that I was going home. I wanted to pass another car—the car Miss McKinsey was in. I passed three or four cars to the best of my knowledge before I came to the Goodman car."

He did not try to put the blame on the girl, but, like a man, said he drove fast because he wanted to pass another car.

There is no evidence that Bynum Tudor knew what car Miss McKinsey was in, and the mere request by Ruth Tyree "to get her home in a hurry" did not license Bynum Tudor to drive at the terrific speed which was a violation of law. Besides, Fin Horton testified that he and Bynum had made an agreement to race back home, and Bynum had offered to bet \$5 on the result.

The jury found upon the issues submitted that: (1) The plaintiff's intestate was killed by the negligence of the defendant Bynum Tudor, as alleged in the complaint. (2) That Bynum Tudor was the agent or servant of the defendant Geo. C. Tudor, at the time mentioned in the complaint. (3) That the plaintiff's intestate did not contribute to her death by her own negligence as alleged in the answer—and assessed the damages.

The very able counsel for the defense have persented every possible exception, but we do not consider it necessary to elaborate and discuss more fully the contentions presented.

The evidence offered as to the conduct and record of Bynum on that occasion and before was, not to show his general reputation or character but that he was a reckless driver, and, taken in connection with other evidence, was proof that his father knew or should have known it. In *Linville v. Nissen*, 162 N. C. 100, 77 S. E. 1096, it is held that the father would be liable for intrusting an automobile to his son if the father knew that the son was reckless and incompetent.

The evidence of negligence of the defendant is practically uncontradicted, and the reliance of the defendants is upon the defense of contributory negligence. Notwithstanding that Bynum and his brother both testified that Bynum did not drink anything on that occasion, the brief of the defendant strenuously insists that he was intoxicated and that the young girl was guilty of contributory negligence in that she did not know this (for there was no evidence that she did) and did not get out of the car which was one of the last to leave, at 1 o'clock in the morning, three miles from home, and the defendant's brief further stressed the proposition that she was guilty of contributory negligence in view of his fast driving that she did not get out of the car (running at times 60 miles an hour), and therefore she, and not the defendants, are responsible for her death. In *Hunt v. R. R.*, 170 N. C. 442, 87 S. E. 210, the court said:

"It is held by the greater weight of authority that negligence on the part of the driver of an automobile will not as a rule be imputed to another occupant or passenger unless such other occupant is the owner or has some kind of control over the driver. This is undoubtedly the view prevailing in this state. See a learned opinion on the subject by Associate Justice Douglas in *Duval v. R. R.*, 134 N. C. 331, citing *Crampton v. Irie*, 126 N. C. 394; both of these decisions being approved in the more recent case of *Baker v. R. R.*, 144 N. C. 37."

See, also, *Bagwell v. R. R.*, 167 N. C. 611, 83 S. E. 814; *McMillan v. R. R.*, 172 N. C. 853, 90 S. E. 683.

This was quoted with approval in the very recent case of *Pusey v. R. R.*, 181 N. C. 142, 106 S. E. 452. In that case the defendant requested an instruction that the plaintiff should have remonstrated with the chauffeur if he was driving too fast, and have declined to go with him if the driver was drinking, and if he did not it was contributory negligence. But the court held that it was not error to refuse such instruction because "Pusey was a guest riding for the pleasure of the trip, and had no control over the car, and nothing to do with driving it."

It has been repeatedly held that, for a person to be responsible for the operation of

an automobile, he must be the owner of the car which is operated by some one under his authority and permission, or he must have control of the operation of the car, neither of which functions could be attributed to Ruth Tyree, who was a mere guest in the car which was entirely under the control of Bynum Tudor under the authority and by the permission of his father. The above proposition is sustained by unbroken authority in this state; among other cases, by *Linville v. Nissen*, 162 N. C. 93, 77 S. E. 1096; *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134; *Williams v. Blue*, 173 N. C. 452, 92 S. E. 270; *Clark v. Sweaney*, 175 N. C. 282, 95 S. E. 568; *Wilson v. Polk*, 175 N. C. 490, 95 S. E. 849.

In *Williams v. Blue*, supra, the court said:

"If it should turn out upon the trial that defendant Fannie A. Blue was exercising no control over the machine or chauffeur and was occupying it simply as the wife of John Blue and with his consent, then she would not be liable. As to the defendant Graham, * * * if it should turn out upon the trial that he did not assist in directing the operation and course of the machine at the time of the collision, he would not be liable."

Among the later cases, affirming this uniform doctrine of our courts, is *Parker v. R. R.*, 181 N. C. 103, 106 S. E. 759, where, sustaining a verdict of \$45,000 for damages sustained by a lady riding in her sister's automobile where the same defense of contributory negligence was set up, the court said:

"As to the contributory negligence, the burden of which was upon the defendants, the plaintiff was not driving the automobile, but was only a guest or passenger in the car. There is no evidence that she had any control over the movements of the car, and the negligence of the driver, if there was any, cannot be imputed to the passenger"—citing numerous authorities.

In 2 R. C. L. 207, it is said:

"The prevailing view is that where the occupant has no control over the driver, even in a case where the relation of carrier and passenger does not exist, the doctrine of imputed negligence does not apply."

[5] In view of the negligence of the father in intrusting this machine and the custody of the young daughter of a neighbor to the care of a reckless and incompetent driver as he knew his son to be, having but recently twice obtained his discharge from the law for reckless driving, once on the very day before, and in view of the overwhelming evidence of the chauffeur's reckless conduct and violation of law on this and previous occasions, it cannot be maintained seriously that the remark of the girl in a casual conversation, three-quarters of an hour before leaving in the car, that she would like fast driving (but which she declined at that time), and the offered testimony, which was prop-

erly excluded, that on the way home she said she wanted the chauffeur to get home ahead of a certain other car, that these remarks were the proximate cause that this car, running perhaps 60 miles an hour, was catapulted 36 feet, by striking another car, cutting down 4 locust posts 4 to 6 inches in diameter, seriously injuring both the young men, destroying the car, and ruthlessly extinguishing the life of this bright young girl, whose safety had been intrusted to their care. This defense that "the woman and not the man" was to blame has been often asserted throughout the ages, but never on slighter foundation, not even on that memorable occasion when it was first pleaded by Adam. Genesis, iii, 12.

The question of damages was fully discussed before the jury and under a charge which was properly stated following the uniform decisions of this court. *Hill v. R. R.*, 180 N. C. 492, 105 S. E. 184, and cases there cited by Walker, J.

[6, 7] The amount assessed by the jury is not reviewable by us (*Benton v. R. R.*, 122 N. C. 1009, 30 S. E. 333; *Cook v. Hospital*, 168 N. C. 256, 84 S. E. 352, L. R. A. 1915D, 611, Ann. Cas. 1917C, 158), and, if it were, we could not say that the verdict of \$15,000 for the untimely death of a young girl of about 16 years of age, who was shown to possess good health, an excellent character, and more than usual ability, was excessive compensation for her death, under most distressing and painful circumstances caused by most inexcusable negligence on the part of the father and criminal negligence on the part of the son, to whose protection and care she had been confidently intrusted by her relatives.

No error.

STACY, J. (dissenting). There are several propositions of law, laid down in the opinion of the court, with which I do not find myself in accord; and hence I am constrained to state briefly the reasons for my dissent.

At the outset, it should be observed that the sufficiency of the plea of contributory negligence is challenged, for the first time, in the opinion of the court. At no stage of the case, either here or below, has it been questioned by any of the parties. Furthermore, giving a liberal construction to the allegations of the answer, which we are required to do under C. S. § 535, I think the plea is fully adequate and entirely sufficient. *Brewer v. Wynne*, 154 N. C. 471, 70 S. E. 947; *McNinch v. Trust Co.* (at the present term) 110 S. E. 663.

"The uniform rule prevailing under our present system is that, for the purpose of ascertaining the meaning and determining the effect of a pleading, its allegations shall be liberally construed, with a view to substantial justice between the parties. * * * This does not mean that a pleading shall be construed to say what it does not, but that if it can be seen

from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it. *Buie v. Brown*, 104 N. C. 335. As a corollary of this rule, therefore, it may be said that a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient." *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874.

Suppose a pedestrian upon the highway had been injured by this ill-fated car, and Ruth Tyree had not been killed, can it be said and successfully maintained that she could not have been held responsible, along with the driver, for such injury, when the speed of the car, at the time, was "due entirely to her request?" *Clark v. Sweaney*, 175 N. C. 280, 95 S. E. 568; *White v. Realty Co.*, 182 N. C. 536, 109 S. E. 564. This is the substance of the defendants' allegation of contributory negligence; and, if it be sufficient to render her liable in the supposed case, it ought to suffice as a plea in bar of the plaintiff's right to recover here. C. S. § 523, and cases cited thereunder. So much for the sufficiency of the plea. I regard the present decision of the court unfortunate in this respect. It will rise up to trouble us in the future.

I am also of the opinion that the evidence offered by the defendants, tending to support their plea of contributory negligence, was competent and should have been admitted by his honor below. Its weight and credibility, of course, were matters for the consideration of the jury, and not for the court. *Loggins v. Utilities Co.*, 181 N. C. 227, 106 S. E. 822. The books are full of cases sustaining recoveries where the evidence of negligence was not anything like as strong as that offered to show the contributory negligence of the deceased in the case at bar. I do not say the evidence would or should have been accepted by the jury as true, but it was entirely competent, and it was error in the court below not to have submitted it to the jury for its consideration.

It is stated in the opinion of the court that—

"Gowan Caldwell testified that about three-quarters of an hour before leaving the Country Club for home, while the witness and Bynum were talking in the presence of Ruth Tyree about having a race with John Casper at a very rapid rate of speed 'Ruth said she wanted to go as fast as they had been going,' Bynum said, 'Let's go now,' to which she answered, 'No,

let's wait until we go home,' and Bynum replied that he would run as fast as she wanted to."

I do not so understand the record. This evidence was excluded. The witness was permitted to give the above testimony, in the absence of the jury, and not in its presence, and this only for the purpose of incorporating it in the statement of case on appeal. No witness was allowed to testify, in the presence of the jury, as to anything said by the deceased while at the Country Club or just before the fatal accident. All statements made by her, relating to how fast she wanted to ride or why she wanted to go at a rapid rate of speed, were carefully excluded. This evidence, as offered by the defendants, went to the very heart of their plea of contributory negligence, and it must be competent. That which is logically relevant is legally relevant, unless excluded by statutory enactment or some rule of evidence; and none has been shown here. It happens, in many cases, that the very fact in controversy is whether certain words were spoken, and not whether they are true or false; and this is our case.

"The law may be regarded as settled that wherever, for any reason, an extrajudicial statement is constitutively relevant by reason of its bare existence, proof of it will be received." *Chamberlayne on Evidence*, § 2595; *Means v. Railroad*, 124 N. C. 574, 32 S. E. 960, 45 L. R. A. 164.

All statements made by the decedent a short time before starting on the fatal ride, and all utterances made by her while in the car and only a moment or so before the accident, were excluded, though the defendants offered to prove them by disinterested witnesses and persons not parties to the action. The defendants offered to show by the witness Gowan Caldwell that decedent, while at the Country Club, said she wanted to run at the same rate of speed that Bynum Tudor had been racing, to which Bynum replied, "Let's go now," and to which she said, "Let's wait until we go home." Also, they offered to prove the following by the witness Phil Cranford:

"We returned from racing with John Casper, and something was said about going 60 miles per hour, and Miss Ruth said she wanted to drive 60 miles per hour, and Bynum said, 'Let's go now,' and she says, 'No, wait until we start home,' and Bynum says: 'All right.'"

Also defendants offered to prove by the witness George Tudor, Jr., the following:

"Soon after leaving the Country Club she requested that Bynum get her home in a hurry in order to get home before Miss McKinsey did, because if she didn't get home before Miss McKinsey did her mother would think she had been riding after the close of the dance."

This evidence was offered to establish the allegation of contributory negligence to the

effect that Bynum Tudor's manner and method of driving the car was attributable to the direction and request of the decedent.

It was stated on the argument that his honor excluded this evidence under authority of *Dowell v. Raleigh*, 173 N. C. 197, 91 S. E. 849; but, to my mind, the instant ruling is not supported by what was said in that case. There plaintiff's intestate was driving a wagon along a rough street in the city of Raleigh. The king-pin broke, throwing the wagon and driver to the ground and instantly causing his death. The question was whether the defective condition of the street or the defective condition of the wagon was the proximate cause of the injury. The trial court received evidence that decedent had said the king-pin was in a defective condition. This court held that such declaration was inadmissible, as an admission, because it was not made by a party to the action or by one in privity with him, or as a declaration against interest since decedent, before the accident, had no interest to serve or to disserve.

In the *Dowell Case*, in effect, decedent said, "My wagon is defective." In this case, decedent, in effect, said, "Wait until we go home to drive 60 miles per hour," and, "Get me home in a hurry ahead of my guest." The *Dowell* utterance contained a statement of fact, while the *Tyree* utterance contained no statement of fact, but was, in form, a request or an entreaty. The *Dowell* utterance was offered to prove the truth of the matter asserted in it; the *Tyree* utterance was offered as itself constituting a fact in issue. The *Dowell* utterance was offered as evidence of an independent fact; the *Tyree* utterance was offered as the fact itself and not as an admission or declaration against interest, nor as evidence of an unrelated fact. Herein lies the distinction; and it seems to me that the excluded evidence in the instant case was clearly competent.

The request of decedent, made after she and the defendant had started on their trip home, and immediately before the accident, is competent for another reason. This was a part of the *res gestæ*, in that it was so closely related to the accident as to form a part of its details. In the *Dowell Case* the court stated that, on an examination of the cases apparently opposite, it would be found that they were put upon the principle (or largely influenced by it) that the declarations, by reason of the fact that they were made at the very time of the injury, or of their being concomitant therewith in some degree, and explanatory thereof, became *pars rei gestæ*. The instant utterance or request, made, as it was, from one to three minutes before the accident, and bearing directly upon it, should have been admitted as part of the *res gestæ*.

It is stated in the opinion of the court that Bynum Tudor did not testify that he was speeding at the request of the deceased. How

could he, when his honor had ruled that all statements made by her were incompetent? He alleges it in his answer and made every effort to establish it by disinterested witnesses. What more could he do?

Again, in fairness to the defendants, I think it should be said that, while there is some evidence tending to show that Bynum Tudor was drinking on the occasion in question, the overwhelming weight of the testimony is that he was not. It is to be regretted, however, that, according to his own admission, he had taken several drinks recently. This, no doubt, weakened his testimony before the jury. But it is not my province to lecture or to criticize; I am only stating both sides of the question. It also appears in the statement of the case that Bynum Tudor was racing back to the city with Fin Horton. I think this, too, is a misapprehension of the record.

In the recent case of *Langley v. Southern Ry. Co.*, 113 S. C. 45, 101 S. E. 286, it was held that where an automobile driver, in driving an automobile to a depot, heeded the directions of occupants who wanted to board a train, the management of the automobile was the concurrent act of driver and occupants, and the negligence of the driver in driving at excessive speed was imputed to an occupant precluding recovery from the railroad for injuries at crossing. The court said:

"The evidence is undisputed that plaintiff's wishes as to speed were respected and obeyed. Clearly, therefore, the evidence was susceptible of the inference that she was responsible for the rate of speed at which the automobile was being run. It matters not whether she had the 'right' to control the driver, since it is not disputed that she did in fact control him."

In 20 R. C. L. p. 165, it is stated:

"One riding in a car driven by another, though a mere guest and having no control over the person driving the car, may be guilty of such negligence as to preclude a recovery for a personal injury resulting from negligent operation of the car, e. g., if the driver, from intoxication, is in a condition which renders him incapable of operating the car with proper diligence and skill, and this fact is known or palpably apparent to one entering the car, entering or remaining in it may be held negligent on the part of the guest; and likewise, a guest may be held negligent who consents to stay in an automobile when the driver attempts to run it after dark without light on an unfamiliar road." *Lynn v. Goodwin*, 170 Cal. 112, 148 Pac. 927, L. R. A. 1915E, 588; *Powell v. Berry*, 145 Ga. 696, 89 S. E. 753, L. R. A. 1917A, 306, and note; *Rebillard v. Minneapolis R. Co.*, 216 Fed. 503, 133 C. C. A. 9, L. R. A. 1915B, 953.

In the note appearing in *Ann. Cas.* 1916E, at 268 et seq., the writer says:

"But the courts have declared certain conduct on the part of the occupant to be negligence as

a matter of law. Thus it has been held to be negligence on the part of the occupant to fail to remonstrate with the driver when he is engaged in reckless driving. *Jefson v. Crosstown St. Ry.*, 72 Misc. 103, 129 N. Y. S. 233. And it has been held that if the passenger was aware that the operator was carelessly rushing into danger, it was incumbent on him to take proper steps for his own safety, but when the road was strange to the passenger and there was nothing to make him aware of approaching danger, it could not be said as a matter of law that he was negligent in failing to call the chauffeur's attention to the danger of the situation. *Thompson v. Los Angeles, etc., R. Co.*, 165 Cal. 748, 134 Pac. 709. The occupant of an automobile has been held to be guilty of contributory negligence in riding in a motor car on a dark night, without lights over roads which neither the driver of the car, nor any of the persons with him in the car were familiar. *Rebillard v. Minneapolis, etc., R. Co.*, 216 Fed. 503, 133 C. C. A. 9, L. R. A. 1915B, 953.

"Continuing to ride in an automobile after knowledge that the chauffeur is intoxicated, has been held to show independent negligence on the part of the passenger. *Lynn v. Goodwin*, 170 Cal. 112, 148 Pac. 927, L. R. A. 1915E, 588. See, also, *Pittsburgh R. Co. v. Kephert* (Ind.) 112 N. E. 251. And in a case wherein it appeared that both the driver and the occupant were drunk, the occupant was held to be guilty of independent negligence. *Cunningham v. Erie R. Co.*, 137 App. Div. 506, 121 N. Y. S. 706."

There was nothing said in the case of *Pusey v. R. R.*, 181 N. C. 137, 106 S. E. 452, which militates against the principles announced in the cases above cited. There plaintiff's intestate was killed because of the alleged negligence of the railroad company in maintaining a crossing in a defective or unsafe condition; the defense being that the driver of the automobile in which plaintiff's intestate was riding was driving at an excessive rate of speed, and that plaintiff's intestate was guilty of contributory negligence in failing to remonstrate with the driver and acquiescing in the rate of speed. There was no evidence that the decedent had any control over the car, or had anything to do with the driving of it; nor was there any evidence that the decedent knew that the car was being operated at an excessive rate of speed.

In the case at bar, it should be borne in mind that the driver of the automobile was a boy barely 16 years of age; that decedent was a girl of about the same age; that she was in high school, while he was only in graded school; that she was more mature than he; that a short time before they started home she, with knowledge that he had been driving at that rate of speed, stated she would like to ride 60 miles per hour, and the defendant, Bynum Tudor, had agreed that on the return trip he would drive at that rate of speed in accordance with her request. Moreover, after they had started home, and

only a moment or so before the fatal accident, decedent requested the defendant Bynum Tudor to overtake a car that had departed ahead of them and to get her home before her own guest should reach there.

Although the decedent was not the owner of the car, and was not physically engaged in driving it, at the time of the injury, the above testimony raises a strong inference of fact that the car was being recklessly operated at her request and in accordance with her wishes.

It should also be remembered that the relation of guest and host which existed here was the result of an offer on the part of Bynum Tudor to take Miss Tyree to the dance, and her acceptance of that offer. Subsequently that relationship was altered, in a measure, at the request of the guest; the host agreeing to operate the car in a manner agreeable to her wishes and in accordance with her direction. The guest, therefore, by sharing and participating in the running of the car to an appreciable extent, if she really did, necessarily assumed a part of the responsibility for its operation; at least, to my mind, the evidence was sufficient to submit the question of her contributory negligence to the jury.

"Contributory negligence," such as will bar a recovery, is the negligent act of a plaintiff, or plaintiff's intestate, which, concurring and co-operating with the negligent act of a defendant, or one acting for him, thereby becomes the proximate cause of the injury, or the cause without which the injury would not have occurred. The same rule of due care, which the defendant, or the one acting for him, is bound to observe, applies equally to the plaintiff or to the plaintiff's intestate; and "due care" means commensurate care, under the circumstances, when tested by the standard of reasonable prudence and foresight. *O'Dowd v. Newnham*, 18 Ga. App. 220, 80 S. E. 40. Such contributory negligence may consist in doing the wrong thing at the time and place in question, or it may result from doing nothing when something should have been done. This is the universal rule.

In answer to the suggestion, contained in the majority opinion, that the view herein expressed is but an effort to put the blame on "the woman and not the man," I am content to reply in the words of *Leviticus*, xix, 15:

"Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt thou judge thy neighbour."

Upon the record, I think the case should be remanded for a new trial.

WALKER, J., concurs.

WITTY v. NATIONAL COUNCIL OF JUNIOR ORDER UNITED AMERICAN MECHANICS. (No. 393.)

(Supreme Court of North Carolina. May 8, 1922.)

Insurance §753(2) — Local council through which funeral benefit business is conducted is agent of association.

A local council, through which a fraternal benefit association conducts the business of its funeral benefit department, is the agent of the association and not of the members or their beneficiaries, and payment of assessments to the local council is sufficient.

Appeal from Superior Court, Guilford County; Long, Judge.

Action by Minnie Witty against the National Council of the Junior Order United American Mechanics. Judgment for plaintiff, and defendant appeals. Affirmed.

Douglass & Douglass and Murray Allen, all of Raleigh, for appellant.

N. L. Eure and R. C. Strudwick, both of Greensboro, for appellee.

PER CURIAM. Without waiving a trial by jury, the parties agreed on the facts. The defendant, a secret fraternal order, is the supreme governing body of the Junior Order United American Mechanics, and maintains a funeral benefit department. In May, 1913, E. M. Witty became a member of Pleasant Garden Council, and his name was enrolled in said funeral benefit department; but on February 17, 1915, his name was stricken from the roll of Pleasant Garden Council, and did not thereafter appear in the record of membership on file in the funeral benefit department of the defendant. Said Witty was reinstated in Pleasant Garden Council on March 10, 1917, and remained in good financial standing until his death, which occurred on August 17, 1919. When he was reinstated his name was given the recording secretary to be sent to the funeral benefit department for enrollment, but it was not sent. The name of J. E. Newman twice appeared on the roll of the Pleasant Garden Council on file in defendant's funeral benefit department, and monthly assessments of the local council were paid to this department up to the time of Witty's death on the double enrollment of Newman's name. This double enrollment was made pursuant to the application of the recording secretary of the local council. Only one J. E. Newman was a member. The plaintiff is the legal dependent of E. M. Witty, and her contention is that the assessments paid by him to the local council were remitted to the defendant and erroneously credited to the double enrollment of Newman. In response to the issue the jury

awarded \$500 as the amount of the defendant's indebtedness to the plaintiff.

There are 15 exceptions in the record, all of which in the last analysis are directed to the legal proposition that the Pleasant Garden Council was the agent, not of the defendant, but of the plaintiff. In an opinion rendered at this term in *Evans v. Junior Order United American Mechanics*, 111 S. E. 526, the question has been resolved against the defendant's contention. There it is said:

"Since the funeral benefit department is formed for the express purpose of paying funeral benefits to the members of the order, and as the defendant chooses to do the funeral benefit business through the local councils, it thereby makes the local or subordinate council its agent for the purpose."

The judgment is therefore affirmed.
Affirmed.

(183 N. C. 786)

STATE v. LIPPARD. (No. 433.)

(Supreme Court of North Carolina. May 3, 1922.)

1. Larceny §64(1) — Presumption of guilt from possession of property must be warily pressed.

The doctrine that there is or may be a presumption of guilt of larceny from the recent possession of stolen goods is one that must at all times be warily pressed.

2. Larceny §64(2)—Presumption from possession is rebuttable by evidence raising reasonable doubt of guilt.

Though the presumption of guilt from recent possession of stolen property is frequently designated a rule of law, it is not so in the strict sense of that term, shutting out all evidence to the contrary, but is presumption of fact rebuttable by proper proof, and which is rebutted by evidence in explanation which raises a reasonable doubt as to defendant's guilt.

3. Larceny §64(1) — Presumption of guilt arises only when possession is under circumstances giving assurance possessor was the thief.

Before the presumption of guilt from possession of recently stolen property can arise, it must appear that the stolen goods had come into defendant's possession by his own act or with his concurrence, and the possession must be so recent and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder is himself the thief; and, unless the possession meets this test, it is merely an inculpatory circumstance.

4. Larceny §64(3), 68(3) — Possession two weeks after theft held not to raise presumption of guilt, but with other evidence made a case for the jury.

Proof that two weeks after an automobile was stolen defendant was found in possession of a horn and jack which had been removed from the stolen automobile was not sufficient to

raise a presumption of his guilt, but such circumstances with other inculpatory facts were sufficient to carry the case to the jury.

Appeal from Superior Court, Mecklenburg County; Ray, Judge.

Carl Lippard was convicted of larceny of a Ford automobile, and he appeals. New trial.

J. D. McCall, Plummer Stewart, and Hamilton C. Jones, all of Charlotte, Wilson Warlick, of Newton, and W. A. Self, of Hickory, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

HOKE, J. There were facts in evidence, on the part of the state, tending to show, among other things, that on June 13, 1921, the Ford automobile of C. W. Johnson was stolen at the baseball park, in the city of Charlotte, and has never been found or recovered; that some two weeks later, the defendant, at the time driving an Essex car, the property of his father, was arrested in the city of Charlotte for speeding, and there was found in the car, covered over with a coat or quilt, a jack, identified as that owned by the prosecutor, and in his car at the time it was stolen. A few days later, at the home of defendant's father, and on a new Ford owned by defendant, there was found a Claxon horn, which was identified by prosecutor as the horn which was on the stolen car at the time it was taken. There were also other inculpatory facts, including confused and contradictory statements of defendant as to how he came into possession of these articles, and also much evidence on part of defendant tending to show how he came into possession of these articles, and in a manner consistent with his innocence of the crime charged, etc. In referring to the possession of these articles, identified by the state's evidence as being in or a part of the stolen car, his honor, among other things, said:

"It being a rule of law, gentlemen, that one found in possession of stolen property is presumably the thief—that this is a reasonable presumption of the law that he be the thief, if found in possession of stolen property, and throws the burden upon the defendant to account for his possession."

Again, after stating that this is presumption of fact and not of law, shutting off all evidence to the contrary, and that, in order to the application of the principle, it must appear that the possession is with the knowledge and concurrence of the defendant, which is correct, the court instructed the jury further that the finding of stolen goods in the possession of the defendant a reasonable time after the theft is committed raises a presumption that he himself is the thief, and it

is the law that a person found in possession of goods recently stolen is presumed in law to be the thief, and it is not necessary for the state to show further circumstances tending to prove defendant guilty. And later in the charge, on the subject, the court said:

"And again, gentlemen, where a person is found in possession of goods that have been recently stolen, there is a presumption of law that he is guilty of the theft, and it is not necessary in order to convict him for the state to show that any other suspicious circumstances accompanied such possession."

[1-3] The doctrine that there is or may be a presumption of guilt from the recent possession of stolen goods is one that, in the language of Chief Justice Hale, must at all times "be warily pressed," approved by Allen, J., in *State v. Ford*, 175 N. C. 797-800, 95 S. E. 154, and to our minds in this instance has been erroneously applied to defendant's prejudice. While this presumption when permissible, is not infrequently designated as a rule of law, it is not so in the strict sense of the term, shutting out all evidence to the contrary, but is one of fact and rebuttable by proper proof, and is rebutted by evidence in explanation which raises a reasonable doubt as to a defendant's guilt. *State v. Anderson*, 162 N. C. 571, 77 S. E. 238. And our decisions hold that—

In order to its proper application it must be "manifest that the stolen goods have come to the possession by his own act or with his undoubted concurrence, and it must be so recent and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder is himself the thief." *State v. Ford*, 175 N. C. 797, 95 S. E. 154; *State v. Anderson*, 162 N. C. 571, 77 S. E. 238; *State v. Hullen*, 133 N. C. 656, 45 S. E. 513; *State v. Graves*, 72 N. C. 482; *State v. Smith*, 24 N. C. 402.

In the *Ford Case* also, Justice Allen delivering the opinion, quotes with approval from Pearson, C. J., in the *Graves Case* to the effect that the presumption does not arise except when the fact of guilt is self-evident from the bare fact of having the stolen goods. And from *State v. Anderson*, supra, "except when defendant could not have reasonably gotten the possession unless he had stolen them himself." In the case of *State v. Graves* it was proved that on the 9th of August, the home of J. I. Scales, in Greensboro, N. C., was feloniously broken into, and a watch and chain stolen; that on the 10th of August, at Danville, Va., defendant had the watch and chain in his possession, and swapped them off for another, receiving small boot. Defendant, denying his guilt, testified that

he got the watch and chain from John and Dennis Sellars on Sunday night the 9th of August, who got defendant to take them to Danville and trade them off. There were other facts tending to inculpate defendant. On the trial the superior court judge charged the jury that—

"If defendant was in possession of goods in Danville on Monday August 10th of the goods stolen in Greensboro on August 9th, the law presumed he was the thief and had stolen them; the prisoner was bound to explain satisfactorily how he came by them."

In holding this to be an erroneous charge, the court said:

"His honor committed manifest error in taking the case from the jury and ruling that, 'If the jury believed from the evidence that the prisoner was in possession of the watch and chain in Danville on the Monday after the watch and chain were stolen on Saturday night in Greensboro, the law presumed he was the thief, and had stolen the watch and chain, and that the prisoner was bound to explain satisfactorily how he came by the goods.'"

The rule is this:

"When goods are stolen, one found in possession so soon thereafter that he could not have reasonably got the possession unless he had stolen them himself, the law presumes he was the thief."

And, further, the presumption would only arise where the fact of guilt is self-evident from the bare fact of being found in possession of the stolen goods, and otherwise it becomes a case depending on circumstantial evidence to be passed on by the jury. And a like position was upheld in *State v. Anderson*, supra, where the fact of possession was only held to be an inculpatory circumstance with other facts tending to show guilt, and to be considered and passed upon by the jury without any artificial weight arising from a presumption raised by the law.

[4] In the present case, defendant was never found in possession of the stolen car, but of a jack and horn which the state's evidence tended to show had been detached from the same and found in defendant's possession two weeks and more after the alleged theft. These and other inculpatory facts are sufficient to carry the case to the jury, but the circumstances presented afforded so many opportunities for defendant to have become possessed of these articles in a manner consistent with his innocence that the artificial weight incident to a presumption raised by the law does not obtain, and for the error indicated, defendant is entitled to a new trial of the issue.

New trial.

(183 N. C. 427)

ATLANTIC COAST LINE R. CO. v. TOWN OF DUNN. (No. 102.)

(Supreme Court of North Carolina. March 3, 1922.)

1. Adverse possession \S 8(1)—Instruction possession for seven years bars all claims is erroneous where there was evidence of dedication as public square.

In an action by railroad company against a town to recover a tract of land, where there was evidence on behalf of the town that the land in controversy had been dedicated as a public square, and the dedication accepted, an instruction that adverse possession by the plaintiff for seven years will ripen title, and bar all persons not under disability, was erroneous under C. S. § 435, providing that no person shall ever acquire exclusive right to a public square by reason of any occupancy thereof.

2. Trial \S 296(2)—Erroneous instruction as to adverse possession of claimed public square held not cured by other instructions.

Error in instructing that adverse possession for seven years would give right to property against all claims by persons not under disability, which was erroneous because there was evidence that the property in controversy was a public square held not cured by other instructions stating the law pertaining to the dedication of property to the public.

Appeal from Superior Court, Harnett County; Cranmer, Judge.

Action by the Atlantic Coast Line Railroad Company against the Town of Dunn. Judgment for plaintiff, and defendant appeals. New trial.

Civil action tried before his honor E. H. Cranmer, Judge, and a jury at November term, 1921, superior court, Harnett county. The action is to establish plaintiff's ownership in an open square in the town of Dunn abutting on the railroad's right of way through said town, and to restrain defendant from trespass and other wrongful interference with plaintiff's rights therein. Defendant denied plaintiff's ownership of the property, and in a further answer averred that said square had been dedicated as a public square and accepted as such by the town authorities before plaintiff had, or claimed, any right therein, and prayed for an injunction restraining plaintiff from alleged wrongful trespass or use of said square. The cause was submitted and verdict rendered on the following issue:

"Is the plaintiff the owner in fee simple, and entitled to the possession of the land described in the complaint? Answer: Yes."

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Godwin & Williams and Young & Best, all of Dunn, for appellant.

Rose & Rose, of Fayetteville, for appellee.

HOKE, J. There was evidence to the effect that in 1886 one Henry Pope, admitted to be the owner, conveyed to H. Walters and J. B. Edgerton 37½ acres of land, covering the land or square in controversy; that in 1892 said Walters and Edgerton conveyed said property, or the portion of it that contained the square, to the East Carolina Land & Improvement Company; that on May 28, 1907, said Land & Improvement Company conveyed the land in dispute to plaintiff, and said plaintiff had occupied and controlled the said land, asserting ownership under its deed since said date. There was evidence on the part of the defendant tending to show that said Walters and Edgerton, while owners of said property in fee, made a subdivision of a portion of said 37½ acres which subdivision included the locus in quo, divided same into streets, alleys, blocks with a public square, for the purpose of creating the present town of Dunn; that a blueprint was made of the property showing the lots as an open public square, and in 1887 said parties conducted an auction sale of numbers of these lots, at which it was stated that the site was to be and remain an open square, etc., lots were sold and deeds made as adjoining said square. And it was publicly announced at the time that the square would never be sold but would be and remain a public square for the use and convenience of the public. And there were facts in evidence permitting the inference that some of the railroad officials and others largely interested as owners of the stock were present at the sale and acquiescing in these assurances. There was further evidence for the defendant that the authorities of the town of Dunn, which was incorporated in 1887, had accepted the dedication of the property in controversy as a public square; that in 1892 it had caused an official map of the town to be made, naming the streets, blocks, etc., largely following the plat as made by Walters and Edgerton, and recognizing the property in dispute as a public square, designated as Lucknow square, so named in said official record of maps of the town; that some of the lots sold as abutting on the square had been improved by the owners, and the city had constructed concrete sidewalks on the western side of the property and has paved the western edge as a street and had extended Cumberland street through the property and paved the same, and other uses had of the square shown for the benefit of the general public. Upon this opposing testimony, the court charged the jury, among other things, as follows, and which was duly excepted to by appellant:

"The plaintiff contends that it is the owner in fee of the land, and that it has been in the continuous, quiet, and peaceable possession of the land since 1907, about 11 years, and that the title extends back an unbroken chain, to

the Pope deed to Walters and Edgerton in 1886, about 32 years, and that it, and those under whom it claims, have now occupied and held adversely to all persons the land in question. I instruct you, gentlemen of the jury, that 7 years' adverse possession under known and visible lines and boundaries, and under color of title, will ripen title, and be a bar to all persons if no disability, and there is no evidence of disability in this case, of any person being under disability."

[1] The true title having been admitted to be in Henry Pope, that as an abstract proposition is correct; but, when considered in reference to the facts in evidence, and the opposing positions of the parties arising thereon, we are of opinion that this instruction is erroneous. In 1891 (chapter 224) the Legislature, changing the law as it had formerly prevailed, enacted a statute, now appearing in section 435, Consolidated Statutes, as follows:

"No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations."

Under the provisions of this statute, the effect of which on the law as it formerly existed is referred to in *Threadgill v. Commissioners of Wadesboro*, 170 N. C. 641, 87 S. E. 521, and other cases, if the defendant's evidence is accepted by the jury, and there was a completed dedication of the square, the right of the public therein was immediately established, and thereafter a title by adverse possession could no longer be acquired or maintained against it. *Haggard v. Mitchell*, 180 N. C. 255, 104 S. E. 561; *Wittson v. Dowling*, 179 N. C. 542, 103 S. E. 18; *State Co. v. Finley*, 150 N. C. 726, 64 S. E. 772; *Tise v. Whitaker*, 146 N. C. 374, 59 S. E. 1012.

[2] True the court in its further charge made elaborate, and, in the main, a very correct, statement of the law appertaining to dedication and acceptance of these public easements, but he nowhere modifies the charge as above set out, or instructed the jury that, in case a completed dedication is established, a title by adverse possession could, under no circumstances, prevail against it. Standing alone, and without further statement or explanation, the charge could very well be interpreted to mean that, notwithstanding a previous dedication and acceptance, if plaintiff had thereafter shown adverse possession, under known and visible lines and boundaries for seven consecutive years, it would be a valid title. It is not

unlikely that the charge excepted to was so understood by the jury, and in our opinion, as stated, it must be held for prejudicial error entitling defendant to a new trial.

Venire de novo.

(119 S. C. 12)
PATTERSON v. CAUSEY et al. (No. 10823.)

(Supreme Court of South Carolina. Jan. 25, 1922.)

1. Partition \S 62—Plaintiff may attack deed introduced by defendants.

Defendants in partition having pleaded title and introduced deeds and proof of execution thereof, plaintiff could, after they were in, attack them by evidence of grantor's mental incapacity, as well as on the grounds of fraud and their nondelivery.

2. Deeds \S 66—Where more than one inference can be drawn from evidence, question of delivery for jury.

The question of delivery of deeds is for the jury where under the evidence more than one inference can be drawn.

3. Vendor and purchaser \S 239(9) — Purchaser acquires no title if deed to his grantors was not delivered or their grantor was incapacitated.

A purchaser acquires no title as an innocent purchaser if the deed to his grantors was not delivered or if their grantor was mentally incompetent.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of Hampton County.

Action by Catherine E. Patterson against E. M. Causey and others. From judgment on verdict directed for certain of the defendants claiming exclusive title under deeds, plaintiff appeals. Reversed, and new trial granted.

Exception 3 was to the holding that certain grantees of persons named in deeds of Thomas A. Causey were the owners of parcels described in their deeds; it being claimed that they could have only such title as their grantors had, and that their grantors never had a deed to the property delivered to them by Thomas A. Causey, and so had no title.

Geo. Warren and W. D. Connor, both of Hampton, for appellant.

Randolph Murdaugh, of Hampton, for respondents.

WATTS, J. This was an action for partition. Certain defendants claimed title. Appellants proved title in Thos. A. Causey and descent to his children. Contesting defendants offered seven deeds from Thos. A. Causey, dated in May, 1906, and recorded the same year, after the grantor's death, to all of which objection was made that there was no

proof of delivery. On motion his honor directed a verdict for the defendants. Appellants appeal and by five exceptions impute error.

[1] The first exception imputes error in holding that the plaintiff could not offer testimony to show mental capacity of the grantor to make deeds, introduced by the defendants after said deeds had been introduced in evidence, and in excluding the evidence of witnesses to prove grantor's mental incapacity to make said deeds; it being contended that his honor should have held such evidence competent, and should have allowed it. This exception must be sustained. The deeds could not be attached until they were in. Defendants had pleaded title and introduced certain deeds and prove the execution of the same by witness. The appellants then had the right to attack them on the ground of fraud, mental incapacity, or nondelivery, and his honor was in error in excluding the evidence.

[2] Exceptions 2, 4, and 5 raise the same questions that his honor erred in finding under the testimony that the deeds had been delivered and in directing a verdict for the defendants. These exceptions are sustained. Under the evidence the question of delivery should have been submitted to the jury for their determination, as under it more than one inference could be drawn.

[3] Exception 3 is sustained, for, if the deeds were not delivered, or the grantor was incapacitated and could not make them, Ayer and Fuller could not have any more title than their grantors had, and that issue should have been submitted to the jury.

Judgment reversed, and new trial granted.

GARY, C. J., and FRASER, J., concur.

COTHRAN, J. (dissenting). Appeal from an order directing a verdict in favor of the defendants upon the issue of title in a partition suit. The parties claimed from a common source of title, Thomas A. Causey. The plaintiffs and certain of the defendants claimed as heirs at law, and certain other defendants claimed indirectly under deeds executed by Thomas A. Causey and committed to his brother R. T. Causey to keep until his death and then to deliver them to the several grantees.

The depository testified that his brother stated that the children who were not among the grantees of these deeds had been amply provided for; that when the deeds were committed to him the grantor reserved no right of control over them and never during the remainder of his life made an attempt to recall them for any purpose whatever; that the grantor wished to retain control of his land while he lived, and wanted the deeds delivered to the grantees after his death. After the grantor's death the

deeds were severally delivered by the depository.

It appeared that two of the defendants, Ayer and Fuller, claimed under several deeds by two of the grantees under the deeds referred to, and assumed the position of bona fide purchasers without notice.

At the conclusion of the evidence the presiding judge upon motion directed a verdict for the defendants. The plaintiffs have appealed and raise practically but two questions: (1) Error in excluding evidence of the mental incapacity of the grantor; (2) error in directing a verdict for the defendants upon the issue of delivery of the deeds and in not submitting that issue to the jury.

As to the exclusion of evidence tending to show the mental incapacity of the grantor: We do not think that there can be a question as to the right of a plaintiff whose title is opposed by a deed offered in evidence by the defendant in reply to attack such deed upon the ground of fraud, undue influence, or want of mental capacity in the grantor, without having set up any such ground in his complaint or in a reply to the answer of the defendant.

But in my opinion the plaintiffs have not placed themselves in a position to take advantage of the erroneous ruling of the presiding judge in conflict with the above principle. When the matter of the grantor's mental condition first appeared in the evidence, the witness R. T. Causey testified at the instance of the plaintiffs' counsel that at the time the deeds were executed the grantor was suffering from cancer of the stomach, could drink only liquids, and was in bed a part of the time; that he did not know of his own knowledge that morphine was being administered to him. The counsel for the defendants then inquired the purpose of this examination. Counsel for plaintiff stated that it was to show the mental incapacity of the grantor. Counsel for defendants took the position that, objection to the introduction of the deeds in evidence having been placed solely upon the issue of delivery, the plaintiffs could not then go into the question of mental incapacity. After argument the presiding judge ruled that the evidence was admissible. No further testimony along this line was introduced by the plaintiffs, and none other was actually offered. Later in the examination of this witness counsel for defendants, apparently without the provocation that might have been caused by further tender of evidence along this line, interrupted the examination upon another phase of the case with the question:

"We wish to know—do I understand your honor to rule that our friends would have the right to go into the question of the mental capacity of the grantor to make those deeds?"

After argument the court ruled that the

deed could not be attacked upon that ground after it had been introduced. No testimony along the line indicated was at that time being tendered, and it is impossible for the court to assume that the plaintiffs had any such testimony to tender. If they did have, it was their duty to tender the testimony by the production of the witnesses and a statement of what they expected to prove by them. They have waived their right to complain of the adverse erroneous ruling by being frightened away from laying the foundation for an exception.

"A ruling of the trial court refusing to allow a witness to answer a question is not presented for review where the record does not set out the question and what was expected to be elicited by it." 3 Cyc. 165.

In *Avery v. Wilson*, 47 S. C. 78, 25 S. E. 286, it was held that an objection to the ruling of a circuit judge refusing to admit in evidence a certain judgment roll cannot be considered by this court unless the judgment roll is incorporated in the record for appeal.

In *Sweasringen v. Ins. Co.*, 52 S. C. 309, 29 S. E. 722, it is declared:

"The proper course was for defendant's counsel, after cautioning his witness not to answer until authorized by the court to do so, to have stated the question and asked the court to rule as to its admissibility."

In *Allen v. Cooley*, 53 S. C. 77, 30 S. E. 721, the syllabus is:

"This court will not consider the competency of testimony not actually offered."

The opinion states:

"All the evidence which the appellant offered was admitted [which is true in the case at bar]. As the appellant did not offer to introduce further testimony, this court cannot say that * * * it would have been ruled out by the presiding judge. The proper practice in such cases is to offer the testimony, and to have the presiding judge to rule upon its competency, if the specific objections are urged against its introduction."

The plaintiffs did not present a single witness to prove the incapacity of the grantor, and of course could not be allowed to insert in the record the fact that they had such a witness or what his testimony would have been. So far as the record shows, what transpired appears simply as an academic discussion of a moot point. With the advance information of what the circuit judge would rule when the question became a practical issue, in order to avail themselves of the error of such ruling, it was indispensable that the witness should have been produced and the substance of his testimony stated to the court and appear in the record for appeal.

As to the alleged error in directing a verdict for the defendants and in not submit-

ting the issue of delivery to the jury: The plaintiffs offered no testimony at all conflicting with the testimony of the depository of the deeds, which was ample and clear that the deeds were executed by the grantor and committed to him for delivery to the several grantees at his death; that the grantor reserved to himself thought of control over the deeds and never mentioned the transaction to him afterwards. This presents as clear a case of delivery as could be conceived, and the case falls under the well-established rule that, where the testimony is all one way, the circuit judge is justified in directing a verdict. See *Herndon v. R. Co.* (just filed) 111 S. E. 13, and the cases cited therein.

The principle is established by a host of cases:

"When it clearly appears that the grantor placed a deed with a depository, to be kept continuously by him until after the grantor's death, and that it was then to be delivered to the grantee upon the grantor's death, the estate vests in the grantee from the time of the execution of the deed." 16 R. C. L. 641.

See *Watson v. Cox*, 108 S. E. 168; *Merck v. Merck*, 95 S. C. 328, 78 S. E. 1027.

"The delivery of a deed by the grantor to a third person to be held by him and delivered to the grantee upon the grantor's death will operate as a valid delivery, where there is no reservation on the part of the latter, of any control over the instrument." 13 Cyc. 569.

I think for these reasons that the judgment below should be affirmed.

(153 Ga. 178)

CURRIE v. STATE. (No. 2735.)

(Supreme Court of Georgia. April 11, 1922.)

(Syllabus by the Court.)

1. Criminal law §823(17) — Instruction on manslaughter not erroneous because of failure to charge therein on homicide under reasonable fears.

The charge complained of in the second division of the opinion is not erroneous, simply because it fails to embrace other instructions upon some other theory of the case, which would be appropriate elsewhere in the charge.

2. Homicide §237—Defendant only required to establish insanity by preponderance of evidence.

Where, on the trial of one charged with murder, the defense of insanity at the time of the commission of the act is relied upon, the burden of proof is upon the defendant to show his insanity by a preponderance of the evidence. The court erred in charging the jury that in such case "the burden is on the defendant to make good such defense to a reasonable certainty and to the reasonable satisfaction of the jury."

3. Criminal law \Leftrightarrow 956(10), 1156(4)—Denial of new trial for alleged bias of juror not disturbed, unless discretion abused; discretion not abused in denying new trial for alleged bias of juror.

The discretion of the trial judge, who passes upon the alleged prejudice and bias of a juror, from conflicting evidence, on a motion for new trial, will not be interfered with unless it is manifestly abused. There was no abuse of discretion in the instant case.

4. Sufficiency of evidence.

As the case goes back for a new trial, no opinion is expressed as to the sufficiency of the evidence to support the verdict.

Beck, P. J., and Fish, O. J., dissenting in part.

Error from Superior Court, Toombs County; R. N. Hardeman, Judge.

Lee Currie was convicted of murder, and he brings error. Reversed.

See, also, 150 Ga. 736, 105 S. E. 361.

Giles & Sharpe, of Lyons, and Lawrence & Abrahams, of Savannah, for plaintiff in error.

Walter F. Grey, Sol. Gen., of Swainsboro, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

HILL, J. Lee Currie was tried upon an indictment charging him with murder by shooting Burley Phillips with a certain pistol. A verdict was rendered finding him guilty, and he was sentenced to be hanged. He made a motion for a new trial, which was overruled, and he excepted.

[1] 1. The first ground of the amended motion complains that the court erred in charging the jury that—

“When a sudden quarrel arises between two men, and upon that sudden quarrel thus arising the parties, acting under passion or anger, seize their weapons and mutually agree to fight, or if presently they mutually agree to fight, upon a sudden quarrel arising, and one kills another under such circumstances, it is voluntary manslaughter.”

The criticism upon this charge is that the court did not, at the time of giving it, nor elsewhere in the charge, state that if, under the same circumstances, the defendant entertained a reasonable fear that a homicide was about to be committed upon him, and if, acting upon such reasonable fear, he killed the deceased, then the homicide would be justifiable, and not murder or manslaughter. The charge is not erroneous simply because it fails to embrace other instructions upon some other theory of the case, which would be appropriate elsewhere in the charge. *Hays v. State*, 114 Ga. 25 (4), 40 S. E. 13; *Gibson v. State*, 114 Ga. 34, 39 S. E. 948; *Tucker v. State*, 114 Ga. 61, 39 S. E. 926; *Roberts v. State*, 114 Ga. 450, 40

S. E. 297; *Deal v. State*, 145 Ga. 33, 88 S. E. 573.

In the general charge, not immediately in connection with the foregoing charge, the court instructed the jury that they might, after hearing all of the evidence and the defendant's statement, consider the situation in which the defendant found himself at the time of the fatal encounter, and if the jury believed that the facts and circumstances surrounding him were sufficient to excite the fears of a reasonably courageous man, a reasonable man, and his fears were aroused by reason of the circumstances in which he found himself, and those circumstances were sufficient to excite the fears of a reasonable man, and if he acted under the influence of those fears, and not in a spirit of revenge, he would be justifiable, and the jury should acquit him. The error complained of in the fourth ground of the amended motion is controlled by the ruling above made; it being substantially the same.

[2] 2. The second and third grounds of the motion for new trial are substantially the same, and will be considered together. Error is assigned upon the following charge of the court:

“I charge you that, where a party pleads not guilty, without specially pleading it, he may by evidence plead, without former [formal?] plea for that purpose, and establish, if he can, that he is mentally incapable of committing crime, and may introduce evidence upon the trial of the case, for the jury's consideration, to determine whether or not he be a person of sound memory and discretion. With reference to that phase of the case I charge you that, where a party sets up that he is mentally incapable of committing crime, that his mental defects are such as to render him irresponsible for his criminal acts, if any, the burden is on the defendant to make good such defense to a reasonable certainty and to the reasonable satisfaction of the jury.”

It is insisted that the charge of the court complained of placed a greater burden on the defendant than that authorized by law. We are of the opinion that the charge complained of is not a correct statement of the law on this subject. See *Polk v. State*, 148 Ga. 34 (5), 95 S. E. 988, where Mr. Justice George, in a well-considered opinion, points out the error in such a charge, and where he refers to various decisions of this court upon that question. In *Carter v. State*, 56 Ga. 463, it was said:

“Inasmuch as the law presumes, for the safety of society, that every person is of sound mind until the contrary appears, therefore that presumption should be rebutted by a preponderance of evidence of insanity at the time the offense is alleged to have been committed. Unless there is a preponderance of evidence in favor of the insanity of the defendant, the jury would not be authorized to acquit him of

the offense with which he is charged on that ground of his defense."

We are of the opinion that the above states the true rule in such cases; and, as pointed out by Mr. Justice George in the Polk Case, *supra*, the rule announced in 56 Ga. was expressly approved and followed in *Danforth v. State*, 75 Ga. 615, 58 Am. Rep. 480; *Carr v. State*, 96 Ga. 284 (5), 285, 22 S. E. 570; *Ryder v. State*, 100 Ga. 528 (5), 529, 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. Rep. 334; *Minder v. State*, 113 Ga. 772 (3), 774, 39 S. E. 284; *Allams v. State*, 123 Ga. 500, 51 S. E. 506. In the Polk Case, *supra*, it is said:

"The rule is settled beyond controversy in this state that, where the defense of insanity at the time of the commission of the act is relied upon, the burden is upon the defendant to show his insanity by a preponderance of the evidence."

The true rule in such case is, therefore, that the burden is on the defendant to establish his insanity by a preponderance of the evidence. The charge of the court in this case put upon the defendant a greater burden than the law imposes. The cases of *Polk v. State*, 148 Ga. 34 (3), 95 S. E. 983, and *Bowden v. State*, 151 Ga. 336 (3), 106 S. E. 575, are in conflict. Neither of these was a full bench decision; but the Polk Case is older than the Bowden Case, and is based on full bench decisions to the same effect as the Polk Case, and must therefore control.

[3] 3. The fifth ground of the motion for new trial complains that one of the jurors, who rendered the verdict of guilty in the case, was prejudiced and biased against the defendant, and had made statements, several weeks or months prior to the time of the trial, that the defendant "should be hung." The juror made an affidavit denying the statement attributed to him, and stating, also, that there was no bias or prejudice resting on his mind either for or against the defendant at the time of the trial, and that until the trial he had never heard the evidence delivered under oath, and did not see the crime committed, and had not formed any opinion as to the guilt of the defendant. We cannot say that the judge abused his discretion in passing upon the alleged prejudice and bias of the juror, from the conflicting evidence on this ground of the motion for new trial. *Hall v. State*, 141 Ga. 7, 80 S. E. 307.

[4] 4. As the case goes back for a new trial, no opinion is expressed as to the sufficiency of the evidence to support the verdict.

Judgment reversed. All the Justices concur, except

BECK, P. J., with whom concurs FISH, C. J. (dissenting). I dissent from the ruling

made in the second division of the opinion. The charge here brought in question and held to be error was, in the case of *Beck v. State*, 76 Ga. 452 (which was a full bench decision), held to be a proper charge. There is nothing in the case of *Carter v. State*, 56 Ga. 463, that can be construed as making a different ruling; the ruling there merely being that the burden was upon the defendant to prove his defense of insanity by a preponderance of the evidence. That rule is in no respect in conflict with the ruling made in *Beck v. State*—that he must establish such defense to a reasonable certainty. Besides, the Code itself provides:

"Moral and reasonable certainty is all that can be expected in legal investigation. In all civil cases the preponderance of testimony is considered sufficient to produce mental conviction. In criminal cases a greater strength of mental conviction is held necessary to justify a verdict of guilty." Civil Code 1910, § 5730.

And this section should furnish us a guide in determining questions like that now under consideration. See, also, *Bowden v. State*, 151 Ga. 336, 106 S. E. 575.

(153 Ga. 182)

RILEY v. STATE. (No. 2745.)

(Supreme Court of Georgia. April 11, 1922.)

(Syllabus by the Court.)

1. Criminal law §494—Rape §43(1)—Evidence that defendant had been treated for venereal disease admissible; not inadmissible because physician testified he did not have disease.

The exception is to a judgment refusing a new trial to the defendant, who was convicted of rape. There were two counts in the indictment. One charged that the offense was committed by unlawfully having sexual intercourse with a named person, being "a female child under the age of fourteen, to whom he had not previously become lawfully married," etc. The other count charged that the offense was committed on the named female "forcibly and against her will." Held:

On the issue of whether the defendant had sexual intercourse with the child, testimony of a physician, to the effect that at a stated time about 7 months prior to the alleged criminal act he treated the accused for a particular venereal disease, was relevant in connection with other evidence tending to show that the child developed such disease within about 7 days after the alleged criminal act, that the alleged disease is usually communicated from one person to another by sexual intercourse, and that when so communicated it usually manifests itself within a period of 3 to 10 days after the act.

(a) The fact that another physician testified that shortly after the offense was alleged to

have been committed he made several examinations of the accused, and in his opinion the latter was not infected with the disease, would not render the evidence objected to inadmissible. This would make a conflict of evidence, going to the credibility of the witnesses or the evidential value of their respective opinions, but would not go to the admissibility of the evidence of either.

2. Criminal law § 761(11), 815(9), 1172(7)—Rape § 59(3)—Instruction as to corroboration not erroneous or confusing.

The charge: "The testimony of a single witness is generally sufficient to establish a fact, but there are certain exceptions to this rule, and this case presents one of such exceptions, it being the law that the jury could not convict the defendant of the offense for which he is on trial, upon the unsupported testimony of the female alleged to have been raped; before you would be authorized to convict the defendant, there must be other evidence, independent of hers, sufficient to connect the accused with the offense charged, and to raise an inference of guilt," is favorable to the defendant, and not error on the grounds (a) that it assumed there had been an offense committed; or (b) that it did not indicate what amount or character of corroborating testimony is necessary; or (c) that it was confusing and misleading to the jury.

3. Rape § 59(3)—Instruction as to corroboration not erroneous for want of elaboration.

The court instructed the jury: "Before you would be authorized to convict the defendant, there must be other evidence, independent of hers, sufficient to connect the accused with the offense charged and to raise the inference of guilt. It is for the jury to determine whether the female alleged to have been raped has been so corroborated or not. It is not necessary that there be corroborating evidence sufficient of itself to prove the defendant's guilt beyond a reasonable doubt, but the jury would be authorized to convict the defendant, if they are satisfied of his guilt beyond a reasonable doubt." This charge was favorable to the accused, and was not erroneous, as against him, because the judge failed to elaborate on the question of the kind of corroborating evidence required in such a case.

4. Criminal law § 785(10)—Instruction as to impeachment of witnesses not confusing or misleading.

The court charged: "A witness may be impeached by disproving the facts testified to by him or her; a witness may be impeached by evidence as to his or her general bad character; a witness may be impeached by contradictory statements previously made by him or her as to matters relevant to his or her testimony and to the case." This was a statement of principles of law as set out in Pen. Code 1910, §§ 1051, 1052, 1053; and the fact of giving such principles in immediate sequence was not confusing or misleading as applied to the case, the defense having introduced evidence tending to impeach the mother of the child on all three of the grounds covered by the charge.

5. Criminal law § 814(18)—Instruction as to disregarding testimony of witness deemed unworthy of belief not erroneous, as not adjusted to facts.

The court instructed the jury: "Whenever the unworthiness of belief of a witness is established in the minds of the jury, his or her evidence ought to be disregarded by the jury altogether, unless such witness be corroborated by other unimpeached evidence or the proved circumstances of the case. It is at last exclusively a question for the jury to determine, as to whom and what they will believe as to every issue in the case." This charge was not error for the reason assigned, namely, that it was not properly adjusted to the facts of the case.

6. Criminal law § 770(3)—Instruction as to contentions of parties not confusing or erroneous.

The court instructed the jury: "The state contends that the defendant on or about the time named in the bill of indictment, in the county of Dougherty, did have sexual intercourse with one Lillian Rowell, that she was at the time a female child, and that she was at the time under the age of 14 years, and that she was at the time a female child to whom the defendant had not previously become lawfully married. If these contentions have been established to the satisfaction of the jury beyond a reasonable doubt, the jury ought to convict the defendant; you should look to the evidence and the defendant's statement for any other contentions of the state or defendant, and decide the issues made thereby according to the rules of law as given you in charge." This charge was not error on the ground that it misstated the contentions of the state and the accused, and that it was confusing. It was insisted that the charge permitted the jury to look to the evidence and statement of the accused for the respective contentions of the parties; whereas, they could only look to the indictment and plea of not guilty.

7. Criminal law § 770(3)—Instruction as to contentions of parties not confusing or erroneous.

The court instructed the jury: "You should look to the evidence and the defendant's statement for any other contentions of the state or defendant, and decide the issues made thereby, according to the rules of law as given you in charge." This charge was not error, on the ground that it misstated the contentions of the state and the accused.

8. Criminal law § 1064(1, 7)—Ground of motion must be complete; ground of motion held too incomplete and indefinite to present any question for decision.

A ground of a motion for new trial should be complete within itself. Where the only complaint in certain grounds of the motion for new trial is (a) that the judge erred in charging "the Act of the General Assembly of the State of Georgia, 1918, p. 259"; (b) that "the court charged at length upon the act of the General Assembly of the State of Georgia, p. 259, with reference to the age of consent, and the kind of verdicts, and stated to the jury that there could be four different kinds of verdicts, if they

found the defendant guilty under the act of 1918; all of which charge, we insist, was error, as it is a fact that no part of the state's evidence developed consent of Lillian Rowell to the cohabitation, and according to the contention of the defendant, in his evidence and statement, no cohabitation took place," such grounds of the motion for new trial are incomplete and too indefinite to present any question for decision.

9. Newly discovered evidence.

The alleged newly discovered evidence was merely impeaching, and not of such character as to cause the grant of a new trial.

10. Criminal law §935(1)—New trial properly denied, when evidence sufficient.

The evidence was sufficient to support the verdict, and the trial judge did not err in refusing the grant of a new trial.

Error from Superior Court, Dougherty County; R. O. Bell, Judge.

Ludie Riley was convicted of rape, and he brings error. Affirmed.

Claude Payton, of Albany, for plaintiff in error.

B. C. Gardner, Sol. Gen., of Camilla, Geo. M. Napier, Atty. Gen., Seward M. Smith, Asst. Atty. Gen., Billie B. Bush, of Atlanta, and J. W. Kieve, of Albany, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(153 Ga. 208)

JAMES et al. v. MADDOX: (No. 2921.)

(Supreme Court of Georgia. April 11, 1922.)

(Syllabus by the Court.)

1. Adverse possession §110(2)—Vender and purchaser §240—Demurrer properly sustained to allegations concerning notice of plaintiff's rights by defendant's predecessor in title; petition held insufficient to show fraud other than notice of another's rights.

"If one with notice sell to one without notice, the latter is protected." Civ. Code 1910, § 4535. Accordingly, the court properly sustained the demurrer to that portion of the petition which alleged "that defendant's original predecessor, in claiming title to said land, entered with full knowledge that he had no title; that the title was in Davis Pruitt; and he also knew that his claim of title was fraudulent. The origin of defendant's claim being in fraud, his title could never ripen into a perfect prescriptive title; and petitioners allege that this notice and knowledge of the fraudulent inception of defendant's claim of title attached to and followed the same on down to defendant." The allegations in regard to fraud are insufficient to charge any fraud, except notice on the part of defendant's predecessor in title.

2. Adverse possession §55—Fraudulent appointment of administrator and suits by him held insufficient to prevent prescriptive title.

The facts set out in the petition in regard to the appointment of John Davis Pruitt as administrator of Davis Pruitt and the suits filed by him as administrator, to which special demurrers were interposed, are insufficient to prevent prescriptive title from ripening.

3. Pleading §67—Petition need not negative defenses, but, if it does anticipate a defense, it must be effectually avoided.

Ordinarily the plaintiff, in his petition, need not anticipate or negative a possible defense. Where, however, such defense is anticipated, it must be effectually avoided, or the complaint is bad. *Latta v. Miller*, 109 Ind. 302, 10 N. E. 100; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; 21 R. C. L. 492, § 55.

4. Ejectment §29, 65—Judgment §688—Pleading §34(4)—Taken against pleader on demurrer; petition for land not showing possession for many years held insufficient on demurrer; suit for land by administrator, which is still pending or has resulted in defendant's favor, bars suit by heirs.

The petition must be taken most strongly against the pleader, on the decision of a demurrer. *Krueger v. MacDougald*, 148 Ga. 429, 96 S. E. 867. Thus construed, the petition shows that the plaintiffs and their predecessors in title have not been in possession of the land since the death of Davis Pruitt in 1857; nor does it allege any facts sufficient to prevent the ripening of prescriptive title. It also shows that the defendant and her predecessors in title have been in possession for an indefinite number of years, presumptively since 1857, or at least for a period sufficient for prescriptive title to ripen. It further shows that John Davis Pruitt, as administrator of the estate of Davis Pruitt, filed suit for the land, and that such suit is either still pending or has resulted in favor of the defendant. In either event the suit would bar the present proceeding. No amendment having been offered to cure the defects pointed out, the court did not err in sustaining the demurrers and dismissing the petition.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by Winnie James and others against Susie Maddox. Judgment for defendant, and plaintiffs bring error. Affirmed.

The petition of Winnie James and others, including John Davis Pruitt, alleges that Davis Pruitt died a resident of Elbert county, Ga., in 1857; that at the time of his death he was seized and possessed of a described tract of land, including the land herein sued for, in Fulton county; that said Davis Pruitt held under a grant from the state dated in 1826; that he left surviving him as his sole and only heir a sister, Julia Pruitt; that she inherited the land men-

tioned; that she left surviving her a sole heir and only child, Stephen Pruitt, and that petitioners are children and grandchildren of said Stephen; that there has never been and administration upon the estate of Davis Pruitt, but that—

"the purported administration on the estate of said Davis Pruitt, deceased, by John Davis Pruitt, was illegal, fraudulent, and void, because at the time of the said purported administration the said John Davis Pruitt was an old, ignorant, and illiterate man, 75 years old, who could not read or write, and did not authorize the appointment of himself as administrator, and he was totally incompetent to administer upon said estate, and he was improperly advised and imposed upon by Hulse, when he was appointed administrator, and did not even know that he was being appointed when he was so appointed"; and "because of fraud in the procurement of said administration, practiced on the court and on petitioners by said J. Davis Pruitt and these acting in concert with him, among other things, in that it was alleged in the application for appointment that the heirs at law of Davis Pruitt, deceased had agreed that J. Davis Pruitt be appointed administrator, and requested his appointment, when in fact the heirs at law, petitioners herein, had no notice, either actual or constructive, of said application until long after the appointment; and when petitioners learned that said J. Davis Pruitt had been fraudulently appointed administrator of the estate of Davis Pruitt, deceased, they filed a petition with the ordinary of Fulton county, Ga., to have said administration set aside and declared null and void because of fraud."

The judgment of the court of ordinary is set out, and in it is found the following language:

"It appearing to the court that said letters of administration granted to said J. Davis Pruitt were obtained by fraud on the part of said J. Davis Pruitt, it is therefore ordered, adjudged, and decreed that said letters of administration granted to said J. Davis Pruitt on the estate of Davis Pruitt, deceased, be and the same are this day revoked and declared by this honorable court to be null and void, and that the said estate of Davis Pruitt, deceased, is declared to be without an administrator."

It does not appear that the court of ordinary of Fulton county granted letters of administration to J. Davis Pruitt, or in what county such letters of administration were obtained by him. It is alleged that every act of John Davis Pruitt as administrator was illegal and void, and that all suits brought by him as administrator for the recovery of the land were void and without authority, and further that—

"All suits filed in Fulton county superior court by J. Davis Pruitt as administrator of the estate of Davis Pruitt, deceased, to recover land lot 143 of the seventeenth district of originally Henry (now Fulton) county, Ga., or any part of said land lot, and especially suit No. 31411, were absolutely void and without

authority in law, because the said J. Davis Pruitt procured his appointment by fraud upon the court and upon petitioners herein, which fact has been so adjudicated, and which is evidenced by the order of the court of ordinary of Fulton county, Ga., setting aside administration and declaring it null and void because of fraud, which order is copied above."

It is alleged that Davis Pruitt, deceased—

"never executed a deed conveying said land to any one, nor has any one representing him ever conveyed said land to any one, and since the said Davis Pruitt died intestate, seized and possessed of said land, it descended to his heirs at law."

It is further alleged that the record of the grant from the state to Davis Pruitt, and the absence of any transfer of the same on the records in the office of secretary of state, was notice to all persons, so that any grantee would, as a matter of law, take with notice of the rights of the heirs at law of Davis Pruitt. No administrator was ever appointed to administer upon the estate of Julia Pruitt, deceased, and it is not alleged whether administration was had upon the estate of Stephen Pruitt.

Anticipating the defenses which might be set up by the defendant, the petition also alleged in effect that defendant's original predecessor, in claiming title to said land, entered with full knowledge that he had no title, and that the title was in Davis Pruitt, and had come into possession of the land with full knowledge of petitioner's rights, title, and interest therein, and is not a bona fide purchaser without notice. It is not alleged in what manner the defendant acquired possession of the land sued for. There is no allegation that any of the petitioners or their predecessors in title since the death of Davis Pruitt in 1857 have been in possession of the land, or that any one holding adversely to the defendants have been in possession since 1857. The petition does not allege who were the parties to the suit brought in the court of ordinary of Fulton county to set aside the judgment appointing J. Davis Pruitt as administrator of the estate of Davis Pruitt, deceased, and therefore it does not appear that this defendant was a party to that proceeding, although information on that subject was called for by special demurrer.

The defendant filed general and special demurrers to the petition. Among the grounds of special demurrer were: (a) There is no allegation in the petition as to why defendant is said to be illegally or fraudulently in possession of the property sued for, and there is no allegation going to show that the defendant is not a bona fide purchaser, or that he came into possession with knowledge of any petitioners' rights. (b) That the allegations in regard to notice by reason of the facts of record in the office of the

secretary of state are an erroneous conclusion of law, and that the facts alleged are not such notice to defendant as would prevent her from becoming a bona fide purchaser without notice. (c) That all allegations in regard to notice on the part of the defendant were mere conclusions, without the statement of facts upon which they were based, and were insufficient to charge the defendant. (d) That the proceedings in the court of ordinary upon which the judgment revoking letters of administration of J. Davis Pruitt was based are not sufficiently set out, and the allegation that no act of said administrator is binding upon petitioners, and that every act of said administrator was illegal and void and absolutely without any binding force or effect upon the rights of plaintiff is an incorrect legal conclusion; that no facts are shown sufficient to indicate that his acts as administrator were illegal and void. (e) That the allegation in regard to the suits filed in Fulton superior court by J. Davis Pruitt, as administrator of the estate of Davis Pruitt, were insufficient, because the same are not named and described.

The court sustained the general demurrer and all the special demurrers, and the plaintiffs excepted.

Hill & Adams, of Atlanta, for plaintiffs in error.

Linton C. Hopkins, of Atlanta, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(153 Ga. 95)

COLLINS et al. v. STATE. (No. 2644.)

(Supreme Court of Georgia. March 4, 1922.)

(Syllabus by Editorial Staff.)

1. Criminal law §1064(4) — Ground of motion for new trial, not showing when defendants' declaration made, insufficient to show error.

On a trial for murdering a deputy sheriff, claimed to have been searching for contraband liquor, a ground of a motion for new trial, complaining of the admission of a statement by one of the defendants that he had plenty of liquor, and was going to get some wine, did not show error, when it did not show when the declaration was made, as it may or may not have been admissible as part of the res gestae, or because of the circumstances in connection with which it was made.

2. Homicide §158(3) — Threats by accused admissible, though conditional and uncommunicated.

On a trial for murder, threats by accused against the deceased before the homicide were admissible as tending to show malice, though stated conditionally and not communicated to deceased.

3. Criminal law §1064(4)—Ground of motion not considered when contents of diagram not shown, and copies not set forth or attached.

A ground of a motion for a new trial, complaining of the admission of a diagram or plat, will not be considered, where it does not appear therefrom what the diagram showed, and no copies are set forth therein or attached to the motion as an exhibit.

4. Witnesses §274(1)—Testimony on cross-examination as to decedent's character held admissible to repel inference from direct testimony.

On a trial for murdering a deputy sheriff claimed to have been searching for contraband liquor, where a witness for defendant testified that deceased asked him where he could find some liquor, his testimony on cross-examination that he never saw deceased touch liquor, or saw him when he indicated that he had had any, was admissible to repel the inference that he was a drinking man, and desired the liquor for his own use, over the objection that it was irrelevant and tended to prove the good character of deceased when it had not been attacked.

5. Criminal law §1064(4)—Ground of motion, complaining of evidence set forth in preceding grounds, not good in form.

A ground of a motion for new trial, complaining that the court erred in admitting all of the evidence set forth in the preceding grounds, was not good in form.

6. Homicide §300(14)—Failure to charge on self-defense in immediate connection with voluntary manslaughter not erroneous.

Where the jury could find that defendant acted in self-defense on account of reasonable fears aroused by words, threats, or menaces, it is not erroneous in charging on voluntary manslaughter under Pen. Code 1910, § 65, to fail or refuse to charge in immediate connection therewith the right of the jury to consider words, threats, or menaces in determining whether the circumstances justified the fears of a reasonable man that his life was in imminent danger, or that a felony was about to be committed.

7. Homicide §317 — Inapplicable instruction as to deceased's right to arrest held not ground for new trial.

On a trial for murdering a deputy sheriff in connection with his attempt to search defendants' automobile for contraband liquor, where it was conceded that he had no warrant, an instruction as to his right to arrest with a warrant or without a warrant for an offense committed in his presence, etc., though inapplicable, held not ground for a new trial, where the court subsequently explained that a search without a warrant was illegal, and that accused was authorized under such circumstances to use such force as was necessary to resist the illegal search and arrest, etc.

8. Homicide §317—Inappropriate instruction as to presumption of performance of duties held not ground for new trial.

On a trial for murdering a deputy sheriff attempting to search defendants' automobile for

contraband liquor, where it was not contended that he was armed with a search warrant, and the court charged that officers were presumed to perform their duties according to law, and that no officer had a right to make an arrest or search unless he did so with a warrant, the inappropriateness of the instruction as to such presumption held not ground for a new trial.

9. Criminal law §789(17)—Instruction as to sources of reasonable doubt held not erroneous.

An instruction that a reasonable doubt must arise from the evidence on behalf of the state or that on behalf of defendants, or the lack of evidence, or the conflict in the evidence, or from defendants' statements or from any one or more or all of such sources combined, was not erroneous on the ground that such doubt may arise from the weakness or insufficiency of the evidence, or the unreasonableness of the testimony and from other causes.

10. Criminal law §811(6)—Instruction as to consideration of defendants' sworn testimony and unsworn statements held not objectionable.

Where defendants jointly indicted testified under oath, and two of them made unsworn statements, instructions that defendants had a right to make such statements, that they should not be under oath, and should have such force and weight as the jury thought proper to give them, and that the jury might believe the statements in preference to the sworn testimony, if they thought proper to do so, and that defendants' sworn testimony should be considered along with the other evidence and given such weight as the jury thought proper from all the facts and circumstances, was not objectionable on the theory that no reference should have been made to any statements by defendants not making unsworn statements, and that the testimony of defendants was singled out and minimized.

11. Homicide §301—Charge on defense of defendants' brother unnecessary when not set up in testimony or statements.

Where defendants did not set up in their statements or sworn testimony that they shot deceased to protect the brother of two of them who was the brother-in-law of another, but did set up the defense of self-defense and homicide under the influence of reasonable fears, and the court fully, clearly, and correctly instructed as to such defenses, charges based on the right to defend such brother or under Pen. Code 1910, § 75, that instances standing upon the same footing of reason and justice as those enumerated were justifiable homicides, were unnecessary.

12. Criminal law §958(2)—Motion for new trial must show that newly discovered evidence not known during the trial.

Affidavits in support of a motion for a new trial for newly discovered evidence should have affirmatively stated that movants and their counsel did not know of the evidence during the trial as well as before the trial, and where they failed to do so they showed no cause for a new trial, as defendants, learning of evi-

dence during the trial, cannot take their chances of a verdict and then complain thereof.

Atkinson, J., dissenting.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Kelley Collins and others were convicted of murder, and they bring error. Affirmed.

E. J. Giles, of Lyons, Kirkland & Kirkland, of Metter, and W. T. Burkhalter, of Reidsville, for plaintiffs in error.

J. Saxton Daniel, of Claxton, Elders & De Loach, E. C. Collins, and S. B. McCall, all of Reidsville, James K. Hines, of Atlanta, R. A. Denny, Atty. Gen., and Graham Wright, Asst. Atty. Gen., for the State.

FISH, C. J. Kelley Collins, Roach Sikes, George Sikes, and Abram Sikes, were jointly tried on an indictment charging them jointly with the murder of Wade H. Coleman, by willfully and maliciously killing him in Tattnall county on July 24, 1920, by then and there shooting him with a rifle and shot-guns. Coleman was a deputy sheriff, and, as the state contended, had been active in his efforts to arrest and prosecute violators of the prohibition law, and on the occasion he was killed by the defendants was endeavoring to search for contraband liquor in automobile in which defendants were riding; and when he got upon the running board of the car defendants, who were heavily armed, got out of the car with their guns, and, taking positions some short distance from the car, began firing on the deceased when he was making no felonious assault on any of them; and three of the defendants shot and maliciously killed him. The defendants contended substantially that the deceased jumped upon the running board of their car without a warrant to search it, had a pistol, and with it made a felonious assault upon them, and that he was killed in order to prevent such assault being carried into effect, and that in shooting the deceased they acted purely in self-defense and without malice, and that they were justified in all they did at the time of the homicide. There was a verdict finding all of the defendants guilty as charged, with a recommendation to mercy. All made a joint motion for a new trial, which was overruled, and they excepted. The first three grounds of the motion were the usual grounds, that the verdict was contrary to law and the evidence and without evidence to support it.

[1] 1 (Ground 4). A ground of the motion complained that a witness for the state was permitted to testify, over defendants' objection that the testimony was irrelevant, that Kelley Collins "said he had plenty of liquor and was going to get some wine." The motion does not disclose when such declaration was made. It may or may not have been

admissible, dependent upon whether it was a part of the *res gestæ*, or the circumstances in connection with which it was made. This ground is therefore without merit.

[2] 2 (Grounds 5 and 6). On a trial for murder threats uttered by the accused against the deceased before the homicide were admissible in evidence as tending to show malice, although they were stated conditionally and were not communicated to the deceased. *Golatt v. State*, 130 Ga. 18, 60 S. E. 107; *Graham v. State*, 125 Ga. 48 (2), 53 S. E. 816. Accordingly, grounds 5 and 6 of the motion, assigning error upon the admission of evidence of such threats, are not meritorious.

[3] 3. Ground 7 of the motion assigns error upon the admission in evidence of "a purported diagram or plat of the scene of the homicide, showing distances," etc., over the objection of the accused "that it had not been shown the said diagram or plat was correct." This assignment of error will not be considered; it not appearing from the ground itself what the diagram or plat shows, and no copies thereof being set forth in the ground, or attached to the motion as an exhibit. *Clare v. Drexler*, 152 Ga. —, 110 S. E. 176.

[4] 4 (Ground 8). The state contended that the deceased was killed near Cobbtown. A witness for the defendants testified, on direct examination, that a few hours before the homicide the deceased approached witness and another, and asked, "Boys, you know where any liquor is?" to which witness said, "Yes; I could find some;" and deceased further inquired, "Well, where is it?" On cross-examination the witness was allowed to testify:

"Wade Coleman [the deceased] never asked me about liquor before this evening, that I remember of. I knew where liquor was, and knew where I could get it. This was the first time Wade asked me for it. * * * I have lived around Cobbtown for years, and I guess Wade Coleman was born and reared out there all his life. I never did see him touch a drop of liquor in his life, and never saw him when he indicated he had a drop in his life."

The testimony of the witness so delivered on cross-examination tended to repel any inference which might be drawn from the testimony of the witness on his direct examination, to the effect that the deceased was a drinking man and desired the liquor for his own use; and the court did not err in admitting such evidence on cross-examination, over the objection that it was irrelevant and tended to prove the good character of the deceased when it had not been attacked.

5 (Ground 9). The testimony of Will Eason, set forth in the ninth ground of the motion, and to the admission of which error is assigned upon the grounds that it was irrelevant, hearsay, and prejudicial to the defendants, was not subject to the objections. The witness testified in behalf of the defend-

ants, and the testimony objected to was brought out on his cross-examination. In view of the testimony on the direct examination, and other testimony on the cross-examination, the evidence objected to was admissible.

[5] 6. The tenth ground of the motion, complaining that the court erred in admitting all of the evidence set forth in the preceding nine grounds, of the motion for new trial is not good in form, nor meritorious.

[6] 7 (Grounds 11 and 12). "On the trial of one for murder, where the evidence or the defendant's statement at the trial would authorize the jury to find that the person killing acted in self-defense on account of a reasonable fear aroused in his mind by words, threats, or menaces, in connection with the other facts in the case, it is not erroneous for the court, in instructing the jury on the law of voluntary manslaughter, as contained in the Penal Code of 1910, § 65, to fail or refuse to charge in immediate connection therewith the right of the jury to consider words, threats, or menaces, in determining whether the circumstances attending the homicide were such as to justify the fears of a reasonable man that his life was in imminent danger or that a felony was about to be committed upon his person." *Deal v. State*, 145 Ga. 33, 88 S. E. 573; *Vernon v. State*, 146 Ga. 709, 92 S. E. 76. In view of the above ruling, the eleventh and twelfth grounds of the motion are without merit.

[7] 8 (Ground 13). The defendants, as before stated, were jointly on trial for murder. There was evidence tending to show the commission of the homicide under the following circumstances: Defendants were traveling on a public road in an automobile. The deceased, who was an arresting officer, suspecting that they were carrying contraband liquor, stopped them, declaring his intention to search their car. The defendants demanded that he show his search warrant, to which the officer replied that he did not have one, and did not need one, and proceeded in an effort to search the car, notwithstanding resistance by the defendants. In a difficulty which ensued, the officer was killed by the defendants shooting him with a rifle and shotguns. The state did not introduce evidence showing there was contraband liquor in the car, the defendants adduced contradicted evidence to the effect that the car contained no such liquor. The court instructed the jury:

"Now I charge you in connection with this * * * the question of arrest without a warrant—not that it is directly involved in this case, but merely to illustrate the rights and privileges of the parties interested. An arrest may be made for a crime by an officer with a warrant, or without a warrant if the offense is committed in his presence, or if the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for

want of an officer to issue a warrant. Now that question of arrest is not directly involved, but merely to illustrate the rights that the officer would have in undertaking to enforce the law."

It is entirely reasonable to assume, if the deceased as an arresting officer was attempting, on the occasion of his homicide, to search the automobile of the defendants for contraband liquor, that his purpose was to arrest the defendants for having it in their possession, in the event he should find it in the car. The excerpt complained of, considered without reference to other portions of the charge, would be inapplicable under the facts of the case, and error, because it is conceded that the deceased officer was not provided with a warrant when he undertook to search the automobile. However, when considered in connection with the entire charge, a new trial is not required. The court in the instructions to the jury fully explained that without a warrant the search by the deceased officer was illegal, and that the accused, under such circumstances, would be authorized to use such force as was necessary to resist the illegal search and arrest, and a homicide committed in defending against the illegal arrest and search would be murder, manslaughter, or justifiable homicide, according to whether there was malice, unnecessary force, or only such force as was necessary in resisting the arrest.

[8] 9 (Ground 14). The court instructed the jury as follows:

"Now, of course, the presumption is that officers perform their duties according to law."

This was excepted to because not applicable in criminal cases; that "in this case it was incumbent upon the state to show that the officer undertaking to make the search was clothed with a duly issued warrant authorizing him to search the car in which the defendants were riding"; that the instruction "put upon the defendants the burden of showing that the deceased, at the time said search was undertaken to be made, did not have a duly issued search warrant to authorize him to make said search, when under the law the burden was upon the state to show that the deceased did have such a warrant." As part of the same sentence containing the instruction excepted to, and immediately following it, the court added:

"But no officer has a right either to make an arrest or a search unless they do so with a warrant," etc.

The state, as already said, did not show that the deceased had a warrant to search the car, and indeed counsel for the plaintiffs in error say in their brief that—

"The state did not contend that the deceased was armed with a search warrant, and in fact admitted in open court he had none."

Accordingly, the inappropriateness of the

instruction in this case, in view of the circumstances stated and the exceptions assigned on the charge, does not require a reversal of the judgment refusing a new trial.

10 (Ground 15). There was an exception to an instruction as to the law of conspiracy. The only ground of complaint was that it was not authorized by the evidence, and, being so unauthorized, the charge was misleading. The evidence was amply sufficient to authorize the instruction.

11 (Ground 16). The instruction excepted to in this ground of the motion was so clearly not error for the reason assigned that no further reference to it is necessary.

[9] 12 (Ground 17). After defining reasonable doubt, the court gave the following instruction on that subject:

"The doubt must arise upon the trial of the case from the evidence introduced on behalf of the state, or the evidence introduced on behalf of the defendants, the lack of evidence, the conflict in the evidence, or from the defendants' statements, or from any one or more or all of these sources combined the doubt must arise."

This instruction was not error for the alleged reason that—

"Said doubt may legally be created in the minds of the jurors from the weakness or insufficiency of the evidence, or the unreasonableness of the testimony, and for other causes."

[10] 13 (Grounds 18 and 19). As heretofore stated, the four defendants were jointly indicted and jointly tried. Without objection by the state all four of them were permitted to testify as witnesses under oath, and all did testify at length, both on direct and cross examination. Two of them, however, Kelley Collins, and Abram Sikes, after finishing their testimony under oath, made what are called, in the brief of evidence, "unsworn statements," which statements were however, quite brief. The court instructed the jury as follows:

"(a) Now these defendants * * * have a right to make such statements, each of them, in their own behalf as they think proper. They shall not be under oath, and shall have such force and weight only as you think proper to give the statements. You may believe the statements in preference to the sworn testimony in the case, if you think proper to do so. Now I am charging you that in connection with the statements. (b) Now these defendants were each sworn in behalf of the others as part of the evidence in the case; and you will take that and consider that evidence along with the other evidence in the case, both for the state and the accused, and give the evidence such weight and force as you think proper from all the facts and circumstances of the case, and give such force and weight to their statements, or that portion of each of these defendants that was submitted as statements."

The court then, addressing counsel, said:

"I believe they made some portions of statements."

Counsel for defendants replied:

"Yes, some of them."

The court then, continuing the instruction on the subject, charged:

"Now you remember those things, gentlemen, and remember that the statements of any one or more, as the case may be, made in his own behalf, is not under oath, and is entitled to such force and weight as you think proper to give the statement. You may believe the statement in preference to the sworn testimony, if you think proper to do so. That portion of the testimony of these defendants that was under oath, why you are to take and consider that along with the other evidence in the case in determining their guilt or innocence."

The error assigned on the instruction we have designated as (a) is:

"That the four defendants were being jointly tried, and that Abram Sikes [?], George Sikes, and Roach Sikes neither made any statement in their own behalf, but were sworn as witnesses without objection on the part of the state. * * * This being the case, the court should not have made any reference whatever to statements of these defendants; and that the charge given tended to injure the defendants before the jury by confusing them as to what was evidence in their own behalf testified to by them and by each of them."

The error assigned on the instruction indicated as (b) is:

"That it singled out the four defendants from all the other witnesses in the case and instructed the jury to give their evidence such weight and force as they thought proper from all the facts and circumstances of the case, without applying the same rule to the other witnesses in the case, which naturally minimized and cast reflections upon the evidence of these four defendants and operated to their prejudice; and because it left the jury in a position to disregard the rules of law laid down for the guidance of juries in passing on the testimony of witnesses and their credibility."

While the instructions might have been more aptly phrased, yet when considered together they substantially stated the law on the subject, and furnished no cause for a new trial, for any reason alleged. See *Berry v. State*, 122 Ga. 429, 50 S. E. 345. The charges excepted to did not contravene what was held in *Staten v. State*, 140 Ga. 110, 78 S. E. 768.

[11] (14 Grounds 20, 21, 22). "(20) One of the main contentions in the case was that the deceased with a pistol in his hand had hold of one of the defendants, Abram Sikes, who was the brother of George and Roach Sikes, and the brother-in-law of the defendant Kelley Collins, who married the sister of Abram Sikes and the other two defendants, and was threatening to shoot him, Abram Sikes, and these defendants, hearing and be-

lieving that the deceased would commit a felony upon their brother and brother-in-law and shoot and kill him, shot in order to protect their brother Abram Sikes's life. And in fact the deceased did carry out his threats, and actually shot their brother Abram Sikes, and also the brother-in-law, Kelley Collins, at the time of the homicide." Error was assigned on the court's failure to state this contention in connection with the other contentions of the defendants. (21) "Because the court erred in failing to charge the jury that under the law of this state a brother has the legal right to defend his brother against an apparent felonious assault or a felonious assault, and that if the jury believed that George Sikes and Roach Sikes shot and killed the deceased, Wade Coleman, to prevent him, the deceased, from committing a felony on their brother, Abram Sikes, or if they, as reasonable, courageous men at the time of the shooting believed that a felony was about to be committed upon their brother, then they had the right to shoot and to kill the deceased in order to prevent him from committing a felony upon their brother." (22) "Because the court erred in failing to charge the jury (Penal Code, section 75), as follows: 'All other instances which stand upon the same footing of reason and justice as those enumerated, shall be justifiable homicide.'"

The failure of the court to instruct the jury as complained of in these three grounds of the motion is not cause for new trial. The defendants did not set up, either in the statements made by two of them to the jury or in the testimony under oath given by all of them, that they shot the deceased to protect Abram Sikes as the brother of two and the brother-in-law of one of them, but they did set up the defense of self-defense and of homicide under the influence of reasonable fears; and the court fully, clearly, and correctly instructed the jury as to such defenses, thereby giving them the full benefit of the law as to their defenses whether they were kin or not.

[12] 15 (Ground 23). The refusal of a new trial on the ground of alleged newly discovered evidence is not error. The state made a countershowing; rebutting much of the evidence submitted by movants; the evidence for movants was largely merely cumulative; and the movants and their counsel made affidavits that they did not know of the alleged newly discovered evidence "before the trial," and that "the same could not have been discovered by the exercise of ordinary diligence." If they knew of the evidence during the trial, they could not go on with it, take the chances of a verdict in their behalf, and then complain of a verdict against them. Their affidavits should have affirmatively stated that they did not know of the evidence during the trial. Failing in this, they have no cause for a new trial on the ground of the alleged newly discovered evidence.

16. There was ample evidence to authorize the verdict.

Judgment affirmed.

All the Justices concur, except ATKINSON, J., dissenting.

HINES, J., disqualified.

(28 Ga. App. 468)

HUFF v. STATE. (No. 13292.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Criminal law §822(1)—Charges to be considered in light of entire charge and facts of case.

The exceptions to the charge of the court, when considered in the light of the entire charge and the particular facts of this case, are without substantial merit.

2. Criminal law §935(1)—New trial properly denied when verdict authorized.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Warren County; E. T. Shurley, Judge.

Action between Madison Huff and the State. Judgment for the State, and Huff brings error. Affirmed.

L. D. McGregor, of Warrenton, for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 471)

HURST v. STATE. (No. 13313.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

Criminal law §935(1)—New trial properly denied, when verdict authorized and approved.

The special grounds of the motion for a new trial, when the charge of the court is considered in its entirety and as adjusted to the evidence, is without merit. There is some evidence to authorize the verdict, and, the verdict having the approval of the trial judge, it was not error to overrule the motion for a new trial.

Error from City Court of Wrightsville; S. W. Sturgis, Judge.

Action between Warren Hurst and the State. Judgment for the State, and Hurst brings error. Affirmed.

B. B. Blount, of Wrightsville, for plaintiff in error.

W. C. Brinson, Sol., of Wrightsville, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 504)

THURMON v. STATE. (No. 13310.)

(Court of Appeals of Georgia, Division No. 1.
April 14, 1922.)

(Syllabus by the Court.)

1. Criminal law §1088(17)—Affidavits, not referred to in motion for new trial nor attached, not considered.

The only ground of the amendment to the motion for a new trial is as follows: "Because, after the hearing of the above-stated case, and after the verdict had been rendered, and after movant had been sentenced, newly discovered evidence has come into his hands, of which he had no knowledge, nor means of obtaining same, at or before the time of the trial." Following this ground the record contains several affidavits, evidently relating to it; but these affidavits cannot be considered, since they are not embodied or referred to in the ground, nor attached thereto as exhibits, nor identified in any manner. *Summerlin v. State*, 130 Ga. 791 (1), 61 S. E. 849; *Leathers v. Leathers*, 132 Ga. 211 (5), 63 S. E. 1118.

2. Criminal law §935(1)—New trial properly denied, when verdict authorized.

The evidence authorized the verdict, and it was not error to overrule the motion for a new trial.

Error from Superior Court, De Kalb County; John B. Hutcheson, Judge.

Ralph Thurmon was convicted of an offense, and he brings error. Affirmed.

C. W. Buchanan, of Atlanta, for plaintiff in error.

A. M. Brand, Sol. Gen., of Lithonia, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 482)

BRINSON v. STATE. (No. 13213.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1922.)

(Syllabus by the Court.)

Drunkards §11—Evidence of drunkenness, manifested by profane language, held to support conviction.

This case is here upon the sole assignment of error that the evidence does not authorize the verdict. The defendant was charged with

the crime of being upon a public road in an intoxicated condition, which intoxication was made manifest by boisterousness and by indecent conduct and acting, and by using vulgar, profane, and unbecoming language, and by loud and violent discourse. The evidence adduced upon the trial showed that the defendant was drunk, and that his drunkenness was made manifest by his using profane language. This was sufficient to authorize his conviction. It follows that the court did not err in overruling the motion for a new trial.

Error from City Court of Cairo; L. W. Riggsby, Judge.

J. W. Brinson was convicted of being on a public road in an intoxicated condition, etc., and he brings error. Affirmed.

Jeff A. Pope, of Cairo, for plaintiff in error.

M. L. Ledford, Sol. pro tem., of Cairo, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 434)

PICKENS CO. v. THOMAS. (No. 11508.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Authority of manager of corporation.

"The general manager of a mercantile and farming corporation is without authority, by virtue of his office alone, to employ counsel to represent employees thereof who are charged with larceny of property alleged to be that of third persons, but claimed by such corporation as its own, in the absence of express authority from the corporation, or ratification by the corporation of his act in so employing counsel, or by a previous course of dealing known to the corporation, from which such authority might be inferred; and this is true although prior to the indictments against these employees a third person who claimed one of the hogs alleged to be stolen had prosecuted a possessory warrant for the same against the corporation, and although the property alleged to be stolen by the employees was claimed by the corporation and found upon its premises where the employees were working."

2. Right of attorney to retaining fee.

"Where an attorney at law is employed by a corporation as its general counsel for one year, the position having no fixed salary attached, but the attorney is to be paid a separate fee for every specific legal service rendered the corporation, and there is no agreement between the attorney and the corporation as to any retaining fee, such attorney is not entitled, as a matter of right, at the end of his year's employment, to a retaining fee in addition to the fees paid him for specific services rendered his client during the period of his employment."

Error from City Court of Jesup; D. M. Clark, Judge.

Action by J. R. Thomas against the Pickens Company. Judgment for plaintiff, and defendant brings error. Reversed in conformity to Supreme Court's answers to certified questions. 152 Ga. —, 111 S. E. 27.

Gibbs & Turner, of Jesup, and Wilson & Bennett, of Waycross, for plaintiff in error.

J. H. Thomas, J. W. Walker, and Jas. R. Thomas, all of Jesup, for defendant in error.

LUKE J. [1, 2] This court certified to the Supreme Court the following question involved in this case:

"(1) The Pickens Company is a private corporation chartered under the laws of this state and engaged in merchandising and farming. Certain of the employees of the company were prosecuted and indicted by third persons for hog stealing. These employees were defended in the courts by an attorney at law, and he subsequently presented a bill for his services to the Pickens Company, which refused to pay it, and the attorney brought suit against the company. Upon the trial of this suit the evidence authorized a finding of the following facts: The hogs which the employees were charged with stealing were claimed by the Pickens Company, and were found upon the company's premises where the indicted employees were working; prior to these indictments a third person, who claimed one of these hogs, prosecuted a possessory warrant for the hog against the Pickens Company; the attorney was employed to defend these employees by the general manager of the Pickens Company, who was also a director thereof, and who told the attorney at the time of his employment that the Pickens Company would pay his fees. It was not, however, shown upon the trial that the corporation itself, through its board of directors, had employed the attorney to defend these employees, or that the general manager had authority under the charter of the corporation or its by-laws to employ him, or that the action of the general manager in employing him had ever been ratified by the board of directors of the corporation, or that under the charter of the corporation or its by-laws such an employment was within the powers of the corporation. Under these facts, would a verdict finding the defendant liable be contrary to law?"

"(2) Where an attorney at law is employed by a corporation as its general counsel for one year, the position having no fixed salary attached, but the attorney to be paid a separate fee for every specific legal service rendered the corporation, and there being no agreement between the attorney and the corporation as to any retaining fee, is the attorney entitled, as a matter of right, at the end of his year's employment, to a retaining fee in addition to the fees paid him for his specific services?"

The Supreme Court answered the first question in the affirmative, and the second question in the negative, and the preceding headnotes are the headnotes of that decision. For the full opinion of the Supreme

Court see *Pickens Co. v. Thomas*, 152 Ga. —, 111 S. E. 27, decided February 16, 1922.

Under the above rulings, and the facts of the instant case, the plaintiff was entitled to recover the sum of \$50 only, with interest thereon (that amount being the balance of an attorney's fee which upon the trial the defendant admitted it owed the plaintiff), and the verdict for \$800 in favor of the plaintiff was contrary to law and the evidence, and the court erred in overruling the motion for a new trial.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 509)

HALE v. HALE. (No. 12820.)

(Court of Appeals of Georgia, Division No. 2.
April 14, 1922.)

(Syllabus by the Court.)

1. Tenancy in common \S 38(1)—Trover will not lie between tenants for cotton paid as rent.

"As a general rule, trover will not lie in favor of a tenant in common against his cotenant." *Hall v. Page*, 4 Ga. 428, 48 Am. Dec. 235; *King v. Neel*, 98 Ga. 438(1), 441, 25 S. E. 518, 58 Am. St. Rep. 311; *Starnes v. Quin*, 6 Ga. 84(3). The instant action, brought by the administratrix of the estate of her deceased husband against the brother of the decedent for the recovery of five bales of cotton, does not fall within either of the recognized exceptions to this rule. The uncontroverted evidence showing that four of the bales, marked and identified, represented rent from land paid to the decedent and the defendant as owners in common, and that the defendant thus had an equal right of possession with the estate of the decedent, and was entitled to these four bales, or a portion thereof, as his proper share of such rent, if a division were made, the verdict for the defendant as to the four bales was fully authorized, if not demanded, by the evidence.

2. Evidence \S 593—Trial \S 105(2)—Hearsay evidence insufficient to support verdict; hearsay evidence, admitted without objection, will not establish facts in issue.

The jury, however, found in favor of the defendant for the entire five bales. As to the fifth bale, which was unmarked, a verdict was demanded for the plaintiff. The defendant testified, on direct examination that all the bales were his and represented common rents, but on cross-examination admitted that he did not see the cotton delivered or put in the warehouse, and that he knew "nothing about it of" his "own knowledge, only what was told" him. There was no other evidence that this bale belonged to the defendant, or was part of the common rental, and nothing to dispute the evidence of the plaintiff identifying this particular bale as property of her husband's estate. The rule is that while, in the absence of a proper exception to the evidence, a verdict will not be set aside on account of the erroneous admis-

sion of hearsay testimony, yet where the verdict is entirely unsupported, except by such testimony, which is wholly without probative value, its introduction without objection will give it no weight or force in establishing the facts in issue. *Eastlick v. Southern Ry. Co.*, 116 Ga. 48, 42 S. E. 499; *Kemp v. Central of Ga. Ry. Co.*, 122 Ga. 559(2), 560, 50 S. E. 465; *Miller v. McKenzie*, 128 Ga. 746, 55 S. E. 952. A new trial must therefore be granted, as the verdict was to this extent without evidence to support it.

(a) The exception that the court erred in admitting the defendant's testimony that the five bales in dispute were his, and were his part of the rents from land owned jointly by him and his brother, upon the ground that it related to a transaction with a deceased person, need not be considered, for the reason that the question as to its admissibility is controlled by the preceding broader ruling upon its effect.

3. Other grounds of motion.

None of the remaining grounds of the motion for new trial authorize a reversal. The alleged errors as to the admission of testimony concerning the four bales of cotton, which were admittedly raised upon lands owned in common, being controlled by the preceding rulings, and not being likely to recur in a subsequent trial, need not be determined.

Error from City Court of Monroe; A. C. Stone, Judge.

Action by M. A. Hale, administratrix, against E. C. Hale. Judgment for defendant, and plaintiff brings error. Reversed.

Orrin Roberts, of Monroe, for plaintiff in error.

R. L. & H. C. Cox, of Monroe, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 462)

SHIRLEY v. STATE. (No. 13264.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Charge not erroneous.

There is no merit in that ground of the motion for a new trial which alleges error in the charge of the court in reference to the "maximum" and "minimum" term the jury could prescribe by their verdict.

2. Criminal law \S 939(1), 942(1)—New trial not granted for evidence discoverable by ordinary diligence; newly discovered impeaching evidence not ground for new trial.

A new trial should not be granted on the ground of alleged newly discovered evidence because:

(a) The alleged newly discovered evidence is that of two men who were walking in the road with accused when, as claimed by him,

he was stopped by the prosecutor and the quarrel occurred, and the witnesses themselves swear that they heard the quarrel and saw the fight. This evidence could have been discovered before the trial by the exercise of ordinary diligence.

(b) The only effect of the evidence would be to impeach the witnesses for the state, and it is settled law in this state that, even "though the witness sought to be impeached by newly discovered evidence was the only witness against the prisoner upon a vital point in the case, if the sole effect of the evidence would be to impeach the witness, a new trial will not be granted." *Key v. State*, 21 Ga. App. 795 (1), 95 S. E. 269, and citations.

3. Criminal law §160—Verdict supported by evidence and approved by trial judge not disturbed.

There is ample evidence to support the verdict, the trial judge has approved it, and, no error of law having been shown, this court has no power to interfere.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Daniel Shirley was convicted of an offense, and he brings error. Affirmed.

Garnett S. McMillan and McMillan & Erwin, all of Clarksville, for plaintiff in error. J. G. Collins, Sol. Gen., of Gainesville, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 452)

PALMER v. STATE. (No. 13225.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(Syllabus by the Court.)

Homicide §309(4)—Charge on manslaughter held authorized.

The defendant was indicted for murder. Upon conflicting evidence the jury was authorized to convict him of manslaughter. Under the evidence, a charge upon the law of manslaughter was proper, and the charge given was not error for any reason assigned. It was not error to overrule the motion for a new trial.

Error from Superior Court, Union County; J. B. Jones, Judge.

Bill Palmer was convicted of manslaughter, and he brings error. Affirmed.

W. B. Sloan and W. V. Lance, both of Gainesville, and C. H. Edwards, of Cleveland, for plaintiff in error.

J. G. Collins, Sol. Gen., of Gainesville, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 474)

THOMAS v. STATE. (No. 13317.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(Syllabus by the Court.)

1. Failure to pass on exceptions and demurrer does not require new trial.

Granting (but not deciding) that the court erred in not specifically passing on the exceptions to the answer of the judge of the county court, and on the demurrer to said exceptions, this was not such error as, under all the facts of the case, would require the grant of a new trial.

2. Petition for certiorari properly overruled.

Under the judge's answer to the writ of certiorari, there is no merit in any of the grounds of the motion to set aside the judgment which are embraced in the petition for certiorari, and the judge of the superior court did not err in overruling the petition.

Error from Superior Court, Oconee County; Blanton Fortson, Judge.

Action between H. L. Thomas and the State. Judgment for the State, and Thomas brings error. Affirmed.

John J. Strickland and Jim W. Arnold, both of Athens, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

(28 Ga. App. 446)

E. H. ODOM BROS. CO., Inc., v. GUNTER. (No. 13220.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(Syllabus by the Court.)

Petition for certiorari properly overruled.

Upon the petition for certiorari and the answer thereto, it was not error for the judge of the superior court to overrule and deny the same.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between the E. H. Odom Bros. Company, Inc., and N. U. Gunter. Judgment for the latter, and certiorari overruled by the superior court, and the former brings error. Affirmed.

Claud Brackett and Ev. T. Williams, both of Atlanta, for plaintiff in error.

Geo. B. Rush, of Atlanta, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 453)

CALLAWAY v. LIVINGSTON. (No. 13229.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)*

1. Abatement and revival \S 54—Executors and administrators \S 430—No recovery for negligence when no suit pending at death of negligent party; action for executor's negligence must be brought against him individually.

The petition as amended did not set out a cause of action, and the court erred in overruling the general demurrer.

(Additional Syllabus by Editorial Staff.)

2. Executors and administrators \S 119—Estate not liable for torts unless pecuniary advantage results.

Executors and administrators cannot by any tortious act, whether intentional or negligent, create a liability against the estate represented by them, except where pecuniary advantage results therefrom to the benefit of the estate; their torts being individual acts.

3. Appeal and error \S 1144—Amendment by striking representative character of executor denied.

In an action against an executor as such for his own negligence and the negligence of his testator, a judgment for plaintiff will not be affirmed with direction that plaintiff be permitted to amend the declaration, verdict, and judgment by striking the testator's name, and the executor's representative character, where the executor is named only in the statement of the case, in the allegation that he is indebted to plaintiff in his representative capacity, and in the prayer for judgment, as other amendments would be required to state a cause of action against the executor individually, and moreover he is entitled to a trial of the case as between him and plaintiff.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Solomon Livingston against E. H. Callaway, executor. Judgment for plaintiff, and defendant brings error. Reversed.

Solomon Livingston brought suit against E. H. Callaway in his representative capacity as executor of the estate of J. B. White, deceased. The substance of the material allegations of the petition as amended is that J. B. White, deceased, was, from August 1, 1900, until March 31, 1917, the date of his death, the owner of a certain lot and building on Broad street in Augusta, Ga.; that extending through the roof of said building was a brick chimney about 7 feet high, constructed of brick and mortar; that for many years this chimney had been allowed by White, his agents and representatives, to fall into a state of disrepair, the chimney being out of plumb and in a dangerous and dilapidated condition; that on January 30, 1918, bricks and mortar from the top of the chim-

ney, because of its dilapidated condition, tumbled off onto the sloping roof of the building and were precipitated about 35 feet upon the head and shoulders of the plaintiff (who was walking upon the sidewalk by the building), striking him with such force as to cause serious and permanent injuries; that it was the duty of the deceased, his agents and representatives, to keep the building in proper repair, so as not to endanger the lives of pedestrians passing along the sidewalk adjacent thereto, but that, despite such duty, the deceased, his agents and representatives, carelessly and negligently allowed the building to fall into decay and disrepair, to the hurt and damage of petitioner, notwithstanding the deceased, his agents and representatives, knew, or by the exercise of ordinary care and diligence could have known, of the dangerous and dilapidated condition of the building and the chimney thereon. The petition prayed for damages in the sum of \$20,000 against E. H. Callaway in his representative capacity as executor of the estate of J. B. White, deceased.

The defendant interposed general and special demurrers to the petition as finally amended, which the court overruled, and the case proceeded to trial and resulted in a verdict for the plaintiff in the sum of \$10,000. The case came to this court upon exceptions to the overruling of the demurrers and to the denial of a motion for a new trial.

Callaway & Howard, of Augusta, for plaintiff in error.

Pierce Bros. and C. Henry & R. S. Cohen, all of Augusta, for defendant in error.

BROYLES, C. J. (after stating the facts as above). [1] In our opinion the petition failed to set out a cause of action, and the trial judge erred in overruling the general demurrer interposed. The petition affirmatively shows that it is based upon acts of negligence alleged to have occurred prior to the death of White, and upon negligence alleged to have occurred after his death.

Under the settled law of this state no recovery can be had for the acts of negligence on the part of White, his agents or representatives, alleged to have occurred prior to his death, since no suit based upon such acts was pending at the time of his death. This principle is set forth in the case of *Smith v. Jones*, 138 Ga. 716, 76 S. E. 40, where it was held:

"At common law a cause of action for a personal tort abated on the death of the tortfeasor. This rule was modified by statute (Civil Code, § 4421), so that it should not apply in case of the death of the defendant. The phraseology of that section leaves it plain that the exception was limited to cases where action had been instituted against the tortfeasor before his death. If the tortfeasor died before suit against him, the cause of action did not

survive. See *Frazier v. Georgia R. Co.*, 101 Ga. 77 (28 S. E. 662); *Southern Bell Tel. Co. v. Cassin*, 111 Ga. 581 (36 S. E. 881, 50 L. R. A. 694); *King v. Southern Ry. Co.*, 126 Ga. 793 (55 S. E. 965, 8 L. R. A. [N. S.] 544); *Peebles v. Charleston & Western Carolina Ry. Co.*, 7 Ga. App. 279 (66 S. E. 953)."

See, also, to the same effect, *Leathers v. Raburn*, 17 Ga. App. 437, 87 S. E. 754.

Nor can there be any recovery, under the allegations of the petition, for the acts of negligence alleged to have occurred after the death of White. In order to recover for such acts of negligence, suit should have been brought against the executor of White's estate in his individual capacity, and not in his representative capacity. The petition clearly shows that this suit was brought against the estate of White, and not against the executor thereof individually.

[2] Neither executors nor administrators can by any tortious act create liability against the estate represented by them, except where pecuniary advantage results therefrom, to the benefit of the estate. Their torts are individual acts, for which the sole remedy of the person injured is to sue them individually. The rule is the same whether injury results from intentional wrong or from mere negligence. 11 Am. & Eng. Enc. of Law (2d Ed.) p. 942. This principle has been recognized and applied in the following Georgia cases: *Parker v. Barlow*, 93 Ga. 700, 21 N. E. 213; *Anderson v. Foster*, 105 Ga. 563, 32 S. E. 873; *Carr v. Tate*, 107 Ga. 237, 33 S. E. 47; *Hundley v. Pendleton*, 9 Ga. App. 268, 70 S. E. 1115. The facts alleged in the petition in the instant case do not bring it within any exception to the general rule.

It follows from what has been said that any cause of action founded upon acts of negligence on the part of White, his agents or representatives, in failing to repair the building and chimney during his lifetime abated with his death, since no suit based upon such acts of negligence was pending at that time, and that any subsequent acts of negligence of his executor in failing to repair the building and chimney could not be the basis of an action against the estate.

[3] The request of counsel for the defendant in error that the judgment of the lower court be affirmed, with direction that the plaintiff be permitted to amend his declaration, verdict, and judgment by striking therefrom the representative character of E. H. Callaway, and also the name of J. B. White wherever it occurs, is denied. Under the allegations of the petition, such an amendment would be ineffective to set out a cause of action against the executor in his individual capacity. The only mention of the defendant in the petition is found in the statement of the case, where it is alleged that "Solomon Livingston brings this his complaint against

E. H. Callaway, in his representative capacity as executor of the estate of J. B. White, deceased," and in the first paragraph, where it is alleged that "defendant, in his representative capacity as aforesaid, is indebted to your petitioner in the sum of \$20,000," and in the prayer of the petition, which is as follows:

"Your petitioner prays judgment against E. H. Callaway, in his representative capacity as executor of the estate of J. B. White, deceased."

Therefore, if the suggested amendment to the petition were allowed, the petition would require many other amendments before it would set forth a cause of action against the executor in his individual capacity. See, in this connection, *Smith v. Ardis*, 49 Ga. 602; *Shepherd v. Southern Pine Co.*, 118 Ga. 292 (2), 45 S. E. 220. Moreover, if the executor is to be held personally liable in this case, he is entitled, as a matter of right and justice, to have the jury try the case as between him and the plaintiff, instead of trying it (as they did) as between the estate of the deceased and the plaintiff. See, in this connection, *Horn Trunk Co. v. Delano*, 162 Mo. App. 402, 142 S. W. 770(3).

The error in overruling the general demurrer to the petition rendered the further proceedings in the case nugatory.

Judgment reversed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 432)

HARTLEY v. SMITH et al. (No. 11241.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

Widow not liable on stock set apart as year's support.

"Where a man at the time of his death held a certificate for five shares of bank stock of the par value of \$100 a share, upon which a balance of \$200 of the subscription price remained unpaid, and a year's support was set aside to his widow and minor children of his 'entire estate after all the just debts are paid,' and in the schedule of the appraisers the five shares of stock set aside as a part of a year's support was valued at \$300, and subsequently, upon an inspection of a certified copy of the entire proceedings of the year's support exhibited to the cashier of the bank by the widow, the cashier issued to her a certificate for five shares of stock, in which there was recited, '60% paid in and assessable,' the receivers of the bank, which subsequently became insolvent, could not obtain against the widow a general judgment for \$200, as balance due as unpaid subscription."

Error from City Court of Louisville; M. C. Barwick, Judge.

Action by T. Y. Smith and others, receivers, against Mary Hartley. Judgment for plaintiffs, and defendant brings error. Former judgment (26 Ga. App. 212, 105 S. E. 725) vacated, and judgment of the city court reversed, in conformity to Supreme Court's decision on certiorari (152 Ga. —, 111 S. E. 41).

Evans & Evans, of Sandersville, for plaintiff in error.

R. G. Price and Phillips & Abbot, all of Louisville, for defendants in error.

LUKE, J. Hartley died March 11, 1918, leaving as an asset of his estate five shares of stock in the Farmers' State Bank of Bartow. A year's support, including this stock and comprising the entire estate of deceased "after all just debts are paid," was duly set aside to the widow and her three minor children. The stock certificate held by the husband, and likewise the one issued in lieu thereof to the widow, showed on its face the following: "60% paid in and assessable." The widow received one dividend on the stock, which was used for the benefit of herself and minor children. Later the bank was declared insolvent, receivers were appointed, and suit was brought by them against the widow and others for the balance owing on the stock. A verdict was directed and a judgment rendered against her for the full balance due for the stock. The trial judge overruled the defendant's motion for a new trial, and she excepted to his judgment. This court affirmed the judgment of the lower court. 26 Ga. App. 212, 105 S. E. 725. Upon certiorari, the Supreme Court reversed the judgment of this court, and held as quoted in the headnote. See *Hartley v. Smith*, 152 Ga. —, 111 S. E. 41, decided February 18, 1922. It is therefore ordered that the former judgment of this court in this case be vacated; and the judgment of the trial court, overruling the motion for a new trial, is reversed.

Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 479)

DUNBAR v. HINES, Director General.
(No. 11493.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1922.)

(Syllabus by the Court.)

Decision of Supreme Court conformed to.

This was an action for damages against the Director General of Railroads. The petition contained two counts. The trial court sustained general demurrers to each count, and dismissed the case. This judgment was affirmed by this court. *Dunbar v. Hines*, 25 Ga. App.

675, 104 S. E. 574. Upon certiorari, the Supreme Court reversed the judgment of this court as to the ruling that the first count of the petition did not set forth a cause of action, and affirmed it as to the ruling that the second count did not set forth a cause of action. The Supreme Court directed also that leave be given to the plaintiff so to amend the second count as to show that he did not know of the defect and danger in the engine house referred to in that count. See the full opinion of the Supreme Court, handed down March 4, 1922 (Ga. Sup.) 111 S. E. 396. Accordingly, the judgment formerly rendered by this court is vacated, and the judgment of the trial court sustaining the general demurrer to the first count of the petition is reversed, and its judgment sustaining the general demurrer to the second count is affirmed, with direction that leave be given the plaintiff to amend that count in accordance with the mandate of the Supreme Court.

Error from City Court of Macon; Du Pont Guerry, Judge.

Action by M. S. Dunbar against Walker D. Hines, Director General. Judgment of dismissal, and plaintiff brings error. Former judgment (25 Ga. App. 675, 104 S. E. 574) vacated, and judgment of the trial court reversed in part and affirmed in part, with directions, in conformity to the decision of the Supreme Court on certiorari (111 S. E. 396).

Robt. L. Berner, of Macon, for plaintiff in error.

Harris, Harris & Witman, of Macon, for defendant in error.

BROYLES, C. J. Judgment reversed in part, and affirmed in part, with direction.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 510)

AMERICAN RY. EXPRESS CO. v. ROBERTS. (No. 12879.)

(Court of Appeals of Georgia, Division No. 2.
April 14, 1922.)

(Syllabus by the Court.)

1. Carriers — 159(2), 166 — Reasonable time for delivery, as affecting time for notice of claim, is question for jury; matters to be considered in determining reasonable time stated.

Where, in an interstate shipment by express, the receipt contains a stipulation that claims "must be made in writing to the originating or delivering carriers within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed," and where, in an action for damages for failure to make delivery of goods, the carrier sets up as a defense that the written notice as actually filed was not given within

the time prescribed, it is for the jury to say what was a reasonable time for the transportation, in determining whether the notice given was within four months thereafter, except where the undisputed facts show so clear and manifest a delay that the court may as a matter of law hold it unreasonable. *Western & Atlantic R. Co. v. Summerour*, 139 Ga. 545(2), 77 S. E. 802; *American Ry. Express Co. v. Bothwell Grocery Co.*, 25 Ga. App. 728, 104 S. E. 644; *American Realty Co. v. Bramlett*, 25 Ga. App. 159(2), 102 S. E. 873; 10 Corpus Juris, 806. In the determination of such a question the facts of each particular case are to be considered, including the distance to be traveled, the transportation facilities, the time ordinarily required for a like carriage, the character of the freight, the season and weather conditions, and any unusual circumstances affecting the traffic. *Columbus Ry. Co. v. Flournoy*, 75 Ga. 745(2), 746; *Moore v. American Ry. Express Co.*, 181 N. C. 300, 107 S. E. 6; 10 Corpus Juris, 286. Under the evidence the court did not err, in submitting to the jury the question as to reasonable time.

2. Carriers ⇐184, 167 — Consignee's testimony as to congestion of traffic admissible on question of reasonable time for delivery; instruction to determine reasonable time under conditions existing not erroneous, where there is evidence of conditions.

Under the rule stated, the objection to the consignee's testimony to the effect that during the time in question traffic conditions were congested between the points of shipment and destination, and that he had much delay and trouble in receiving his goods, upon the ground urged that it illustrated no issue in the case, because under the receipt a delivery was required regardless of congested conditions, was without merit. Nor did the court err in instructing the jury that they should determine "what was a reasonable time under the conditions existing at the time of this shipment of goods," there being some evidence as to such conditions; and it was a question for the jury to determine whether or not, under such circumstances, the written notice as in fact given was within four months after a reasonable time for delivery had elapsed.

3. Carriers ⇐32(1), 159(3)—Commerce ⇐8 (12)—Federal statutes and decisions supersede state statutes and decisions as to interstate shipments; parties to interstate receipt or bill of lading cannot waive or ignore terms; promise to trace missing shipment and acknowledgment of notice of claim filed after time prescribed did not excuse delay.

The act of Congress of June 29, 1906, commonly called the "Carmack Amendment," and the act amendatory thereof of March 4, 1915, known as the "Cummins Act," both amending the original Interstate Commerce Act (U. S. Comp. St. §§ 8592, 8604a), and the interpretation of these acts by the United States Supreme Court, supersede state statutes and rules of decision relating to the interstate shipments covered by those acts, in so far as they are conflicting. *Central of Ga. Ry. Co. v. Yesbik*, 146 Ga. 769, 92 S. E. 527; *Southern Ry. Co. v. Morris*, 147 Ga. 729, 95 S. E. 284.

(a) Under decisions of the United States Su-

preme Court, the parties to an interstate receipt or bill of lading "cannot waive its terms, nor can the carrier by its conduct give the shipper a right to ignore them." *Ga., Fla. & Ala. Ry. Co. v. Blish Co.*, 241 U. S. 190, 191, 197, 38 Sup. Ct. 541, 544 (60 L. Ed. 948); *Tex. & Pacific Ry. Co. v. Leatherwood*, 250 U. S. 478, 481, 39 Sup. Ct. 517, 63 L. Ed. 1096. The Georgia decisions, recognizing waivers of such terms in intrastate shipments, are inapplicable to interstate shipments, where valid express conditions are contained in the receipt or bill of lading. *Heath v. Sandersville R. Co.*, 23 Ga. App. 255(3), 98 S. E. 92. In view of the above federal authorities, the motion of the plaintiff in error to review and overrule that portion of the decision by this court in *American Railway Express Co. v. Bothwell*, 25 Ga. App. 728, 729, 104 S. E. 644, recognizing such a waiver in an interstate shipment, is granted, and to this extent only that decision is modified. The instant case is distinguishable in its facts from those in *Pope v. American Railway Express Co.*, 28 Ga. App. —, 110 S. E. 514. There it appears that the shipper, acting within the undisputed time limit, made a bona fide attempt to give the prescribed written notice, but was prevented from so doing by the acts and conduct of the carrier in refusing to permit him to do so. That case was decided, on the theory; not that the carrier had waived the giving of the notice, but that it had refused to permit and had prevented filing a written claim by the shipper when he had actually sought to file a claim within the undisputed time limit prescribed by the bill of lading. In that case the carrier by its own conduct, having prevented the shipper from complying with the terms of the contract when he sought so to do, was estopped from setting up as a defense the failure of the shipper to do that which he had attempted, but which it had refused to permit. In the instant case, as set forth in the second division of the syllabus, while it was a question of fact as to whether the written notice as actually given was filed within the four months after a reasonable time for delivery had elapsed, there is no sort of evidence tending to show that the shipper had attempted to file any previous written notice within the undisputed time limit, or that he was prevented from so doing by the acts and conduct of the carrier in refusing to permit its being done. The most that the oral promise of the agent in promising to trace the freight, and in acknowledging the filing of the written notice at the time it was actually received, could under any contention amount to, would be an implied waiver of a previous filing of the written claim; but, in view of the indicated modification of the rule previously announced by this court in the *Bothwell Case*, it must be held to have been error for the trial judge to submit to the jury the issue as to whether or not the parties had impliedly waived the stipulation requiring the filing of the written claim within four months after a reasonable time for delivery had elapsed, and for this reason only the order refusing a new trial must be reversed. See, generally, 1 A. L. R. 900; *Ann. Cas. 1914A, 235*; case notes.

Error from Superior Court, Seminole County; W. O. Worrill, Judge.

Action by T. E. Roberts against the American Railway Express Company. Judgment for plaintiff, and defendant brings error. Reversed.

Alston, Alston, Foster & Moise, of Atlanta, W. V. Custer, of Bainbridge, and Herman E. Riddell, of New York City, for plaintiff in error.

W. L. Bryan, of Donalsonville, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 480)

ADDER MACH. CO. v. HAWES. (No. 12187.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1922.)

(Syllabus by the Court.)

Trover maintainable against administrator; "debt due by decedent."

"An action in trover against an administrator, wherein a recovery for the hire and value of the property involved is expressly waived, and a recovery of the property itself is sought, is not covered by Civil Code 1910, § 4015, providing that no suit to recover a debt due by the decedent shall be commenced against the administrator until the expiration of twelve months from his qualification." *Adder Machine Co. v. Hawes*, Adm'r (Ga. Sup.) 111 S. E. 188, decided February 21, 1922.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by the Adder Machine Company against T. S. Hawes, administrator. Judgment for defendant, and plaintiff brings error. Reversed, in conformity to Supreme Court's answer to certified question (111 S. E. 188).

Hartsfield & Conger, of Bainbridge, for plaintiff in error.

Jno. R. Wilson and T. S. Hawes, both of Bainbridge, for defendant in error.

LUKE, J. The headnote to this case is the ruling made by the Supreme Court in answer to the following question certified by this court to that court:

"A suit in trover, filed May 2, 1919, to recover an adding machine of the alleged value of

\$310 and of the yearly value of \$100, accompanied by an affidavit for bail, was brought against the administrator of an estate within 12 months of his appointment as administrator. The defendant filed a plea denying that title to the property was in the plaintiff, and pleading specially that he was appointed administrator of the estate on August 2, 1918, and that, 12 months therefrom not having expired, he was exempt by law from being sued, and prayed to be discharged. Upon the hearing of the suit the plaintiff, by leave of the court, amended its petition by striking therefrom its claim for hire or yearly value of the property, and elected to take a verdict for the property itself. Under these circumstances, was this trover suit a 'suit to recover a debt due by the decedent,' within the meaning of the Civil Code 1910, § 4015, which provides that 'no suit to recover a debt due by the decedent shall be commenced against the administrator until the expiration of 12 months from his qualification?'"

Under the ruling of the Supreme Court, the trial court erred in dismissing the suit as being prematurely brought, and the further proceedings in the case were nugatory. Judgment reversed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 481)

ALLEN v. CRAWFORD. (No. 13074.)

(Court of Appeals of Georgia, Division No. 1.
April 13, 1922.)

(Syllabus by the Court.)

Trial ~~error~~ 169—Verdict properly directed when demanded by pleadings and evidence.

The pleadings and the legal evidence in this case demanded a verdict for the defendant, and it was not error for the court to direct such a verdict.

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by Sim Allen against John Crawford. Judgment for defendant, and plaintiff brings error. Affirmed.

W. T. Lane, J. A. Hixon, and R. L. Maynard, all of Americus, for plaintiff in error. Wallis & Fort, of Americus, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(23 Ga. App. 482)

MOORE v. GRIFFITH. (No. 13090.)(Court of Appeals of Georgia, Division No. 1.
April 13, 1922.)*(Syllabus by the Court.)***No error committed and evidence sufficient.**

The charge of the court was full and fair, and adjusted to the pleadings and the evidence. The court did not err as complained of with respect to the admission and exclusion of testimony. The evidence amply supported the verdict. For no reason assigned did the court err in overruling the motion for a new trial.

Error from City Court of Carrollton; Leon Hood, Judge.

Action between J. W. Moore and O. E. Griffith. Judgment for the latter, and the former brings error. Affirmed.

Willis Smith, of Carrollton, for plaintiff in error.

Griffith & Matthews, of Buchanan, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J. concur.

(28 Ga. App. 443)

FLAKE v. BOWMAN. (No. 13218.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)***1. Contracts §176(1) — Construction for court when contract plain and unambiguous.**

The construction of a plain and unambiguous contract is for the court and not for the jury. *Empire Mills Co. v. Burrell Engineering Co.*, 18 Ga. App. 253 (1), 89 S. E. 530. The court therefore did not err in refusing the request to charge the jury that "the construction which will uphold a contract in whole and every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part."

2. Trial §260(1) — Request sufficiently covered properly refused.

The remaining request to charge was sufficiently covered by the charge given.

3. Appeal and error §302(1, 4) — Ground of motion must be complete; motion complaining of failure to charge on set-off defective when not showing set-off supported by evidence.

Under repeated rulings of the Supreme Court and of this court, a ground of a motion for a new trial must be complete within itself. The second ground of the amendment to the

motion for a new trial is as follows: "Because, it is alleged, the court erred in failing to charge the jury on the movant's [defendant's] plea of set-off, the same being material to the issues involved and applicable to the contentions of the parties." It is not shown by this ground, nor even alleged therein, that the defendant's plea of set-off was supported by any evidence. If it were not so supported, the court properly omitted to charge thereon. The ground therefore is fatally defective and cannot be considered by this court.

4. Excerpt from charge not error.

The excerpt from the charge of the court excepted to was not error for any reason assigned.

5. Admission of evidence not error.

The admission of evidence as complained of in the fourth ground of the amendment to the motion for a new trial was not error.

6. Appeal and error §1078(6) — Ground not referred to in brief treated as abandoned.

The remaining ground of the amendment to the motion for a new trial is not referred to in the brief of counsel for the plaintiff in error, and therefore is treated as abandoned.

7. Work and labor §14(1) — Party partly performing may recover therefor.

A party to an entire contract who has partly performed and who is prevented from performing in full by the acts of the other party to the contract can recover for the part that he has performed. See, in this connection, *Civ. Code* 1910, § 4321; *Alabama Gold Life Ins. Co. v. Garmap*, 74 Ga. 51 (2-d); *McLeod v. Hendry*, 128 Ga. 167 (2), 54 S. E. 949; *Spalding County v. Chamberlin*, 130 Ga. 649, 655, 61 S. E. 533; *Byck v. Weiler Co.*, 3 Ga. App. 387 (1), 59 S. E. 1126. Under this ruling and the facts of the instant case, the plaintiff was entitled to recover for a part performance of the entire contract.

8. New trial §70 — Properly denied when verdict authorized.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Rockdale County; Jno. B. Hutcheson, Judge.

Action by Tom Bowman against W. G. Flake. Judgment for plaintiff, and defendant brings error. Affirmed.

J. H. McCalla, of Conyers, for plaintiff in error.

Bond Almand, of Atlanta, for defendant in error.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 482)

COX BROS. v. H. L. BROOKER LUMBER CO. (No. 13237.)(Court of Appeals of Georgia, Division No. 1.
April 18, 1922.)*(Syllabus by the Court.)***1. Rulings on evidence not erroneous.**

The court did not err in any of its rulings upon the admissibility of evidence.

2. Nonsuit properly granted.

Under the facts of the case the grant of a nonsuit was not error.

Error from Superior Court, Whitfield County; M. C. Tarver, Judge.

Action by Cox Brothers against the H. L. Brooker Lumber Company. Judgment of nonsuit, and defendant brings error. Affirmed.

F. K. McCutchen and C. D. McCutchen, both of Dalton, for plaintiff in error.

Maddox, McCamy & Shumate, of Dalton, for defendant in error.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 486)

EDWARDS v. STATE. (No. 13282.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)***1. Exception to admission of evidence without merit.**

The exception to the admission of certain evidence as set forth in the first ground of the amendment to the motion for a new trial is without merit.

2. Charge not erroneous.

The excerpt from the charge of the court as complained of in the second ground of the amendment to the motion for a new trial was not error for any reason assigned.

3. Criminal law §935(1)—New trial properly refused when verdict authorized.

The verdict was authorized by the evidence, and the judge did not err in refusing to grant a new trial.

Error from City Court of Jefferson; C. L. Bryson, Judge.

Action between Charlie Edwards and the State. Judgment for the State, and Edwards brings error. Affirmed.

Cooley & Beall, of Jefferson, for plaintiff in error.

S. J. Nix, Sol., of Jefferson, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 486)

EDWARDS v. STATE. (No. 13283.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)***1. Weapons §17(1)—Accusation must allege that pointing was intentional; accusation charging pointing and aiming sufficient; "aim."**

Unless the language in an accusation or indictment, drawn under section 349 of the Penal Code of 1910, raises no other implication than that the pointing of the pistol was intentional, an allegation therein that the accused pointed a pistol at another, without charging that it was intentionally pointed, is fatally defective, and, after conviction and sentence, a motion to arrest the judgment should be sustained. *Herrington v. State*, 121 Ga. 141, 48 S. E. 908; *Livingston v. State*, 6 Ga. App. 208, 64 S. E. 709. However, where the accusation or indictment charges that the accused did point and aim, a pistol at another, not in self-defense, and contrary to the laws of the state, the accusation or indictment is not fatally defective, as "to aim a weapon at another is to point it intentionally." *Livingston v. State*, 6 Ga. App. 805 (2), 65 S. E. 812.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Aim.]

2. Accusation not fatally defective.

Under the above ruling the accusation in the instant case was not fatally defective, and the court did not err in overruling the motion in arrest of judgment.

3. Criminal law §822(1) — Excerpts from charge to be considered in view of entire charge and facts.

In view of the entire charge of the court and the facts of the case, neither of the excerpts from the charge which are complained of in the motion for a new trial shows reversible error.

4. Criminal law §935(1)—New trial properly denied when verdict authorized.

The evidence authorized the verdict, and the court did not err in overruling the motion for a new trial.

Error from City Court of Jefferson; C. L. Bryson, Judge.

Charlie Edwards was convicted of an offense, and he brings error. Affirmed.

Cooley & Beall, of Jefferson, for plaintiff in error.

S. J. Nix, Sol., of Jefferson, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 483)

PEARCE v. STATE. (No. 13319.)(Court of Appeals of Georgia, Division No. 1.
April 13, 1922.)*(Syllabus by the Court.)*

1. Criminal law \S 1064(4)—Ground of motion must state name of witness whose testimony is complained of.

"A ground of a motion for a new trial which complains of the admission of specified testimony must state the name of the witness whose testimony is complained of." Rountree v. State, 26 Ga. App. 420 (1), 106 S. E. 557.

2. Ground of motion without merit.

In view of the note of the trial judge the third special ground of the amendment to the motion for a new trial is without merit.

3. Criminal law \S 824(9)—Failure to charge on circumstantial evidence not error, when no request and evidence not wholly circumstantial.

The defendant's conviction not depending entirely upon circumstantial evidence, it was not error, in the absence of any appropriate request, to fail to instruct the jury upon the law of circumstantial evidence.

4. Sufficiency of evidence.

The verdict was amply authorized by the evidence.

Error from Court of Macon; Will Gunn, Judge.

O. R. Pearce was convicted of an offense, and he brings error. Affirmed.

O. J. Wimberly and C. A. Cunningham, both of Macon, for plaintiff in error.

Roy W. Moore, Sol., of Macon, for the State.

LUKE, J. Judgment affirmed.

BROYLES, O. J., and BLOODWORTH, J., concur.

(28 Ga. App. 382)

CONNELL v. NEWKIRK-GEORGE MOTOR CO. (No. 12658.)(Court of Appeals of Georgia, Division No. 2.
March 9, 1922.)*(Syllabus by the Court.)*

Evidence \S 434(11), 441(9)—Warranties and representations not admissible, when excluded by written bill of sale.

It is immaterial whether the plaintiff in the court below was, as contended by it, a bona fide purchaser for value of the negotiable purchase-money instrument sued on, or whether, as contended by the defendant, the plaintiff was in fact the real seller of the car, since the written contract, under which the sale was made, expressly provided that the "vendor does not warrant said property, and makes no representations concerning same, except that title to same is in vendor and free from incumbrances"; and consequently the defendant was not entitled to contradict the written terms of the contract of sale by pleading express warranties and misrepresentations on the part of the vendor, relative to the quality and condition of the second-hand car which constituted the subject-matter of the sale. Harrell v. Holman, 21 Ga. App. 159, 93 S. E. 1021; Payne v. Chalmax Motor Co., 25 Ga. App. 677, 104 S. E. 453; Finney v. Davis, 28 Ga. App. 23, 105 S. E. 632; Stamps v. Dawson Mfg. Co., 26 Ga. App. 349, 106 S. E. 185; Butler v. Citizens Bank (Ga. App.) 110 S. E. 501. The facts of the instant case differ entirely in this respect from those disclosed in Snellgrove v. Dingelhoeff, 25 Ga. App. 334, 103 S. E. 418.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Newkirk-George Motor Company against C. S. Connell. Judgment for plaintiff, and defendant brings error. Affirmed.

John H. Hudson, of Atlanta, for plaintiff in error.

Geo. B. Rush, of Atlanta, for defendant in error.

JENKINS, P. J. Judgment affirmed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 450)

BLACKSTOCK v. STATE. (No. 13243.)(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)*(Syllabus by the Court.)*

1. Proof of venue.

The venue of the crime was clearly proved.

2. Sufficiency of evidence.

The evidence authorized the jury to find that the accused made an assault upon his wife with the intent to murder her, and that he assaulted her with a weapon likely to produce death.

3. Denial of new trial not error.

The verdict was amply authorized by the evidence, and it was not error for any reason assigned to overrule the motion for a new trial.

Error from Superior Court, Fulton County; C. E. Roop, Judge.

Thomas Blackstock was convicted of assault with intent to murder, and he brings error. Affirmed.

Chappell & Ray, of Atlanta, for plaintiff in error.

Jno. A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

BROYLES, O. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

16. There was ample evidence to authorize the verdict.

Judgment affirmed.

All the Justices concur, except ATKINSON, J., dissenting.

HINES, J., disqualified.

(28 Ga. App. 468)

HUFF v. STATE. (No. 13292.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(Syllabus by the Court.)

1. Criminal law §822(1)—Charges to be considered in light of entire charge and facts of case.

The exceptions to the charge of the court, when considered in the light of the entire charge and the particular facts of this case, are without substantial merit.

2. Criminal law §935(1)—New trial properly denied when verdict authorized.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Warren County; E. T. Shurley, Judge.

Action between Madison Huff and the State. Judgment for the State, and Huff brings error. Affirmed.

L. D. McGregor, of Warrenton, for plaintiff in error.

M. L. Felts, Sol. Gen., of Warrenton, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 471)

HURST v. STATE. (No. 13313.)

(Court of Appeals of Georgia, Division No. 1. April 11, 1922.)

(Syllabus by the Court.)

Criminal law §935(1)—New trial properly denied, when verdict authorized and approved.

The special grounds of the motion for a new trial, when the charge of the court is considered in its entirety and as adjusted to the evidence, is without merit. There is some evidence to authorize the verdict, and, the verdict having the approval of the trial judge, it was not error to overrule the motion for a new trial.

Error from City Court of Wrightsville; S. W. Sturgis, Judge.

Action between Warren Hurst and the State. Judgment for the State, and Hurst brings error. Affirmed.

B. B. Blount, of Wrightsville, for plaintiff in error.

W. C. Brinson, Sol., of Wrightsville, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 504)

THURMON v. STATE. (No. 13310.)

(Court of Appeals of Georgia, Division No. 1. April 14, 1922.)

(Syllabus by the Court.)

1. Criminal law §1088(17)—Affidavits, not referred to in motion for new trial nor attached, not considered.

The only ground of the amendment to the motion for a new trial is as follows: "Because, after the hearing of the above-stated case, and after the verdict had been rendered, and after movant had been sentenced, newly discovered evidence has come into his hands, of which he had no knowledge, nor means of obtaining same, at or before the time of the trial." Following this ground the record contains several affidavits, evidently relating to it; but these affidavits cannot be considered, since they are not embodied or referred to in the ground, nor attached thereto as exhibits, nor identified in any manner. *Summerlin v. State*, 130 Ga. 791 (1), 61 S. E. 849; *Leathers v. Leathers*, 132 Ga. 211 (5), 63 S. E. 1118.

2. Criminal law §935(1)—New trial properly denied, when verdict authorized.

The evidence authorized the verdict, and it was not error to overrule the motion for a new trial.

Error from Superior Court, De Kalb County; John B. Hutcheson, Judge.

Ralph Thurmon was convicted of an offense, and he brings error. Affirmed.

C. W. Buchanan, of Atlanta, for plaintiff in error.

A. M. Brand, Sol. Gen., of Lithonia, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE and BLOODWORTH, JJ., concur.

(28 Ga. App. 482)

BRINSON v. STATE. (No. 13213.)

(Court of Appeals of Georgia, Division No. 1. April 13, 1922.)

(Syllabus by the Court.)

Drunkards §11—Evidence of drunkenness, manifested by profane language, held to support conviction.

This case is here upon the sole assignment of error that the evidence does not authorize the verdict. The defendant was charged with

the crime of being upon a public road in an intoxicated condition, which intoxication was made manifest by boisterousness and by indecent conduct and acting, and by using vulgar, profane, and unbecoming language, and by loud and violent discourse. The evidence adduced upon the trial showed that the defendant was drunk, and that his drunkenness was made manifest by his using profane language. This was sufficient to authorize his conviction. It follows that the court did not err in overruling the motion for a new trial.

Error from City Court of Cairo; L. W. Riggsby, Judge.

J. W. Brinson was convicted of being on a public road in an intoxicated condition, etc., and he brings error. Affirmed.

Jeff A. Pope, of Cairo, for plaintiff in error.

M. L. Ledford, Sol. pro tem., of Cairo, for the State.

LUKE, J. Judgment affirmed.

BROYLES, C. J., and BLOODWORTH, J., concur.

(28 Ga. App. 424)

PICKENS CO. v. THOMAS. (No. 11508.)

(Court of Appeals of Georgia, Division No. 1.
April 11, 1922.)

(Syllabus by the Court.)

1. Authority of manager of corporation.

"The general manager of a mercantile and farming corporation is without authority, by virtue of his office alone, to employ counsel to represent employees thereof who are charged with larceny of property alleged to be that of third persons, but claimed by such corporation as its own, in the absence of express authority from the corporation, or ratification by the corporation of his act in so employing counsel, or by a previous course of dealing known to the corporation, from which such authority might be inferred; and this is true although prior to the indictments against these employees a third person who claimed one of the hogs alleged to be stolen had prosecuted a possessory warrant for the same against the corporation, and although the property alleged to be stolen by the employees was claimed by the corporation and found upon its premises where the employees were working."

2. Right of attorney to retaining fee.

"Where an attorney at law is employed by a corporation as its general counsel for one year, the position having no fixed salary attached, but the attorney is to be paid a separate fee for every specific legal service rendered the corporation, and there is no agreement between the attorney and the corporation as to any retaining fee, such attorney is not entitled, as a matter of right, at the end of his year's employment, to a retaining fee in addition to the fees paid him for specific services rendered his client during the period of his employment."

Error from City Court of Jesup; D. M. Clark, Judge.

Action by J. R. Thomas against the Pickens Company. Judgment for plaintiff, and defendant brings error. Reversed in conformity to Supreme Court's answers to certified questions. 152 Ga. —, 111 S. E. 27.

Gibbs & Turner, of Jesup, and Wilson & Bennett, of Waycross, for plaintiff in error.

J. H. Thomas, J. W. Walker, and Jas. R. Thomas, all of Jesup, for defendant in error.

LUKE J. [1, 2] This court certified to the Supreme Court the following question involved in this case:

"(1) The Pickens Company is a private corporation chartered under the laws of this state and engaged in merchandising and farming. Certain of the employees of the company were prosecuted and indicted by third persons for hog stealing. These employees were defended in the courts by an attorney at law, and he subsequently presented a bill for his services to the Pickens Company, which refused to pay it, and the attorney brought suit against the company. Upon the trial of this suit the evidence authorized a finding of the following facts: The hogs which the employees were charged with stealing were claimed by the Pickens Company, and were found upon the company's premises where the indicted employees were working; prior to these indictments a third person, who claimed one of these hogs, prosecuted a possessory warrant for the hog against the Pickens Company; the attorney was employed to defend these employees by the general manager of the Pickens Company, who was also a director thereof, and who told the attorney at the time of his employment that the Pickens Company would pay his fees. It was not, however, shown upon the trial that the corporation itself, through its board of directors, had employed the attorney to defend these employees, or that the general manager had authority under the charter of the corporation or its by-laws to employ him, or that the action of the general manager in employing him had ever been ratified by the board of directors of the corporation, or that under the charter of the corporation or its by-laws such an employment was within the powers of the corporation. Under these facts, would a verdict finding the defendant liable be contrary to law?"

"(2) Where an attorney at law is employed by a corporation as its general counsel for one year, the position having no fixed salary attached, but the attorney to be paid a separate fee for every specific legal service rendered the corporation, and there being no agreement between the attorney and the corporation as to any retaining fee, is the attorney entitled, as a matter of right, at the end of his year's employment, to a retaining fee in addition to the fees paid him for his specific services?"

The Supreme Court answered the first question in the affirmative, and the second question in the negative, and the preceding headnotes are the headnotes of that decision. For the full opinion of the Supreme

that plea. Most of the others pertain to the issue as to negligence.

[1] In addition to the claim of an actual partnership, there is one of liability on the ground of a contract entered into by the plaintiff and the defendants, in reliance by the former upon representations of the existence of the relation, by which the latter are estopped to deny it. In actions for damages occasioned by mere wrongs unmixed with contract, it is said the latter ground of liability is not available, likely because, in such cases, the injured party cannot be deemed to have altered his position in reliance upon the representation or holding out, and because there is no element of service or agency in the transaction. *Shapard v. Hynes*, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675; *Brudi v. Luhrman*, 26 Ind. App. 221, 59 N. E. 409. In this case, however, the duty conferring the right of the plaintiff, the existence and breach of which are alleged, arose out of a contract. Though the action is one *ex delicto*, trespass on the case, the liability alleged rests upon and grows out of a contract. Relying upon the representation or holding out, the plaintiff, according to the evidence adduced by her, entered into a contract with the defendants, imposing upon them a duty they have violated to her injury and detriment, wherefore the case is not within the exception to the general rule, invoked in resistance of evidence admitted and instructions given, and in support of instructions refused. No ground is perceived upon which a contract for service of the kind involved here can be differentiated in this respect from an ordinary commercial contract. Technically the action is not on the contract, but substantially it is.

[2-4] Although stoutly denied in some instances and in others not, one or more admissions of the partnership relation, on the part of each of the defendants, were testified to by the plaintiff's husband and other witnesses. The husband swears Dr. Logan and Dr. Hunter each admitted it to him. Dora Cook swears Dr. Logan admitted it to her. Oswald Cook swears Dr. Coleman made a like admission to him. Wiley Bowers swears Dr. Hunter stated to him, in the presence of Dr. Coleman, that they were partners. All of these declarations purport to have been made in connection with the business of the hospital. All of them, except one, seem to have been before the alleged act of negligence, and it is unimportant that the excepted one was made at about the time of the departure of the plaintiff from the hospital. Some sort of connection of all of the defendants with the hospital is admitted. They all say Dr. Coleman was the owner. Dr. Logan was at least an employee of Dr. Coleman. Dr. Hunter was there often. He had the practice of certain neighboring coal companies, and his patients were admitted to the hospital, in

cases of necessity, under a contract between it and him or their employers. The names of all appeared on the billheads of the hospital, Dr. Coleman being designated "surgeon in charge," Dr. Logan "resident surgeon" and Dr. Hunter "associate." Witness W. H. H. Stewart swears all three were in the operating room when his wife was taken into it for an operation, while the plaintiff was still there.

In connection with this evidence, the plaintiff and other witnesses were permitted to testify to the general understanding in the community that the defendants were operating the hospital as partners, and their reliance upon it in their transactions with the defendants and the institution. Though separately made, the admissions taken together are evidence of actual partnership. *Gordan v. Bankard*, 37 Ill. 147; *Barcroft v. Haworth*, 29 Iowa, 462; *Bryer v. Weston*, 16 Me. 261; *Currier v. Silloway*, 1 Allen (Mass.) 19; *Smith v. Collins*, 115 Mass. 388; *Armstrong v. Potter*, 103 Mich. 409, 61 N. W. 657; 9 Ency. Ev. 545. In connection with the admissions and the testimony that it was relied upon, the evidence of general reputation was clearly admissible. *Werner Co. v. Calhoun*, 55 W. Va. 246, 46 S. E. 1024; *Glipin v. Temple*, 4 Har. (Del.) 190; *Gaffney v. Hoyt*, 2 Idaho, 199, 10 Pac. 34; *Marks v. Hardy*, 117 Ky. 663, 78 S. W. 864, 1105, 25 Ky. Law Rep. 1770, 1909, 4 Ann. Cas. 814; *Frank v. J. S. Brown Hardware Co.*, 10 Tex. Civ. App. 430, 31 S. W. 64. Dr. Logan resided in the town in which the hospital was located and Dr. Hunter near it. They and Dr. Coleman were in very frequent attendance upon the hospital. These circumstances, making their knowledge of the alleged reputation highly probable, if it existed, are to be added as elements in the ground of admissibility. *Gay v. Fretwell*, 9 Wis. 186. This evidence of reputation, however, is admissible only to prove liability by estoppel, not the existence of an actual partnership. 9 Ency. Ev. 547, 548.

The infirmity for remedy of which the plaintiff entered the hospital and was operated upon, according to her declaration and testimony, was a laceration of the neck of the womb, due to childbirth, some three or four years before she was operated upon. The operation, however, included an alleged attempt to remedy another laceration of the perineum, occasioned in the same way and at the same time. That she had both ailments and that proper treatment required correction of both is fairly well sustained by evidence and not very strongly denied in the testimony. About two days after the operation, there was an indication of a fistula making an opening between the vagina and rectum, and its existence was confirmed shortly afterward. The contention on the part of the plaintiff is that this was produced by a negligent or unskillful use of one of the instru-

ments used in the operation, and that an operation in the region of the fistula was neither necessary nor authorized. On the other hand, it is contended that it was both authorized and necessary and that the fistula was the result of unavoidable infection. After the fistula was discovered, an unsuccessful effort was made to remedy it. A second effort was proposed and declined, and the plaintiff was taken to another hospital at which, after the infection was eliminated and the tissues strengthened, the trouble was remedied in the third or fourth operation performed there. She entered it about February 14, 1919, and was discharged in the following June.

[5, 6] An assignment of error is based upon the overruling of a motion to strike out evidence to the effect that the plaintiff left the Raleigh-Wyoming Hospital, declining to permit a third operation there, on account of lack of confidence in its surgeons. Though perhaps not important, this evidence was inadmissible. Neither her abandonment of the hospital nor her motive for so doing was a part of the *res gestæ*, and we perceive no ground upon which the evidence of it can be admitted. The anesthetic was administered by a nurse, and the plaintiff relies upon alleged imperfect administration thereof, as having contributed to or caused the injury she claims Dr. Logan inflicted upon her, in the performance of the operation. Being blindfolded when the ether was administered, she cannot say whether the physicians were then present or not, but she thinks they were not. They say they were, and that the ether was properly given under the supervision of Dr. Hunter. She claims to have been sufficiently conscious at one time to know she felt pain and flinched or flounced, while on the operating table. In connection with this evidence, an expert witness was permitted to say over objection that, in his opinion, administration of ether by a doctor of medicine is legally required. As neither the common law nor any statute of this state requires such administration, the ruling was clearly erroneous.

[7] In respect of the evidence of another expert witness, as to the propriety of administration of ether by a nurse, undue limitation or restraint of cross-examination is complained of. The nurse was shown to have had considerable experience in such administration and to be competent, in the opinion of her employer. A question substantially reciting her experience and the quality of her work in that line and asking the opinion of the witness, based thereon, was excluded. He might have adhered to his opinion, but he might have qualified it or admitted that it was not in accord with uniform practice. Manifestly, he should have been required to answer the question. His evidence on that point, taken in connection with the testi-

mony of the plaintiff, was strongly probative in her favor, and the defendants should have been allowed to test the soundness of his opinion thoroughly.

[8] Testimony of the plaintiff to the effect that, after discovery of her new trouble, the head nurse had told her it was due to the necessary depth of the incision made by the surgeon was admitted over an objection, and an instruction to the jury to disregard it was refused. Constituting no part of the *res gestæ* and being mere hearsay, it should have been excluded. *Peterson v. Paint Creek Collieries Co.*, 71 W. Va. 334, 341, 76 S. E. 664.

[9] No impropriety is perceived in the hypothetical question propounded to two of the expert witnesses examined by the plaintiff, and no specific defect in it has been pointed out. It sought the opinions of the witnesses upon the plaintiff's case hypothetically stated, as to the cause of her unlooked-for condition after the first operation, and they answered it favorably to her, saying the injury was occasioned, in their opinion, by a mechanical agency, contrary to the contention of the defendants, that it had been caused by infection following a careful and skillful operation. It assumes no assertions of fact, unsupported by evidence, and it is predicated upon all that are necessary to elicit an opinion upon its subject-matter. It omits inconsistent and contradictory contentions of fact relied upon in defense, but it was not incumbent upon the plaintiff to include them.

[10, 11] Over an objection, the plaintiff was permitted to testify to her barrenness in consequence of the alleged injury, basing the assertion upon the opinion of the surgeon by whom it was remedied, and her own claim of lack of sexual desire. In so far as the assertion of barrenness stands upon the alleged opinion of the surgeon and physical incapacity due to malformation of organs and general debility caused by the negligence charged, if any, it is inadmissible. The professional opinion testified to is mere hearsay and physical incapacity to carry and deliver a child is a question of medical and surgical science, as to which she is obviously incompetent to express an opinion. *Dominick v. Randolph*, 124 Ala. 557, 27 South. 481; *People v. Olmstead*, 30 Mich. 431; *Lush v. McDaniel*, 35 N. C. 485, 57 Am. Dec. 566; *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810; *Nichols v. Oregon, S. L. R. Co.*, 25 Utah, 240, 70 Pac. 996. Loss of sexual desire, if any, is a fact within her own knowledge, to which she can properly testify, of course, and, in so far as barrenness depends or is predicated on that, it may be considered. Loss of sexual inclination, if any, is a physical impairment, constituting a proper element of damages, wherefore evidence as to it was properly admitted.

[12] By way of refutation of the infer-

ence of association or partnership attempted to be raised by the introduction of the bill-head 'carrying the names of the defendants, they offered evidence to prove a general custom of hospitals, to carry the names of physicians and surgeons on their stationery, who have no interest in the institutions, as mere matter of advertising or information to the public, which the trial court rejected. This evidence is obviously not within the rule inhibiting proof of a custom or usage not pleaded. The custom in question is not an element, factor, or part of the contract involved. It relates to the mere status of parties, and it was offered only to repel an inference of such status, which it was apprehended the jury might raise from certain evidence adduced by the plaintiff. The rule relied upon to justify the exclusion is stated in Jones, Ev. § 123b, as follows: "So, when a party relies on a local custom to govern his case, it must be pleaded and proved." The decisions invoked to sustain the ruling denied admissibility of proof of a custom or usage relied upon, as constituting part of the contract involved, but not pleaded. They are manifestly inapplicable.

[13] Instructions Nos. 1 and 2, given at the instance of the plaintiff, conform in all respects to the principles and conclusions herein stated. Alleged lack of proof of the partnership relation charged and inapplicability of the law of estoppel as to persons charged with liability, on the ground of their having held themselves out, or permitted themselves to be held out, as partners, are the principal grounds of objection. These contentions have been disposed of.

[14] Several of the instructions sought by the defendants and refused were variant from the legal conclusions herein stated, respecting liability as partners and estoppel to deny it. Nos. 8 and 10, if given, would have precluded a finding for the plaintiff, unless the jury believed there was an actual partnership. No. 9 would have done likewise, unless the jury could have found that all of the defendants jointly contracted to treat the plaintiff. It would have denied liability by way of estoppel. No. 19 would have had a strong tendency to mislead the jury. It is susceptible of interpretation denying right of recovery on the ground of estoppel, in the absence of representations made to the plaintiff in person. If true, it suffices that she acted upon a representation of partnership relation, believed and accepted by her even though general in its nature and character. As this is an action *ex delicto*, nonliability of one of the defendants would not preclude a verdict against the others. *Pence v. Bryant*, 73 W. Va. 126, 80 S. E. 187. Hence, instruction No. 20, requested by the defendants, was properly refused. Their instruction No. 21 has the same infirmity as their No. 19, wherefore it was properly refused. No. 16,

seeking exclusion of the evidence relating to negligence in the administration of ether, was properly refused. That evidence was obviously admissible. No. 14, seeking exclusion of evidence of loss of sexual desire, was properly refused for reasons already stated. No. 15, directed against the evidence of incapacity to bear children, was too broad, wherefore it was properly refused. It would have excluded all of such evidence. No. 13, directed against the hearsay evidence of the cause of injury, should have been given, since that evidence had been improperly admitted.

[15] Instruction No. 11, requested by the defendants and refused, if given, would have directed a verdict for them. It goes to the sufficiency of the evidence to sustain a verdict for the plaintiff and partakes of the nature of a demurrer. If the evidence improperly admitted vitiates the verdict and calls for a new trial, there is no occasion to pass upon the correctness of the ruling in the refusal of the instruction. In that event, a different case must be made before there can be a proper verdict and judgment, whether such verdict shall be by direction of the court or not. The proper course of procedure on a demurrer to evidence in a case in which improper evidence has been admitted or proper evidence excluded, to the detriment of the complaining party, is to reverse the judgment, set aside the verdict and the demurrer, and remand the case for a new trial. *Dishazer v. Maitland*, 12 Leigh (Va.) 525. As to this, the authorities are not uniform (6 Ency. Pl. & Pr. 445), but we think the reasoning of the court in the case just cited is sound. The ruling in *Taylor v. B. & O. R. Co.*, 33 W. Va. 39, 10 S. E. 29, is not inconsistent with the rule in *Dishazer v. Maitland*, because the errors in admission of evidence in the former were regarded as harmless. In cases of prejudicial rulings as to evidence, the case is not properly made up for either the court or the jury. To make the demurrant waive his exceptions would work a hardship and injustice under the operation of a merely technical rule. In the case of the demurree who has relied upon the rulings of the court in standing upon his evidence, it would work ranker injustice to exclude his evidence and render judgment against him, for he might be able to supply competent evidence on the rejection of the incompetent. However, it may be in the case of a formal demurrer wholly withdrawing the case from the jury, except as to assessment of the damages, there can be no waiver of exceptions to evidence, by reason of a mere request for a peremptory instruction, and, whether the court erred in refusing it or not, the case goes back for a new trial, if evidence was admitted or rejected to the prejudice of the complaining party, and the case must be made anew. Hence, no good purpose could be subserved by a determination of the

propriety of the ruling on the instruction with the illegal evidence either in or out. As we have it now, the case is not properly made up. When it gets before the trial court again, it will have a different status, even though additional evidence should not be adduced, one upon which the trial court has not passed. And additional evidence may work very radical changes in it.

[16] Most of the improper evidence admitted, as well as that rejected, had direct and important bearing upon the vital issues in the case. With the hearsay evidence out and the rejected evidence for the defendants in, it is impossible to say what the verdict of another jury will be, or what the verdict on the trial already had would have been, if the erroneous rulings had not been made. The errors raise a presumption of prejudice to the defendants, which is not rebutted by disclosure of clear right in the plaintiff to the verdict she has obtained. In such cases, there must be a reversal, unless the court can see clearly that no prejudice or injury resulted. We are unable to say the jury could not properly have returned a different verdict on the question of liability.

The judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(90 W. Va. 719)

KAUFMAN v. CATZEN et al. (No. 4316.)

(Supreme Court of Appeals of West Virginia.
April 11, 1922.)

(Syllabus by the Court.)

1. Joint adventures ⇐4(4)—Where one of two lessees furnished all the money to develop property, he is entitled to reimbursements from net profits.

Where one of two lessees accepts a lease of land to be converted into a profit producing investment and concedes to the other a one-third interest in the profits to be derived from the joint enterprise in consideration of the payment by the latter of a stipulated amount which he does pay, coupled with the assurance of an additional amount, which he does not furnish, to develop the property, and the lessee named in the lease does advance it, he is entitled to reimbursement out of the earnings of the enterprise, in the ascertainment of the amount of the net profits derived from the enterprise.

2. Joint adventures ⇐4(3)—Not entitled to appropriate profits for salary in absence of express agreement.

In such case the lessee named in the lease, though the active manager of the leased premises, cannot lawfully appropriate part of the revenues derived from the property for his own use, in the payment of a salary, in the absence of an express agreement to that effect.

3. Joint adventures ⇐4(3)—Agreement between lessees held not to entitle manager to salary.

Where there is no such agreement, and the lessee so named agrees to assume control and management of the property for and in behalf of himself and his associate in the enterprise, upon the condition that his "energy" shall offset interest on the amount so advanced and expended, the lessee so named is not entitled to and cannot demand payment of a salary.

4. Joint adventures ⇐4(4)—One supplying all the funds to improve property is entitled to reimbursement before distribution of profits.

Funds derived from the sale of the capital stock of a corporation, organized by the active party to a lease contract, made to supply funds necessary to improve the property leased, his colessee having promised to provide such funds, but having failed or refused to provide them, should be repaid, with interest thereon, out of the earnings derived from the property before a distribution of profits, if any result from the enterprise.

5. Joint adventures ⇐4(1)—Damages not allowed for defendant joint adventurer's antagonistic delay of property improvement.

A case in which damages charged to the antagonism of one of two lessees against the other, said to have delayed the improvement of the property, are discussed but not allowed.

Appeal from Circuit Court, McDowell County.

Suit by L. Kaufman against Aaron Catzen and others. Decree for plaintiff, and defendants appeal. Reversed and remanded, with directions to order another reference to revise and restate the account.

Russell S. Ritz and Sanders, Crockett, Fox & Sanders, all of Bluefield, for appellants.

D. J. F. Strother, of Welch, and Chapman, Peery & Buchanan, of Tazewell, for appellee.

LIVELY, J. The opinion delivered upon a former appeal, then as now Aaron Catzen, Clark Development Company, and L. H. Clark being appellants, settled the principles of the cause as developed by the proof theretofore taken. Kaufman v. Catzen, 81 W. Va. 1, 94 S. E. 388, L. R. A. 1918B, 672. One of the questions discussed, as applied to the facts involved at that time, was as to the validity of Kaufman's claim to a one-third interest in the profits derived and derivable from the control, management, and improvement by Catzen of the 44 acres of land leased in the name of Catzen from Northfork Realty Company, August 27, 1907. This claim the opinion sustained, notwithstanding Kaufman's refusal or failure to provide the \$20,000, as he assured the lessor's officers he would do, to aid in the improvement of the property, so as to convert it into a profitable investment, and also notwithstanding Catzen's incorporation of Clark Development Company, and his

assignment of the lease to that company, Catzen being the owner of a controlling interest in the company and its general manager. Nevertheless Kaufman was to be held liable in a settlement of the accounts arising out of the management of the leasehold, and especially for any delays in its development caused by his opposition to the efforts of Catzen and the corporation, upon whom fell the financial burden of its betterment for the purposes of the lease, to obtain a saloon license.

[1] It is shown by this record and the former one that the basic object of Kaufman and Catzen, in securing this lease, was to establish saloons on the lease, and incidentally to improve it as a town site. Kaufman did not desire to be known in the lease, and an agreement was entered into between him and Catzen for the purpose of showing their joint interests therein. The \$30,000 paid by Kaufman to the Northfork Realty Company, as rentals for 5 years, was his contribution to the adventure, for which he was to have a one-third of all the rents, issues, and profits arising from the use and occupancy of the land. Catzen was to have control and management of the enterprise. Catzen had very little money, and it is not clear from what source the money for the development was to be derived. Catzen says Kaufman was to contribute \$20,000 for that purpose, but that fact does not appear in the agreement. It was omitted, Catzen says, at Kaufman's request. Afterwards Kaufman wanted the contract changed so that he would have equal authority in determining the erection of buildings, and in the management and control of the property; and further, that he should be paid back his \$30,000 out of the rents, issues, and profits and retain his one-third interest in the profits. Catzen would not agree to this radical change, and thereupon the differences arose, culminating in this litigation. From that time Kaufman seems to have made diligent effort to thwart the enterprise. He tried to prevent Catzen from procuring liquor license, and succeeded in doing so for several months. He did not contribute the \$20,000, nor any sum. Catzen went to work to develop the property, and, between the year 1907 and September 1, 1912, he spent about \$63,000 in building retaining walls, laying out streets, constructing water-works, building houses, and generally in improvement of the property. Of this sum he obtained \$20,000 from his brother, Morris Catzen, \$20,000 from the Flat Top National Bank, \$10,000 from Dr. Clark, and the remainder from sales of his and his wife's property, savings of his children, and from his business, presumably his saloon business. When the development company was incorporated and took over Catzen's interest in the enterprise on September 1, 1912, \$30,000 of its stock was issued to Morris Catzen which represented the sums contributed by him, he

having assumed and paid \$10,000 of the bank debt, and \$10,000 stock to Dr. Clark, representing the sum contributed by him. The other portion of the bank debt, \$10,000, had been paid by Catzen out of the rents collected up to that time. As a result of Catzen's efforts, ground rents were obtained, business houses, hotels, and dwellings were erected, all bringing in rents, and the premises were incorporated as a municipality. Kaufman contended that he was to have this \$30,000 advanced by him repaid before any profits were divided, and then he was to take one-third of the profits afterwards made. He seems to have contemplated that Catzen would make money, presumably out of the liquor businesses on the premises, and pay back the \$30,000 in yearly installments from that source, and "the 'creditors' could wait a year or so." Evidently it was contemplated that the "creditors" were those persons from whom the money was to be obtained to develop the lease. Kaufman agreed with the lessor to back Catzen in the development. If he had not done so the lease would not have been made. Just how much he was to contribute for that purpose does not appear from the testimony of Clark, Tierney, and Lincoln. Catzen says it was \$20,000. Kaufman refused to contribute any sum, and, as stated, he became an enemy of the enterprise when Catzen refused to change the original contract in the particulars set out.

On the former appeal we decided that Kaufman, although he had breached his contract, had not forfeited his \$30,000 and was entitled to a one-third interest in the profits. Are there any profits? This is the question which arises on this appeal from the decree based upon the commissioner's report. The commissioner found there were no profits, but the decree which sustained exceptions to the report ascertained the profits to be \$37,756.44. It must be remembered that Catzen's contribution to the venture was time and energy as against Kaufman's \$30,000, and on this basis Kaufman was to have one-third of the profits and Catzen the other two-thirds. But Kaufman failed to further co-operate after paying in the \$30,000, and the burden fell upon Catzen to develop the lease and carry on the venture or abandon it. The moneys which he raised for that purpose should be returned to him and to those from whom obtained before there can be any profits paid out. It follows that, being entitled to a return of the money contributed, he is entitled to interest thereon from the time it was advanced and used for the common purpose. Had Kaufman furnished the \$20,000 for improvements he would have been entitled to its return with interest, before division of profits. So far as the joint venture was concerned, any advancements used for development were in the nature of a loan to which legal interest should be added, when repaid. From the present record we do not find suffi-

cient data on which to base a calculation of interest on the moneys furnished as advancements. The houses and improvements placed on the land belong to the joint enterprise, together with the value of the lease thus enhanced. But the funds raised by Catzen and expended for that purpose, being a burden shouldered by him and not incumbent, upon him to assume under the agreement, it is clear that such funds, together with interest thereon, should be repaid before division of profits. *Bartlett v. Boyles*, 66 W. Va. 327, 66 S. E. 474. The Clark Development Company simply takes the place of Catzen in the transaction. The money it advanced, if any, to the enterprise is likewise in the nature of a debt.

[2, 3] The purpose of the suit, it is well to remember, is not a dissolution of the relation existing between the parties interested in the enterprise and the conversion of the property into liquid assets, preparatory to a final division among them, as their interests may then appear. On the contrary, the apparent purpose is the ascertainment of the true status of the parties to each other and a statement of the account upon an adjustment of the revenues derived from the lease, and the amount of money expended to put the leased premises upon a profit producing basis to the date of the entry of a final decree in the cause. Both plaintiff and defendants excepted to certain items in the commissioner's report of receipts and disbursements, and the true status of the account as it now appears depends upon a disposition of these exceptions.

[4] The witness, who has the only reliable knowledge of the collections and disbursements, is Catzen, and the amount received by him directly from the property up to September 1, 1912, is \$24,175.43, and by Clark Development Company from that date to September 1, 1918, \$200,342.26, or by both, \$224,517.69. Up to September 1, 1912, Catzen expended for improvements \$60,000, as shown by the report, and after that time Clark Development Company, \$142,431.79, or a total of \$202,431.79. \$60,000 of the amount expended by Catzen prior to September 1, 1912, he derived, not from the property, but, he says, from Morris Catzen \$20,000, from Flat Top National Bank \$20,000, and the remainder from the sale of his and his wife's property, from savings of his children, and money from his saloon business. The \$142,431.79 the decree, by sustaining Kaufman's exceptions, reduced to \$126,741.28. The items deducted are \$3,000 for the services of a bookkeeper during the years prior to September 1, 1912, \$6,279.30 for attorneys' fees and costs of the suit, \$50 subscribed and paid for the use of the Red Cross, \$500 for War Savings Stamps, \$500 for Liberty Bonds, \$617.71 for corporation charter tax, \$200 loaned to New Star Theatre, and \$4,543.50 an unitemized account; a total of \$15,690.51. Under the

conditions existing at the time of the Red Cross subscription and the purchase of the stamps and Liberty Bonds, there seems to be no sound reason for their exclusion from the credit side of the account, as their purpose was patriotic and commendable, moreover, they and the \$200 loan are assets of the company for distribution, to be accounted for when its affairs are finally adjusted. Nor does there seem to be a valid reason for the disallowance of the \$4,543.50. The failure to itemize it does not necessarily subject it to condemnation, as many of the payments were in gross, not by items, nor is their inclusion among the expenditures sufficiently obvious to warrant their exclusion, and for these reasons we are of opinion to restore them to the credit side of the column. As to the other items disallowed by the decree, the action of the court is not erroneous. The evidence of service rendered by the bookkeeper on behalf of Catzen or Clark Development Company is not satisfactory. He was in the employment of Catzen at the time the service was rendered it is true but primarily to manage his (Catzen's) saloon, not as a keeper of books for Catzen or the corporation. The whole amount credited to the account for the salary of Catzen was not proper. The original agreement between him and Kaufman was that his "energy" should in effect offset interest on the \$30,000 advanced by Kaufman, and, as appears, the annual interest on that amount is the same as the annual salary credit. But in no event can one partner charge for his services, unless authorized by an agreement between him and his associates. *Gay v. Householder*, 71 W. Va. 277, 76 S. E. 450, Ann. Cas. 1914C, 297. By adjustment and consolidation of these items in the manner indicated, that is, the exclusion from the account of the bookkeeper's \$3,000, Catzen's salaries, \$13,650, lawyers' fees and court costs, \$6,279.30, charter and stock tax, \$617.71, or a total of \$23,547.11, and the restoration of the Red Cross contribution, War Savings Stamps and bonds, the unitemized larger amount and the \$200 loan, the net result is an expenditure by Clark Development Company of \$118,884.78 (\$142,431.79 minus \$23,547.01), to which must be added the expenditures by Catzen \$60,000, making a grand total expenditure of \$178,884.78.

In view of all the items so far considered, there is an apparent net profit of \$45,632.91. This balance, however, is arrived at without considering appellant's exceptions. They dispute the correctness of the charges against them for receipts from the property. These charges represent six receipt items, aggregating \$71,513.99. These items are for taxes, sales of the Clark Development Company's capital stock owned by Catzen, and by him, it seems, sold to his brother, Morris, L. H. Clark, and others, money borrowed in part from Flat Top National Bank and in part from Clark National Bank. There is

no serious difficulty in reconciling the contention as to taxes. While assessed against the leased premises as a whole or in part only and paid by Catzen or Clark Development Company they were collected from tenants as part of the rent payable by them, as Catzen admits, and being so charged and paid and recharged to the tenants, we see no impropriety in holding Catzen and Clark Development Company accountable for the amount. As to the \$30,000 for stock sold to Morris Catzen and \$10,000 for stock sold to Clark, it is clear that they should not be included in income received from the lease. The stock sold to Morris Catzen represents \$20,000 in money, which he furnished for the development prior to September 1, 1912, and before the Clark Development Company was incorporated, and the assumption and payment of \$10,000 of the loan of \$20,000 from the Flat Top National Bank, which was also used in development prior to that date. Nothing has been repaid to him. The same can be said of the \$10,000 for stock sold to Clark. The item of \$11,348.95 listed as "stock sales and other collections" is not so clear. We find no explanation in the record. The item appears in the exhibit of receipts and expenditures filed with Catzen's answer to plaintiff's amended and supplemental bill, in which there appear the other items of money borrowed for the furtherance of the enterprise, also listed as receipts from the business. We note that stock of the Clark Development Company was sold to Sonnenberg for \$5,000, for which he gave his note which was never paid and has never been used; also \$1,000 stock to Schwartz which does not seem to have been paid in. Whether this item of \$11,348.95 was intended to include these sales to Sonnenberg and Schwartz, we cannot say. We note further that Little, the accountant who audited the books, reports the \$5,000 note of Sonnenberg as a receipt of the development company. We also note that stock in the Clark Development Company, to the amount of \$54,000, was issued to A. Catzen, and it is not clear just what amount of money he put in the enterprise, or if any of it is represented in this item of \$11,348.95. The meagerness of the evidence will not justify us, in the present state of the case, to allow this item as an income from the property. The other two items, \$10,000 and \$5,000 borrowed from the banks by Clark Development Company, were received by that company, and it should be charged with the receipt thereof, as shown in the report, as these amounts were paid to the banks by the company out of the receipts from the joint enterprise, thus making a debit with its corresponding credit. The money was borrowed and expended on the property and the development company took credit as it made the disbursements for improvements; it again took credit in its disbursements when it repaid the loans out of the receipts. Hence,

we can see no good reason why the exception to these two items should be sustained. By striking from the amount reported as total income the three items of \$30,000, \$10,000, and \$11,348.95 (\$224,517.69 less \$51,348.95), we have as total receipts \$173,168.74 as against total expenditures of \$173,884.78. There seem to have been no profits at the time of the decree.

There is in the report no ascertainment of the unpaid liabilities of Catzen and the Clark Development Company, and no requirement in the order of reference for such an ascertainment as there should have been to settle and adjust all matters pertaining to the exploitation of the premises, not for the purpose of winding up the affairs of the joint enterprise, but to enable the court to determine the equities between the parties. The result of such an additional investigation would have enabled the court to determine with more certainty the relative rights of the parties.

[5] Another issue to be discussed is the sufficiency of the proof of damages attributable to the antagonism of Kaufman, but for which the earning capacity of the property would have developed earlier than it did, according to Catzen's contention. Under this heading the report shows \$8,604.45, and charges one-third of the amount (\$2,201.48) to Kaufman, and two-thirds to Catzen. That is, Catzen should bear the greater portion of the burden chargeable to the wrongful conduct of his associate. Evidently this apportionment speaks its own inequality. But the decree disallowed the whole amount. Not only was the amount so found inadequate, according to counsel for Catzen, but they say it should have been much larger.

While Kaufman did not, as he should have done, being vitally interested in the success of the joint enterprise, render the encouragement and financial assistance necessary for the development of the property, his failure was due in a large measure, if not wholly, to an estrangement between himself and Catzen, beginning soon after the date of the lease. The difficulty between them manifested itself, not so much in the failure of Kaufman to provide the \$20,000, that he assured the lessor and Catzen he would provide, but in using his influence with members of the county court to prevent Catzen from obtaining license for a saloon on the property; and because of the resort to this direct method of approach to the licensing body, Catzen was compelled, he says, to obtain the assignment of a license granted to another saloon keeper, and for the same reason or cause to establish and stock a saloon for negroes, in order to counteract Kaufman's political influence in the county and to receive recognition for himself by politicians of the county. So that, as observed, it was not the failure to provide the \$20,000, for that amount and more Catzen obtained, apparently with-

out serious inconvenience, that delayed the conversion of profitless real estate into a profitable investment. And while the record abounds with proof pro and con upon this feature of the cause, it cannot reasonably or justly be said that the court erred in sustaining plaintiff's exception to the amount of damages reported by the commissioner.

The greater part of the proof of damages relied on by appellants as chargeable to Kaufman's antagonism tends to show a necessity for the sale of Catzen's property not involved in the administration of the leased premises, the proceeds of which sales he expended to fit the premises for the purpose of the lease. He does not ask to have the proceeds of the sales returned, or say they have been returned to him out of the earnings of the property. What he does insist upon is the right to be credited with rents that would have accrued and that he would have collected but for such sales. The effect of this insistence on his part, would, if sanctioned, be a double source of profit to him, that is, rents augmented by interest, and a share of the earnings from the property to the production of which the rents contributed. Moreover, he seems to have had more confidence in the earning capacity of the property than in that of the houses sold by him. Careful reading of the decisions cited by appellant's counsel fails to show in what respect, if at all, they have any bearing upon the question under discussion. They deal with the valuation of property for condemnation purposes. The sums realized by him from the sale of his properties, as well as all of the other sums which he personally furnished to make the adventure a paying one, are properly returnable to him, and the interest thereon is the measure of his damages for the use thereof.

Nor is there any convincing reason advanced for denying Kaufman the right to participate in the rents, issues, and profits, from whatever source obtained, except from business transacted by tenants on the 44 acres, including the saloon business conducted by Catzen. The property, not the business on it, is the source from which the profits are to be derived that the parties contemplated when they leased it, not what any of their tenants made as a result of their own individual resources or ability. These profits include, not only ground rents, but house rents also and rents from buildings occupied by tenants. Catzen did not agree, and does not now consent to divide what he may have earned in business on the land, apart from the land itself. If he, or the corporation organized by him, erected the building in which he conducted the business, he is chargeable with the rent.

Our conclusion, therefore, is to reverse the decree and remand the cause, with direction to order another reference to revise and re-

state the account, showing: (1) The debts and liabilities of the joint enterprise; (2) the advancements made by any party, the dates thereof, the interest thereon, and any payments made toward the reduction thereof out of the revenues or assets of the enterprise; (3) the receipts and expenditures since the former report of Commissioner Marshall in the cause, together with a statement, showing the funds on hand, including any liquid assets.

Reversed and remanded

RITZ, J., absent.

(90 W. Va. 780)

AMERICAN SUGAR REFINING CO. v.
MARTIN-NELLY GROCERY CO.
(No. 186.)

(Supreme Court of Appeals of West Virginia.
April 11, 1922.)

(Syllabus by the Court.)

1. Sales \S 354(8)—Special plea to declaration setting up defense of rescission held not a plea for damages for breach of warranty of goods.

A special plea to a declaration upon accepted drafts, given as a payment for merchandise purchased and delivered, which pleads as a defense a rescission of the contract of sale and tenders a return of the goods purchased, and asks for a return of the purchase price and cancellation of the accepted drafts sued on, cannot be considered as a plea for damages arising out of a breach of warranty of the goods, although such damages equal to the purchase price are therein claimed.

2. Sales \S 120—Where sale is executed buyer cannot rescind for breach of quality warranty in absence of fraud or agreement to rescind.

Where a sale of goods is executed, the purchaser cannot rescind merely because of a breach of warranty in the quality of the goods, in the absence of fraud or an agreement to rescind.

3. Sales \S 121—Buyer having paid part after objecting to quality of goods and notifying of rescission but not returning goods may not plead rescission.

Where sugar in bags has been purchased upon a warranty of quality and the purchaser receives the shipment from the carrier on September 21, and places it in his warehouse, and, relying upon the warranty, 9 days later in payment therefor executes and delivers to the seller trade acceptances payable in 30, 60 and 90 days from date, and on the 5th of October, following, inspects the sugar and notifies the seller that the sugar is not the kind and quality purchased, and that he rescinds the contract for that reason, but does not return the shipment, and on the 30th of October makes payment of the first trade acceptance then due, relying upon the warranty, or some adjustment, he cannot successfully set up a rescission

of the contract in a suit by the seller to recover upon the remaining unpaid acceptances; and a plea of rescission, setting up such facts, should be rejected.

4. Sales ¶129—Contract must be rescinded in toto and not in part.

A contract must be rescinded in toto; it cannot be rescinded in part.

5. Set-off and counterclaim ¶35(2) — Unliquidated damages for breach of warranty cannot be set up against liquidated demand in another transaction.

Damages, in order to be a proper set-off to a legal demand, must be liquidated. And where goods have been received by a purchaser, paid for in full, a portion sold, and damages for a breach of warranty are sought to be recovered from the seller by way of set-off to a debt contracted in a subsequent and different transaction, the measure of damage is the difference between the value of the goods as warranted and the actual value as and when received. Such damages are unliquidated and cannot be offset against the liquidated demand.

Certified from Circuit Court, Wood County.

Action by American Sugar Refining Company against Martin-Nelly Grocery Company. A ruling of the circuit court refusing to strike special plea was certified for review. Affirmed in part, and reversed and certified back.

Smith D. Turner, of Parkersburg, for plaintiff.

Ambler, McCluer & Ambler, of Parkersburg, for defendant.

LIVELY, J. The ruling of the circuit court in refusing to strike special pleas numbered 3 and 4 and permitting them to be filed over the objection of plaintiff is certified for review.

Plaintiff, a manufacturer and wholesale dealer in sugar, sold to defendant, a wholesale grocery company, several shipments of sugar. The declaration contained the common counts in assumpsit and three special counts. Special counts Nos. 1 and 2 are upon trade acceptances, the first for \$3,012.61, drawn by plaintiff on defendant, dated September 30, 1920, and accepted by the latter, payable on November 30, 1920; and the other for a like sum payable December 30, 1920. The third count is for 80,400 lbs. of extra fine granulated sugar at 22½ cents per lb. f. o. b. New York, delivered to and accepted by defendant, including \$354.56 freight.

[1, 2] Special plea No. 3 relates to the consideration for the trade acceptances and alleges that prior to September 14, 1920, plaintiff agreed to sell and deliver to defendant 402 bags of sugar warranted to be extra fine granulated, which meant "white in color, regular in granulation, free from caking and not powdered," for 22.941 cents per pound,

or \$9,222.28, which sugar was received by defendant on September 21, 1920, and, relying upon the warranty, it paid for the same on September 30, by accepting three drafts, or trade acceptances, each for the sum of \$3,012.61 and payable in 30, 60, and 90 days; that afterwards, and within a reasonable time, on October 5, following, it discovered that the sugar was not as warranted and immediately notified plaintiff that it refused to accept and rejected the sugar and requested plaintiff to take it back or direct disposition of it; that on October 30 it paid the first draft then matured "in the expectation and belief that plaintiff would make adjustment covering the entire subject, by return of the sugar, and cancellation of the drafts, or in some other manner," but plaintiff afterwards denied the right of defendant to reject or return the sugar, refused to cancel the drafts, refused to deliver to defendant the kind and quality of sugar agreed to be sold, and that therefore the consideration for the drafts wholly failed, whereby defendant has sustained damages to the amount of the purchase price, represented by the drafts, \$9,222.28, and is willing to offset the sum of \$6,025.22 against the drafts sued on and is entitled to recover the amount of the draft paid, \$3,012.61, and tenders delivery of all of the 402 bags of sugar to plaintiff, on its order. What is this plea? It is marked plea "No. 3, failure of consideration." It sets out facts on which it relies for a rescission of the contract. It asks for recovery of the money paid, cancellation of the drafts for the balance, and proffers a return of the sugar, on the ground that it is not the article bought, a breach of the warranty. A return of the money paid, cancellation of the acceptances outstanding, and return of the entire shipment would be a complete rescission of the contract. This is evidently what is intended as the defense. Defendant claims to have rescinded the contract on October 5, within a reasonable time for inspection after it received the goods, and then refused to accept them and so notified plaintiff, and yet it avers that 25 days after it had so rescinded, it paid one-third of the price of the goods, relying upon the warranty, or upon some adjustment covering the entire subject, by return of the sugar, cancellation of the drafts, "or in some other manner." Can we consider it as a plea of set-off for a breach of warranty? If there was a rescission there was no contract and therefore no breach. The defenses, rescission and breach of warranty, are inconsistent, and ought not be set up in the same plea. The contract cannot be rescinded for breach of the warranty. The contract was not severable, was executed, the title and possession passed, the goods were paid for by the accepted

drafts, and later, and after discovery of a breach of the implied warranty, partial payment was made. We think that, under such facts, there could be no rescission, and consequently the plea setting up rescission is bad. *Ellison v. Grocery Co.*, 69 W. Va. 380, 71 S. E. 391, 38 L. R. A. (N. S.) 539; *Mecham on Sales*, § 816. We seem to be committed to the principle followed by the English courts, that an executed sale cannot be rescinded for a breach of warranty, unaccompanied by fraud, or an agreement to rescind. *Manufacturing Co. v. Pipe Co.*, 74 W. Va. 228, 81 S. E. 976.

[3] Coupled with the unexplained delay in making inspection from date of receiving the goods, September 1st to October 5th, is part payment 25 days after discovery of breach of warranty. Unexplained delay in making inspection after receipt of the article sold has been held to be fatal to the right to rescind. *Noble v. Burwell*, 96 Me. 73, 51 Atl. 244. The right of inspection in sales of this character is always accorded to the buyer, but it must be asserted within a reasonable time after the goods are delivered, and if he takes possession with full opportunity of inspection, and afterwards exercises dominion over the goods, makes payment in cash or by note or like obligation, he will be deemed to have waived his right of inspection, and to have relied upon the warranty.

"According to the view taken in most cases after the buyer under an executory contract of sale has had an opportunity to examine the article, and accepts it, as fulfilling the contract, he is concluded by such acceptance and cannot, in the absence of fraud or express warranty, allege its defective quality. Thus, acceptance after inspection or fair opportunity to inspect it, of wheat furnished under a contract for wheat of a certain grade, precludes the buyer from denying that the contract was satisfied." 23 R. C. L. p. 1439, § 264.

The plea says that, relying upon the warranties and description of the sugar, the three acceptances were made on September 30, which was 9 days after it had received the sugar in its warehouse. It had ample time for inspection. The fact that the sugar was in bags does not preclude inspection or relieve from the duty to inspect. *Proctor v. Spratley*, 78 Va. 254. It is well settled in this state that, where the contract is executed, and warranty is relied upon, rescission cannot be had. *Ellison v. Grocery Co.*, supra; *Manufacturing Co. v. Pipe Co.*, supra. The plea being one setting up rescission, cannot be good as a plea for breach of warranty. If there was a rescission, then there was no contract in existence, and there could be no breach of a contract not in existence. We do not mean to say that the case is not such that a proper plea of a breach of warranty may not be filed, con-

taining the proper averments of resulting damages.

Can this plea be considered as a notice of recoupment to the acceptances sued on? Recoupment in its nature acknowledges the contract, the acceptance of the goods purchased, and demands an abatement of the purchase price to the amount of damages sustained by a breach of the warranty. The plea asks for recovery of \$3,012.61, the amount of the accepted draft paid October 30, 1920, above the amount of the two drafts sued on. A recovery over in excess of the sum sued for cannot be had under recoupment. *Ohio River Contract Co. v. Smith*, 76 W. Va. 503, 85 S. E. 671. Damages may be recouped under the general issue but notice thereof must be given that on the trial defendant will claim to have such damages recouped. Such notice is required to prevent surprise and also to show, if a subsequent suit be brought by defendant against plaintiff, that in fact the damages claimed were really recouped in the first suit. *Sterling Organ Co. v. House*, 25 W. Va. 64; *Powell v. Love*, 36 W. Va. 96, 14 S. E. 405. It is argued that this plea should be treated as a notice of recoupment under *Myers v. Cook*, 87 W. Va. 285, 104 S. E. 593. In that case the trial was had with the two special pleas filed, one for injury by misrepresentation and the other for loss of a substantial part of the consideration of the notes sued on, and evidence was introduced under them without objection. The parties and the court treated the pleas as such notices, and there was no surprise. Here objection is made to the filing of this plea. Its sufficiency is questioned as a pleading before trial. We do not think *Myers v. Cook* is authority for holding this plea No. 3 good as a notice of recoupment. The motion to strike requires us to pass upon its legal intent and effect. Its form and substance make it nothing more than a defense of legal rescission for breach of warranty, and that, by reason of defendant's rescission, it is entitled to a return of its purchase money and cancellation of the accepted drafts, thus placing the parties in statu quo. The motion to strike out plea No. 3 should have been sustained.

Plea No. 4 alleges that on June 26, 1920, defendant ordered from plaintiff 804 bags of extra fine granulated sugar of the kind and quality described in plea No. 3 and with like warranty, which sugar was received by defendant on August 26, 1920, and, relying upon the warranty, inspection was not made, and the sugar was paid for on September 10, following; that complaints having been made by defendant's customers to whom a portion of the shipment had been sold, inspection was made of what remained on October 5, when it was discovered that the sugar was not of the kind, grade, or quality

contracted for, so notified plaintiff, and that it rejected the sugar and requested plaintiff to take said sugar off its hands, or indicate what disposition should be made of it; that on November 5 defendant further notified plaintiff that there were other objections to the sugar, that it had a yellow color, and then requested an adjustment covering sugars delivered and rejected; that plaintiff refused to take back the sugar, repay any of the purchase money, or make any adjustment; that 566 bags then remained in defendant's hands unsold, which the plea offers to return; that the amount paid for the bags on its hands and which it offers to return, was \$12,653.92; that defendant did not realize the cost of the 238 bags of the shipment which it sold; and that there was a total failure of consideration for the 566 bags remaining; and that defendant is entitled to recover the price it paid for the 566 bags, \$12,653.92, which is a certain and liquidated sum, and is entitled to offset said sum against the plaintiff's demands. It will be observed that this plea sets up a claim arising from a different transaction than that out of which plaintiff's claim arises, and cannot be the subject of recoupment in this action.

[4, 5] It is not clear whether this plea is for rescission or for breach of warranty. It is not good as a plea of rescission because a rescission must be in toto; it cannot be rescinded in part. *Clark on Contracts*, p. 350; *Tiffany on Sales*, p. 111; *Mechem on Sales*, § 1398; *Contract Co. v. Smith*, 76 W. Va. 503, 85 S. E. 671; *Shoe Co. v. Prince*, 51 W. Va. 511, 41 S. E. 907. A part of the sugar, 238 bags, had been sold by defendant, as the plea shows, and it was impossible to place the plaintiff in statu quo. There could be no total rescission of the contract, no return of the entire purchase. If the plea can be construed as setting up a claim for damages for breach of the warranty, the question arises whether the damages are shown to be liquidated so as to be proper as an offset to the plaintiff's demands. It is insisted that the damages on the 566 bags which are offered to be returned are liquidated and certain; that the aggregate number of pounds multiplied by the price at which they were purchased, 22.813 cents, will give the exact amount of damages to which defendant is entitled. This contention leaves out of consideration the value of

the 566 bags which are in possession of defendant and which are its property. That value is uncertain. It would be a question for the jury upon evidence as to its value. It would be different if there was a rescission and return of the sugar; then the sum would be liquidated, easily ascertained. But a claim for breach of warranty presupposes a completed sale, and the true measure of damages for a breach is the difference between the sale price of the sugar and its actual value at the time of the delivery. *Williston on Sales*, p. 1018, § 613; *Eagle Co. v. Pipe Co.*, 74 W. Va. 228, 81 S. E. 976.

There are some instances where the buyer suffers special or consequential damage, far exceeding the value of the goods, and if they are the result of a breach of the warranty, naturally flowing therefrom, he is generally allowed to recover them in a proper action. If a buyer could return goods and at the same time sue for a breach of the warranty, his damages would be liquidated, amounting to the price paid, in the absence of special consequential damages. Defendant has no legal right to cancel the contract and return the 566 bags, and its damages for the breach are dependent upon the difference between the value of the sugar purchased and the value of the sugar furnished. The statement in the plea that the damages to which defendant is entitled to offset are represented by the amount of the purchase price paid for the bags remaining on hand, does not make the damages liquidated. The other facts set out in the plea show that such damages are uncertain and unliquidated. Where there are no means of accurate estimation of damages furnished by the terms of the contract, the damages are unliquidated. The accuracy alleged in the plea, calculation of the amount based upon the purchase price of the goods remaining, is founded on a false premise, namely, the right to return the bags on hand. We do not think the damages, as alleged in the plea, are liquidated, and, having arisen in a different transaction than that sued on, cannot be pleaded as a recoupment. *Van Raalte v. Solof*, 89 W. Va. 66, 108 S. E. 488; *Pottery Co. v. Parker*, 86 W. Va. 583, 104 S. E. 51.

We are of the opinion that special pleas Nos. 3 and 4 should have been rejected, and so answer the question certified.

Reversed and certified back.

(90 W. Va. 702)

MARKS v. MITCHELL et al.(Supreme Court of Appeals of West Virginia.
April 11, 1922.)*(Syllabus by the Court.)*

1. Appeal and error \S 308—Order quashing attachment issued in chancery court cannot be corrected on certificate.

An order quashing an attachment issued in a chancery cause, if erroneous, can be corrected in this court only on appeal. It has no jurisdiction to make such correction upon certificate under the second paragraph of section 1, c. 135, Code (Code Supp. 1918, \S 4981).

2. Divorce \S 245(3)—Where wife was decreed an absolute divorce and cause dropped from docket and later reinstated without other notice to husband than publication, an alimony decree then rendered is void.

A decree was entered, granting an absolute divorce to the wife, but nothing was stated therein as to the custody of the infant children of the parties or as to alimony for the wife, and the cause was dropped from the docket; at a subsequent term, on motion of the wife, the cause was reinstated on the docket, without notice to the husband other than by order of publication, and a decree was then entered, awarding the custody of the children to the wife and also permanent alimony. Such decree, in so far as it awards alimony, is void.

3. Divorce \S 271—Wife's bill to enforce alimony decree and for necessities furnished held not subject to general demurrer, although based in part on void decree.

Subsequently the wife filed her bill to enforce her decree for alimony as a lien upon defendant's land and also to obtain a decree for necessities furnished by her for the support of the children, procured an attachment against the land and asked that it might be sold to satisfy both liens. Such bill is good as against a general demurrer, notwithstanding it is in part based on such void decree.

Case Certified from Circuit Court, Summers County.

Suit in chancery by Myrtle Marks against J. D. Mitchell, her former husband, and others, certified to the Supreme Court of Appeals and judgment asked on certain questions. Reversed, and demurrer to bill overruled.

Adrian D. Daly, of Hinton, for plaintiff.

Thomas N. Read, of Hinton, for defendant Iantha Mitchell.

MEREDITH, J. By decree of the circuit court of Summers county, October 9, 1918, Myrtle Mitchell was granted an absolute divorce from J. D. Mitchell, the principal defendant in this cause. She has since remarried and institutes this suit under her present name of Myrtle Marks. She and her first husband had two infant children, but in the original decree of divorce nothing was

said as to their custody or maintenance, or as to alimony for the plaintiff. Upon the entry of that decree, the cause appears to have been dropped from the docket. At a subsequent term, on March 11, 1919, the cause was reinstated upon the docket upon order of publication, the defendant being then a nonresident. He made no personal appearance in the subsequent proceedings. On that day the court entered another decree awarding the custody of the two children to the plaintiff and \$50 per month as permanent alimony for the support of the plaintiff and the two children, and authorized execution to be issued therefor. On August 11, 1921, execution was issued for the amount then accrued under the decree, \$1,450, which execution was returned by the sheriff "no property found."

On August 13, 1921, the plaintiff instituted this suit in chancery against her former husband, J. D. Mitchell, by filing her affidavit for attachment for the sum of \$1,450, stating therein that the claim was for support and necessities furnished by her for defendant's infant children between March 11, 1919, and August 11, 1921, and that defendant impliedly promised to pay the same, and that he was a nonresident. That same day the attachment was levied on his interest in a house and lot in Hinton, which he owned jointly with a brother and three sisters, subject to his mother's right of dower, and a notice of the pending suit was filed in the county clerk's office. No summons was issued in the cause until September 3, 1921, when process was issued for J. D. Mitchell, his mother, Iantha Mitchell, Fred Mitchell, Grace Mitchell, Margaret Gwinn, Clara Gover, the First National Bank of Hinton, and C. B. Bryant. The bank, Iantha Mitchell, Grace Mitchell, and Margaret Gwinn were personally served with process. At September rules an order of publication was awarded as to J. D. Mitchell, Fred Mitchell, and Clara Gover, and returned executed at October rules. Also on September 5, a second order of attachment was issued on which Iantha Mitchell and First National Bank of Hinton were summoned as garnishees. At the succeeding October term the bank and one W. H. Roberts, as garnishees, filed their answers, denying any liability to their codefendant, J. D. Mitchell. From the record before us there is nothing to show that Roberts was summoned as a garnishee or made a party to the proceedings, but by order entered on November 4th, the bank and Roberts were each discharged from the suit.

On November 2, 1921, the cause came on to be heard upon the bill and exhibits, process duly executed on those personally served, order of publication as to the nonresident defendants and upon the attachment issued August 13th, the levy made

thereon, together with the affidavit for the attachment, notice of lis pendens filed on August 13th and upon the demurrer of the defendant, Iantha Mitchell, to the bill, and upon the answer of Iantha Mitchell then filed, and general replication thereto, and upon the motion of Iantha Mitchell, Grace Mitchell, Margaret Gwinn, and the First National Bank of Hinton to quash the attachment issued on August 13th, and upon the return and levy of the same. The court thereupon adjudged that the plaintiff's decree for permanent alimony entered in the divorce proceedings on March 11, 1919, was void because of defendant's want of personal service of notice of the reinstatement of the cause on the docket. The court also sustained the demurrer to the bill interposed by Iantha Mitchell and quashed the attachment issued on August 13th, on the ground that no process or summons was issued in this cause until September 3, 1921, and adjudged that the notice of lis pendens issued and recorded August 13th was not issued or recorded in a pending suit, the court in effect adjudging that the issuance of a foreign attachment without the issuance also of a summons or order of publication is not the commencement or institution of a suit and decreed that this suit was not pending as to the defendant J. D. Mitchell or any of the other defendants until September 3, 1921, that being the date of the issuance of the summons.

Thereupon the court certified to and asked the judgment of this court upon the sufficiency of the affidavit for the original attachment, the attachment order and return thereon, the second attachment and return thereon, the summons issued in the cause, the bill of complaint, the demurrer and answers to said bill, the order of publication issued at September rules, the decree of March 11, 1919, for permanent alimony, and the execution issued August 11, 1921, with the return thereon.

[1] In this proceeding the court cannot pass upon the order quashing the attachment. The court below, as well as counsel for the parties, seem to have overlooked the fact that under the first paragraph of section 1 of chapter 135, Code (Code Supp. 1918, § 4981), an order quashing an attachment is an appealable order; such an order cannot be reviewed in this court upon certificate, as provided in the second paragraph of that section. In the case of *Heater v. Lloyd*, 85 W. Va. 570, 102 S. E. 228, Judge Lynch says:

"The effect of the provisions of that statute is to circumscribe, restrict, and limit the right of this court to entertain and decide only questions immediately arising in the preliminary stages of a controversy, that is, mere interlocutory orders, not those fully and completely terminating the action or suit by final judgment or decree. To obtain relief from an erroneous judgment or decree the party aggrieved must

resort to the usual writs provided by law for that purpose, and not to those provided for a special purpose."

To the same effect is the case of *Pittsburgh & West Virginia Gas Co. v. Shreve*, 90 W. Va. 277, 110 S. E. 714, decided at this term.

It will be observed that under the second paragraph of that statute this court, in reviewing matters presented upon certificate of the trial court, is limited in its jurisdiction to "any question arising upon the sufficiency of a summons or return of service, or challenge of the sufficiency of a pleading." But where the trial court has passed upon the sufficiency of the summons or return of service or the sufficiency of a pleading, and in doing so has entered an order which may be reviewed by appeal or writ of error, as provided for in the first paragraph, this court can review such order only by some one of the usual writs by way of appellate procedure. For example, in the case of *Heater v. Lloyd*, it was held that this court might properly consider the correctness of the ruling of the trial court in sustaining a demurrer to a bill, but where the court has taken the further step and has dismissed the bill as to one or more of the parties defendant, such action because of its finality as to those dismissed from the suit, if erroneous, cannot be corrected by this court as to those dismissed therefrom, except upon appeal. To the same effect is the holding in the case of *Gas Company v. Shreve*. Inattention to this distinction by trial courts and counsel may defeat the very purpose of the second paragraph of the statute and lead to costly, if not fatal, delays. This court will therefore not review the action of the circuit court in quashing the attachment; it has no jurisdiction to do so in this proceeding; it cannot review it except upon appeal.

We have also been asked to pass upon the sufficiency of the summons and order of publication. They appear to be regular upon their face and no objection has been made to either in that respect. But in that connection we are asked to determine whether the commencement of the suit dates from the issuance and levy of the attachment, August 13th, or from the issuance of the summons, September 3d. This is the key to the whole case, as it appears from Iantha Mitchell's answer that, subsequent to the levy of the attachment and recording of the lis pendens and before September 3d, the date of the summons, J. D. Mitchell conveyed his interest in the lot levied on to one W. H. Roberts, and the question arises whether Roberts is bound by that recorded notice. Was that a notice in a pending suit? Plaintiff did not challenge the sufficiency of the answer of Iantha Mitchell but merely replied to it generally. Therefore, this question nowhere arises upon the sufficiency of any summons or return of service, or challenge of a plead-

ing, so as to give this court jurisdiction to determine the matter upon certificate. Tyler v. Wetzel, 85 W. Va. 378, 101 S. E. 726.

[2] As the court sustained the demurrer of Iantha Mitchell to the bill, but did not enter a final order dismissing it, this court can, upon certificate, pass upon the sufficiency of the bill. Plaintiff's bill is based upon, first, her decree for alimony entered in the divorce suit, amounting to \$1,450, and there is exhibited therewith a copy of that decree; second, upon her account or claim for \$1,450 for necessities expended by her for the support of defendant's children between the 11th of March, 1919, and the institution of this suit, supported by the order of attachment issued in the cause and the levy made thereon. The order of attachment and levy are exhibited with the bill. Plaintiff not only alleges that her decree for permanent alimony is a binding and subsisting lien upon the real estate of the defendant, J. D. Mitchell, but also that her attachment for the sum of \$1,450 for necessities furnished his children is a binding and subsisting lien on said real estate. The bill shows that James Mitchell, the father of J. D. Mitchell, died intestate in 1920, leaving as his only heirs the defendants, J. D. Mitchell, Fred Mitchell, Grace Mitchell, Margaret Gwinn, Clara Gover, and Iantha Mitchell, his widow, and at the time of his death he was the owner in fee of a lot in the city of Hinton; that J. D. Mitchell is the owner of an undivided one-fifth interest in said lot, subject to the dower interest of Iantha Mitchell. The bill further alleges that the First National Bank of Hinton obtained a judgment against J. D. Mitchell and C. B. Bryant, his surety, in 1911, but that this judgment has been paid, and that there are no liens against the defendant J. D. Mitchell's real estate, other than the liens held by the plaintiff; that the rents, issues, and profits from his real estate will not in five years be sufficient to pay off and discharge the liens thereon and the costs of suit, and plaintiff prays for a decree fixing the amount of her debt against the defendant J. D. Mitchell, and for a reference to ascertain the liens and priorities against his real estate and for a sale thereof to pay off and discharge the liens and for general relief.

Upon demurrer, counsel for Iantha Mitchell point out that the decree for permanent alimony, amounting to the sum of \$1,450 at the institution of this suit, being one of the claims upon which this suit is based, is void, and that the bill and the exhibit of that decree so show on their face. We think that is true; there was no personal service upon the defendant J. D. Mitchell, nor appearance by him in the original divorce suit after the cause had been dropped from the docket which would warrant the court to enter a personal decree against him for the payment of alimony. From the time the cause was dropped from the docket, J. D. Mitchell

was not personally in the case; this record does not affirmatively show that he was personally served with summons at any stage of the suit for divorce, but even had he been served in person or had he appeared in the original divorce proceedings up to the entry of the final decree granting the divorce on October 9, 1918, that decree was final. After the adjournment of that term, the court had no jurisdiction to modify the decree so as to enter a decree for alimony without personal service of notice to the defendant, or by his appearance in the subsequent proceedings. Phillips v. Phillips, 24 W. Va. 591. See, also, McCoy v. McCoy, 9 W. Va. 443; Coleman v. Waters, 18 W. Va. 278; Barrett v. McAllister, 33 W. Va. 738, 11 S. E. 220; Fowler v. Lewis, 36 W. Va. 112, 14 S. E. 447; Dixon v. Dixon, 73 W. Va. 11, 79 S. E. 1016. We have no hesitation in saying that the decree entered March 11, 1919, in so far as it adjudged alimony to the plaintiff, is void.

[3] But counsel for defendant overlook one vital matter in the bill; plaintiff also claims the sum of \$1,450 for necessities furnished to the two infant children of the defendant J. D. Mitchell, and for which the bill alleges the defendant is liable to the plaintiff, and to recover which she sued out her attachment. The fact that she may claim to have a decree for the same debt or account does not destroy the effect of her averment in the bill that the defendant owes her this debt on account, besides it does not affirmatively appear that the decree for alimony and the claim for necessities furnished the children represent one and the same claim. If the plaintiff had not mentioned in her bill the decree of March 11, 1919, there could be no question but that her bill properly made out a case against the defendant J. D. Mitchell. There is no averment in the bill showing the necessity or propriety of making Iantha Mitchell a party thereto. She was probably made a party because of her dower interest in the real estate owned by James Mitchell in his lifetime, and in which the defendant J. D. Mitchell had a one-fifth interest, subject to her dower, but in a suit of this character we can see no necessity or propriety in making her a party on that account. She was also summoned as a garnishee under the second order of attachment, but there is no averment in the bill showing her liability to the defendant J. D. Mitchell for any debt, or for any effects of J. D. Mitchell in her hands, so the action of the court would have been proper in sustaining the demurrer had it limited its action to her interests, but the court sustained the demurrer to the whole bill and adjudged that the bill was not sufficient in law. We think the bill is a good bill as to the defendants J. D. Mitchell, First National Bank of Hinton, and C. B. Bryant, and the court erred in sustaining the demurrer of Iantha Mitchell to the whole bill. Be-

sides, she has no legal interest in the controversy between the plaintiff and J. D. Mitchell, which would entitle her to enter a demurrer in that respect.

The bill is sufficient as to the defendants J. D. Mitchell, First National Bank of Hinton, and C. B. Bryant, and the demurrer should have been overruled, and the action of the circuit court in sustaining the demurrer will be reversed, and it will be so certified.

(90 W. Va. 738)

STATE v. LANTZ.

(Supreme Court of Appeals of West Virginia.
April 11, 1922.)

(Syllabus by the Court.)

1. Indictment and information \S 110(3)—Ordinarily an indictment charging offense in the language of the statute is sufficient.

Ordinarily, where a statute creating an offense contains a statement of all of the facts necessary to constitute it, an indictment charging such offense in the language of the statute is sufficient.

2. Indictment and information \S 86(3)—Indictment charging violation of speed law held not bad because failing to charge particular place of offense.

An indictment, charging a violation of a statute prohibiting the operation of motor vehicles upon certain parts of the public roads in excess of a certain speed, is not bad because it fails to charge the particular point or place at which the alleged offense was committed, the act charged to have been committed being a violation of the law, if committed anywhere within the county.

3. Criminal law \S 13—A statute creating an offense should define the necessary acts with such certainty that one may know when he is violating it.

An act of the Legislature (Laws 1921, c. 112), creating a statutory offense, should define the acts necessary to constitute such offense with such certainty that a person may determine whether or not he has violated the law at the time he does the act, which is charged to be a violation thereof.

4. Constitutional law \S 258 — Criminal law \S 13—Highways \S 166—Act making it a crime to operate an automobile not under control around curve held invalid as violative of the due process provision of Constitution and void for uncertainty.

An act of the Legislature (Laws 1921, c. 112), making it a crime to operate an automobile around a curve on a public road without having the same under control, or without reducing the speed thereof to a reasonable and proper rate, is violative of sections 10 and 14 of article 3 of the Constitution of this state, and is void for uncertainty and indefiniteness.

Certified Questions from Circuit Court, Barbour County.

Grant Lantz was indicted for driving and operating a motor vehicle around a curve without having the same under control and without reducing the speed to a reasonable and proper rate, and his motion to quash was overruled, and the questions certified. Motion to quash indictment sustained.

E. T. England, Atty. Gen., and R. Dennis Steed, Asst. Atty. Gen., for the State.

J. Blackburn Ware, of Belington, for defendant.

RITZ, J. The circuit court of Barbour county, having overruled a motion to quash an indictment charging that the defendant did drive and operate a motor vehicle, to wit, an automobile, around a curve in the public road of Union district, Barbour county, without having said automobile under control, and without reducing the speed to a reasonable and proper rate, certifies the questions arising upon such motion to this court.

[1, 2] The indictment is based upon provisions contained in section 96 of chapter 112 of the Acts of the Legislature of 1921, the pertinent provisions being found in subsection K and subsection P of said section 96. The part of subsection K material here is:

"Upon approaching * * * a sharp * * * curve * * * and in traversing such * * * curve, a person operating a motor vehicle or motorcycle shall have the same under control, and shall reduce the speed to a reasonable and proper rate."

Subsection P makes it a misdemeanor to violate any of the provisions of said section 96, and provides punishment therefor. The indictment charges that the defendant—

"did unlawfully drive and operate a motor vehicle, to wit, an automobile, around a curve in the public road, in Union district, in said Barbour county, and he, the said Grant Lantz, in traversing the said curve, with the said automobile aforesaid, did not then and there have the same under control and did not reduce the speed of the said automobile to a reasonable and proper rate, contrary to the statute in such cases made and provided, against the peace and dignity of the state."

Two objections are made to the indictment: The first, that it does not charge the offense with sufficient certainty; and the second, that the statute upon which the indictment is based, so far as it undertakes to create a criminal offense, is void.

It will be observed that the indictment in this case charges the offense in the language of the statute, and ordinarily an indictment for a statutory crime is sufficient if the offense be charged in the language of the statute creating it. There are exceptions to this rule, it is true. Where the language used in the statute creating the offense does not contain a statement of the facts which

constitute the crime, then it is necessary to amplify the statutory language by stating in the indictment all pertinent facts necessary to constitute the offense. The argument here is that this indictment is bad because it simply charges that the defendant operated his automobile around a curve in Union district in violation of the statute, without pointing out the particular curve around which he was operating the automobile, at the time it is charged the offense was committed. If the offense could only be committed at a particular place, then, of course, the place of its commission would become an essential element of the crime, and would have to be alleged, but in this case the statute undertakes to inhibit the operation of automobiles at an unsafe speed around any curve upon any public road, so that the place in the county at which the offense is committed is not at all an essential element of the crime. The requirement of certainty in this character of indictment goes no further than to compel the pleader to state in the indictment all facts necessary to constitute the offense. If the party accused cannot prepare his defense because of lack of information or particularity in the averments, he may demand a bill of particulars, and, upon a proper showing, the prosecuting attorney will be required to furnish him the same. We are of opinion that, inasmuch as the offense attempted to be charged in this case is complete, no matter where committed in the county, the indictment is not bad because it does not specify or describe the particular curve upon which the automobile is claimed to have been operated in violation of law. *State v. Sneed*, 16 Lea (Tenn.) 450, 1 S. W. 282; *Matthews & Buzzard v. State*, 25 Ohio St. 536; *State v. Buxton*, 31 Ind. 67; *State v. Finney*, 99 Iowa, 43, 68 N. W. 568; *State v. Buchanan*, 32 R. I. 490, 79 Atl. 1114; *White v. State*, 82 Tex. Cr. App. 274, 198 S. W. 964.

[3, 4] A more serious objection to the indictment is that based upon the unconstitutionality of the statute, so far as it undertakes to make the conduct interdicted a criminal offense. It is insisted that the definition of the offense in the statute is so indefinite and uncertain as to make it void because in violation of section 10 of article 3 of the Constitution forbidding anyone to be deprived of life, liberty or property without due process of law; and section 14 of the same article, which requires, among other things, that in all criminal trials the accused shall be fully and plainly informed of the character and cause of the accusation against him. The argument is that the language used in the statute undertaking to create this offense is so indefinite and uncertain that to allow one to be convicted under its terms would be to deprive him of liberty or property without due process of law, and also without informing him of the nature of the accusation against

him. It is a fundamental principle of our jurisprudence that a statute creating a crime must be so certain and definite that one committing an act forbidden can tell, when he does so, that he has violated the law. Now, it will be observed that this statute forbids operators of automobiles from operating the same around curves without having them under control and without reducing the speed to a reasonable and proper rate. Who is to determine when the automobile is under control in going around a curve in a particular case, or whether the speed at which it is operated is reasonable and proper? This cannot be left, of course, to the judgment of the operator, for that would result in a practical annulment of the statute. The court and jury trying the case, if the statute be upheld, would, of course, have to determine whether the automobile was under control, and whether the speed was reasonable and proper in each particular case. Nobody would know, until after a trial was had and a judgment rendered, what the law was. No man, in driving an automobile around a curve, would have any criterion by which he could determine at what speed the same might be operated without committing a violation of the criminal law. The judgment of each particular jury would be the criterion which would have to be observed, and this judgment cannot be ascertained until after the alleged offense has been committed.

To state the case in another way, it may be said that the Legislature has not created an offense at all. It has not exercised its legislative power, but has attempted to cast the same upon the courts and juries in this class of cases. It is equivalent to saying that the law, governing the operation of automobiles around curves on public roads, shall be declared by the courts in cases coming before them, and, if you operate your automobile around a curve at a rate of speed which a jury thinks is unsafe, you are guilty of an offense. The court and jury create the offense. They say what shall be necessary to constitute the offense instead of confining their inquiry to whether or not the accused party has done something forbidden by the Legislature. The jury in such a case as this would have to determine: First, what the law is, or rather would have to make the offense; and then, after doing this, their inquiry would extend to the further question, whether the party accused committed the act which they set up as the law in the case. And not only is it in effect a delegation to the courts of legislative power, but an attempt to delegate to them power to pass *ex post facto* laws, because the law governing in particular cases would not be declared, or would not be known, until after the offense was actually committed.

We are very clearly of the opinion that the

Legislature, in creating a statutory crime, must define the same with sufficient certainty to enable any one to determine, when he does an act, whether or not it is interdicted by the statute; in other words, to enable him to tell whether he was acting rightfully or wrongfully at the time he did the act. If this statute should be upheld, there would be no uniform rule of conduct governing the operation of an automobile upon curves in public roads. There would be as many different standards as there would be different opinions among the juries and judges trying the cases as the same arise, and no man would ever know, until after he was tried and convicted or acquitted upon the charge brought against him, whether he had been guilty of an offense or not. The Supreme Court of the United States in the recent case of *United States v. Cohen Grocery Co.*, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. —, 14 A. L. R. 1045, held unconstitutional a provision of the Food Control Act which made any person guilty of a crime who made an unjust and unreasonable rate or charge in handling or dealing in or with any necessities, upon the ground that the same violated the fifth and sixth amendments to the federal Constitution. The provisions of these amendments substantially accord with the provisions of our bill of rights above adverted to. The principle controlling in that case controls here. A few other cases illustrating the principle are: *State v. Ashbrook*, 154 Mo. 375, 55 S. W. 827, 48 L. R. A. 265, 77 Am. St. Rep. 765; *Augustine v. State*, 41 Tex. Cr. R. 59, 52 S. W. 77, 96 Am. St. Rep. 765; *Hewitt v. State Board of Medical Examiners*, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. R. 315; *Stoutenburgh v. Frazier*, 16 App. D. C. 229, 48 L. R. A. 220; *Cook v. State*, 26 Ind. App. 278, 59 N. E. 489; *Ex parte Jackson*, 45 Ark. 158; *United States v. Capital Traction Company*, 34 App. D. C. 592, 19 Ann. Cas. 68; *Louisville & Nashville R. R. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457; *Gordon v. State*, 12 Ga. App. 710, 78 S. E. 204; *Hayes v. State*, 10 Ga. App. 523, 75 S. E. 523; *Griffin v. State*, 86 Tex. Cr. App. 498, 218 S. W. 494; *People v. Beak*, 201 Ill. 449, 126 N. E. 201. Many more authorities might be cited to the same effect, but these suffice to illustrate the principle controlling in this case.

We are clearly of the opinion that the act is invalid, so far as it attempts to make it a criminal offense to drive an automobile around a curve without having the same under proper control, or without reducing the speed to a reasonable and proper rate.

The motion to quash the indictment should therefore have been sustained, and we answer the question certified accordingly.

(90 W. Va. 747)

SAFFEL v. WOODYARD.

(Supreme Court of Appeals of West Virginia.
April 11, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 308—Appealable orders and decrees are not reviewable by certificate.

Appealable judgments, orders, and decrees are not reviewable by certificate, under the provisions of section 1, c. 135 (sec. 4981). Code.

2. Appeal and error \S 308—Order sustaining demurrer to two counts of declaration and overruling it to the other, held a final judgment and not reviewable by certificate.

An order sustaining a demurrer to two counts of a declaration containing three, overruling it as to the other one and then saying: "And the plaintiff not desiring to amend his declaration any further, it is ordered that the same be dismissed and the defendant shall recover of and from the plaintiff his costs herein"; records a final judgment, wherefore the rulings upon the demurrer are not reviewable by certificate.

Case Certified from Circuit Court, Taylor County.

Action by Samuel Saffel against Thomas E. Woodyard. Certified for review of an order sustaining a demurrer to special counts and dismissing the action. Dismissed for want of jurisdiction.

J. Guy Allender, of Grafton, for plaintiff.

POFFENBARGER, P. The certificate in this case, by which review of the decision of the court below, upon a demurrer to a declaration in an action of assumpsit to recover a proportionate part of the cost of construction of a line fence between the lands of co-terminous owners, consisting of three counts, two special and the other common, must be dismissed as having been improvidently sent up and docketed.

[1, 2] After sustaining the demurrer as to the special counts, the order dismissed the action. Its conclusion reads:

"And the plaintiff not desiring to amend his declaration any further, it is ordered that the same be dismissed and the defendant shall recover of and from the plaintiff his costs herein."

In our opinion, this is a final judgment of dismissal and, therefore, is reviewable only by writ of error. Appealable judgments, orders, and decrees cannot be certified for review. *Pittsburgh & W. Va. Gas Co. v. Shreve* (W. Va.) 110 S. E. 714, not yet officially reported; *Heater v. Lloyd*, 85 W. Va. 570, 102 S. E. 228.

(90 W. Va. 440)

SHELL et al. v. LINEBERGER. (No. 447.)

(Supreme Court of North Carolina. May 3, 1922.)

1. Limitation of actions §184—Defective plea of limitations may be amended by permission.

A plea of the statute of limitations, if not in proper form, may be remedied by amendment by the court's permission.

2. Limitation of actions §130(13)—Counterclaim in action to recover land from one in possession at date of sale not barred by failure to sue within year after nonsuit in defendant's action against former owner's administrator.

That a suit to recover land from a deceased former owner's daughter, who was in possession when plaintiffs purchased the land, was not commenced, as required by Revisal 1905, § 370, within a year after nonsuit in defendant's action against her mother's administrator to have the land sold to pay her claim for services rendered decedent, did not bar defendant's counterclaim for such amount, even apart from the fact that the two suits were not between the same parties, as such statute applies only where the statute of limitations, which does not run against one in possession when the land was sold, would otherwise bar the action.

3. Ejectment §107—Refusal to submit issues as to defendant's alleged equity held erroneous.

In an action to recover land from one in possession at the date of sale to plaintiffs, the court erred in refusing to submit appropriate issues as to defendant's equity, based on fraud and undue influence, inducing the execution of a deed to plaintiffs' grantor by defendant's deceased mother, and in instructing the jury if it found the facts as the witnesses testified to answer in the affirmative issues as to whether plaintiffs were the owners of and defendant in unlawful possession of the land.

Appeal from Superior Court, Gaston County; Ray, Judge.

Action by Ed. Shell and another against Jane Lineberger. Judgment for plaintiffs, and defendant appeals. New trial.

Mangum & Denny, of Gastonia, for appellant.

WALKER, J. This action was brought to recover a tract of land, consisting of one acre and eight poles, situated about one mile from the town of Dallas, on the Dallas & Spencer Mountain road, the defendant being in the possession of the same. She alleged, in her defense, that the land was at one time owned by her mother, Mrs. Sarah Lineberger, who died in the year 1907, and that a short time prior to her death the defendant rendered services to her mother from February 15, 1903, to April 10, 1907, for which the latter promised to pay the reasonable value thereof, which amounted to \$400. Af-

ter her mother's death, the defendant brought an action against her administrator, and, at his death, continued the same against her administrator de bonis non, to recover the amount of her claim and for the purpose of having the land sold to pay it, and the said action pended in the superior court of Gaston county for a long time and until a nonsuit was entered therein in the year 1916.

In this action defendant pleaded, as a counterclaim or defense, the said indebtedness due from her mother to herself, and alleged in that connection, that her brother, Jonah Lineberger, had fraudulently, and by undue influence, procured from their mother, Sarah Lineberger, a deed for the premises in question, and had afterwards conveyed them to the plaintiffs, who had, at the time, full notice, actual and constructive, of the defendant's claim and equity against the land; that her brother paid nothing for the land, the deed to him being entirely voluntary, and that Sarah Lineberger retained no property with which to pay her then existing debts, she being utterly insolvent, having no estate whatever except the land conveyed by her to Jonah Lineberger. Defendant prayed for judgment for the amount of her claim against her mother and that the land be subjected to its payment, and, upon the allegations in her answer, the defendant tendered issues which the court refused to submit to the jury, but, on the contrary, submitted the issues tendered by the plaintiffs which, with the answers thereto, were as follows:

"(1) Are the plaintiffs the owners of and entitled to the possession of the lands described in the complaint? Answer: Yes.

"(2) Is the defendant in the unlawful possession of the lands described in the complaint? Answer: Yes.

"(3) What damages are the plaintiffs entitled to recover of the defendant for the wrongful detention of the lands described in the complaint? Answer: Three years and eight months—\$366.67."

The administrator de bonis non of Mrs. Sarah Lineberger filed an answer as follows:

"Wiley L. Serves, administrator d. b. n., says:

"1. That he has been appointed administrator de bonis non of the estate of Sarah Lineberger by the superior court of Gaston county.

"2. That he is not advised of the facts or the legal conclusions therefrom that are involved in the above entitled action, but that the same affect the estate of his decedent.

"3. That having no knowledge or sufficient information of the claim or the grounds therefor as set forth in the answer of the defendant, Jane Lineberger, he denies the same.

"Wherefore, he prays that he be allowed to come into said cause as a party, that the court advise him of his duties with regard to

the case at bar, and instruct him upon any judgment that may be rendered therein." (Duly verified.)

[1] There was no plea of the statute of limitations by the administrator *de bonis non*. The plaintiffs, in their reply to the answer, attempted to plead the statute of limitations to the defendant's claim against the estate of Mrs. Sarah Lineberger, but did not succeed in doing so, as their plea is not in due and proper form for that purpose, though this may be remedied by amendment if permitted by the court. Plaintiffs did plead adverse possession by themselves for 7 years, under color of title for more than seven years since the death of Mrs. Sarah Lineberger.

The defendant alleged, in her answer, that the plaintiffs were fully aware of her right and equity, as a creditor of her mother, when they allege that they purchased the land from Jonah Lineberger. Defendant further alleged in her answer that she has been in the actual adverse possession of the land ever since her mother's death in 1907, and this was actually known to the plaintiffs when they are alleged to have bought the same from Jonah Lineberger, and she avers that the fact of her possession was notice to them of her claim and equity, as against the land, to have it sold and the proceeds of the sale applied to the payment of the debt she holds against her mother's estate.

[2] There is an allegation by the plaintiffs in their reply that this suit was not commenced within one year after nonsuit in the other case. Apart from the fact that the two suits are not between the same parties, the first action having been between Jane Lineberger, as plaintiff, and R. L. Martin, as administrator of Sarah Lineberger, and Jonah Lineberger, as defendants, and this suit being between the plaintiffs and the defendant herein named, we said in *Grimes v. Andrews*, 170 N. C. 515, at page 522, 87 S. E. 341, at page 344:

"Nor do we think that the plaintiff can gain anything by reason of the fact that the suit was not revived within one year after the dismissal. That is required to be done only under Revisal, § 370, where the statute of limitations would otherwise bar, by the lapse of the period prescribed for bringing the suit. It was held in *Keener v. Goodson*, 89 N. C. 273, that section 370 was intended to enlarge the period of limitation and not to abridge it. But the conclusive answer to this contention is that the defendant was in possession of the land at the time from the day of the sale, and the statute did not run against her for that reason, so that the failure to bring her action within the supposed year of grace is not material. That her possession, and that of her father, suspended the operation of the statute has been well settled. *Mast v. Tiller*, 89 N. C. 423. The provision as to bringing a new action within one year after a nonsuit or dismissal, reversal, or other termination of the first suit, as pre-

scribed in the statute, refers only to those cases where the statute of limitations is applicable, and would bar, but for this clause, which, if complied with, saves the cause of action. Clark's Code (3d Ed.) § 142, and note. If the possession of the feme defendant, since the sale, prevents the bar of the statute, she did not need the additional time of one year within which to sue. The one-year clause applies only where the statute is operative and would defeat the new action if it were not commenced with the extended period, as above shown."

It was held in *Mask v. Tiller*, 89 N. C. 423:

"The enforcement of an equity will never be denied on the ground of lapse of time, where the party seeking it has been in continuous possession of the estate to which the equity is an incident."

And in *Stith v. McKee*, 87 N. C. 369, the court said that one may preclude himself by his laches from asserting a right which otherwise a court would help him to enforce, there are abundant authorities to show; but, to do so in any case, there must be something on his part which looks like an abandonment of the right, or an acquiescence in its enjoyment by another, inconsistent with his own claim or demand, and accordingly we have searched in vain for a single instance in which the court had withheld its aid in the enforcement of an equity, on the ground of the lapse of time, when the party seeking it has himself been in the continued possession of the estate to which that equity was an incident. That case was cited with approval in *Mask v. Tiller*, *supra*, and the same principle has since been often asserted.

[3] The equity set up by the defendant in her answer is that the deed from Sarah Lineberger to Jonah Lineberger, her son, was procured by his fraud and undue influence, she being in very feeble health for some time before her death and her mind greatly weakened, and that the plaintiffs purchased (if at all) with full actual notice of defendant's equity, and certainly with constructive notice thereof.

The actual and continuous possession of the land by Jane Lineberger after her mother's death was admitted. No final account of the administrator has been filed.

The court instructed the jury that, if they found the facts to be as testified by the witnesses, they should answer the first and second issue "Yes." Exceptions were duly taken to all the rulings.

It would be vain and idle to pursue the discussion of the case any further, as we are of the opinion that the court erred in refusing to submit appropriate issues as to the equity of the defendant, Jane Lineberger, which she pleaded in her answer, and in charging the jury as it did. It may be that

in the further development of the case,

may be necessary to submit the issues as to the plaintiffs' title and ownership of the land in connection with the other issues, as their right to recover will depend upon whether or not the defendant, Jane Lineberger, will succeed in establishing her equity.

The error in the particular indicated by us requires that there be another trial of the case.

New trial.

(183 N. C. 447)

BUILDERS' SUPPLY & EQUIPMENT CORPORATION, Inc., v. GADD et al.
(No. 448.)

(Supreme Court of North Carolina. May 3, 1922.)

1. Damages §23—Damages for breach stated.

Damages for breach of contract should be such as may reasonably arise naturally from the breach itself, or such as may reasonably be supposed to have been contemplated by both parties as the probable result of a breach.

2. Damages §23—Special damages recoverable for breach under special circumstances communicated to or known by defendant.

If a contract cannot be distinguished from the mass of similar contracts, only such damages may be recovered for its breach as would naturally and generally result; but, if there are special circumstances communicated to or known by defendant when the contract was made, special damages may also be recovered.

3. Damages §40(2)—Lost profits recoverable if necessary and proximate result of breach of contract, and shown with reasonable certainty.

Lost profits are not recoverable for breach of contract if purely speculative or conjectural or measured by an indefinite or fanciful conception, but are a proper element of damages when they are the necessary and proximate result of the breach, and can be shown with reasonable certainty.

4. Sales §420—Refusal to submit evidence of lost profits held erroneous.

In an action for the balance due for excavating and grading implements, where there was evidence that plaintiff, knowing their purpose, and when the work was to be commenced, promised to have them ready in time, but failed to ship several, and delayed shipment of others, that the wheelers were not equipped with draft hooks, necessitating the use of drag pans, that plaintiff requested defendant not to order the delayed articles from another, and that they could not be bought on the market, the court erred in refusing to submit defendant's evidence as to lost profits.

5. Trial §165—Evidence rebutting plaintiff's evidence need not be considered on motion to nonsuit.

On motion to nonsuit, evidence contradicting or rebutting plaintiff's evidence need not be considered.

6. Sales §420—Buyer held not negligent in efforts to minimize loss after seller's breach.

In an action for the balance due for excavating and grading implements, where there was evidence that plaintiff requested defendant not to order articles, shipment of which was delayed, from another, and that they could not be bought on the market at that time, the court cannot hold as an inference of law that defendant was negligent in his efforts to minimize his loss or waived his right to set up a counterclaim for lost profits by accepting the implements after the breach.

7. Sales §179(1)—Mere acceptance of goods after default does not always amount to waiver or estoppel.

A party may waive his right to damages for breach of contract and insist on performance, but the mere acceptance of goods after default does not always amount to a waiver or estoppel.

8. Estoppel §119—Waiver is for court when facts are not disputed.

Waiver is a matter of law for the court when the facts are not disputed.

9. Sales §420—Whether buyer waived right to damages by accepting articles after breach held for jury.

Whether a buyer of excavating and grading implements waived his right to damages for the seller's breach of contract in delaying shipment by accepting them when delivered held for the jury.

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Action by the Builders' Supply & Equipment Corporation, Incorporated, against W. C. Gadd and another. Judgment for plaintiff, and defendant Gadd appeals. Reversed, and new trial granted.

Plaintiff sued to recover \$447.50 as balance due for purchase of 10 wheel scrapers and other implements. Defendant Gadd, successor of Gadd & Pigg, pleaded payments with which he said he had not been credited, and alleged that the plaintiff had made an entire contract and sold the defendant certain equipment required in contracts for excavating and grading; that the plaintiff knew the purpose for which the implements were to be used, and failed to deliver certain essential parts of said equipment, in consequence of which the defendant suffered financial loss. He pleaded a counterclaim for the loss so incurred. At the close of the defendant's evidence his honor granted a motion to dismiss as to the counterclaim. The defendant excepted. The issue was answered by the jury, and judgment was given for the plaintiff. Defendant appealed.

J. C. Newell and William L. Marshall, both of Charlotte, for appellant.

Frank H. Kennedy, of Charlotte, for appellee.

ADAMS, J. [1, 2] The opinion of Alderson, B., in *Hadley v. Baxendale*, has been generally accepted as an accurate statement of the rule applicable to the measurement of damages for breach of contract:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." 9 Exch. 341; 156 Eng. Rep. 151.

[3] This case approves two rules: (1) If the particular contract cannot be distinguished from the great mass of similar contracts, only such damages may be recovered as would naturally and generally result from the breach; (2) but, if there are special circumstances communicated to or known by the other party at the time the contract is made, special as well as general damages may be recovered. 8 R. C. L. § 25 et seq. Accordingly, where a person violates his contract, he may be liable in given circumstances not only for losses sustained, but for gains prevented. Profits are not considered as an element of damages if purely speculative or conjectural, or measured by an indefinite or fanciful conception as to what they would have been had there been no breach of the contract. *Boyle v. Reeder*, 23 N. C. 607; *Foard v. R. R.*, 53 N. C. 236, 78 Am. Dec. 277; *Roberts v. Cole*, 82 N. C. 293; *Jones v. Call*, 96 N. C. 337, 2 S. E. 647, 60 Am. Rep. 416; *Lumber Co. v. Iron Works*, 130 N. C. 534, 41 S. E. 797; *Machine Co. v. Tobacco Co.*, 141 N. C. 285, 53 S. E. 885. But lost profits are a proper element of damages where such loss is the necessary and proximate result of the breach and can be shown with reasonable certainty. *Mace v. Ramsey*, 74 N. C. 11; *Oldham v. Kerchner*, 79 N. C. 106, 28 Am. Rep. 302; *Willis v. Branch*, 94 N. C. 143; *Rocky Mount Mills v. Railroad*, 119 N. C. 694, 25 S. E. 854, 56 Am. St. Rep. 682; *Neal v. Hardware Co.*, 122 N. C. 105, 29 S. E. 96, 65 Am. St. Rep. 697.

In *Furniture Co. v. Express Co.*, 148 N. C. 89, 62 S. E. 146, 30 L. R. A. (N. S.) 483, 128 Am. St. Rep. 588, Hoke, J., recognizing the uncertainty of estimating the profits of a going enterprise which are dependent on the varying cost of labor and material and the fluctuations of the market value of the product, states also the principle which is often applied in case of the delayed shipment of goods:

"Where the goods shipped have a market value, and there is nothing to indicate the specific purpose for which they were ordered, these damages are usually the difference in the market value of the goods at the time fixed for delivery and that when they were in fact delivered. We have so held in the case of *Davidson Development Co. v. Railroad*, 147 N. C. 503, and *Lee v. Railroad*, 136 N. C. 533, is to the same effect. When, however, the goods are ordered for a special purpose or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated. And it is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the contract, but when they are known to the carrier under such circumstances, or they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages."

See *Lumber Co. v. Railroad*, 151 N. C. 23, 65 S. E. 460; *Peanut Co. v. Railroad*, 155 N. C. 149, 71 S. E. 71; *Rawls v. Railroad*, 173 N. C. 6, 91 S. E. 367.

[4, 5] Applying these principles to the case at bar, we think his honor should have submitted to the jury the evidence relating to the defendant's counterclaim. There was evidence tending to show that the plaintiff failed to ship several of the articles included in the contract; that it knew the particular purpose for which they were to be used and when the work was to be commenced, and promised to have all the articles ready for the defendant at that time; that shipment was delayed several months, and the wheelers when delivered were not equipped with the draft hooks; that plaintiff's officers requested the defendant not to order the delayed articles from another—"Every day they would take it up with me, and they would say, 'Don't order it, we will have them here for you'"—and, in addition, that the wheelers could not be bought on the market at that time. There was evidence tending also to show the loss suffered by the defendant in the use of the drag pans instead of the three delayed wheelers; that if the contract had been performed he would have saved the cost of horses and drivers for three extra drag pans, and would have moved more dirt. Of course with reference to the motion to nonsuit it is not necessary to consider evidence in contradiction or rebuttal.

[8-9] In the circumstances disclosed by the record we cannot hold as an inference of law that the defendant was negligent in his efforts to minimize his loss, or that he waived his right of action by accepting the implements after the alleged breach of the contract. It is true that after the breach a party may waive his right to damages and insist on performance; but the mere acceptance of goods after default does not in all cases amount to a waiver or estoppel. 40 Cyc. 259. Waiver is a matter of law to be determined by the court when the facts are not disputed. *Dula v. Cowles*, 52 N. C. 290, 75 Am. Dec. 463. But in this case the questions to which we have referred, considered in connection with the defendant's evidence, were matters for the determination of the jury under the instructions of the court.

The order dismissing the defendant's counterclaim is reversed, and a new trial granted. This will be certified.

New trial.

(183 N. C. 433)

BELLAMY v. BLADEN COUNTY LUMBER CO. (No. 284.)

(Supreme Court of North Carolina. May 3, 1922.)

1. Master and servant ¶153(1)—Youthful or inexperienced employees entitled to warning.

An employer of labor in dangerous work must warn and instruct youthful or inexperienced employees concerning risks and provide adequate supervision when conditions require it.

2. Appeal and error ¶927(3)—Evidence favorable to plaintiff accepted as true on appeal from judgment of nonsuit.

On judgment of nonsuit, the facts favoring plaintiff's claim should be accepted as true and construed most favorably to him.

3. Master and servant ¶286(4)—Negligence in failing to warn minor held for jury.

In an action for the death of a minor employee, drowned while clearing out the bottom of a slide leading from a lumber mill carriage to a log pen in a river, evidence of defendant's negligence in failing to give warning and instructions held sufficient for the jury.

Appeal from Superior Court, Brunswick County; Connor, Judge.

Action by William M. Bellamy, administrator of the estate of Fred Ballard, deceased, against the Bladen County Lumber Company to recover damages of defendant for wrongfully and negligently causing the death of Fred Ballard, plaintiff's intestate. At the close of plaintiff's evidence, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed. Reversed.

Robert W. Davis, of Southport, and Jno. D. Bellamy, of Wilmington, for appellant.

Rountree & Carr, of Wilmington, for appellee.

HOKE, J. There were facts in evidence on part of plaintiff tending to show that defendant company owned and operated a lumber mill near the Cape Fear river in said county; that the mill carriage was about 30 feet from the river and 20 to 25 feet above the water level, and there was a slide 7 feet in width running from the carriage down into the log pen in the river, and which extended into the pen and under the water a distance of 10 or 12 feet; that the water was about knee-deep where the slide "struck" the river and waist-deep where it ended, and the logs were dragged from the river as needed up this slide on to the mill carriage, etc.; that the slide had become broken or torn up, and when the logs were being pulled out of the pen they would catch and stop, and it had become necessary or desirable to repair same; that the intestate was a lad of about 15 years of age in employment of defendant at the time and had been for about 4 days, and on August 15, 1918, he, with two or three other youthful employees, was directed by the foreman of the mill, one Douglas, to go with him and repair the slide where it had become torn up or broken under the water; that while so engaged Douglas, the foreman, finding that he would need to saw a piece of timber for the purpose, went with Ben Willis, one of the boys, to the mill for the purpose of instructing the intestate and his comrades to stay there in the water and clear out the bottom and the old boards at the foot of the slide; that the two boys were in the water when Douglas left, and that he gave them no warning of any danger, but told them "to stay in there till he cut the piece at the mill; that the channel of the river was from 30 to 40 feet deep and was 30 or 40 feet away;" that intestate could not swim and was in the water with his clothes and shoes on, ready to do the work required; that the tide was rising in the river, and the intestate was seen to fall forward and was caught and carried into deep water and was drowned.

[1] It is fully recognized in this jurisdiction and elsewhere that an employer of labor in this class of work must, in the exercise of ordinary care, provide for its employees a reasonably safe place to work, and to warn and instruct youthful or inexperienced employees concerning the risks and dangers which import menace of serious injury, and, in the exercise of such care, to provide also adequate supervision when conditions are such as to require it—a rule that is especially insistent in case of youthful employees when their lack of experience and training is likely without it to subject them to risk of serious or substantial injury. In *Ensley v. Lumber Co.*, 165 N. C. 687, 695, 81 S. E. 1010, 1013, Associate Justice Walker quotes with approval on the subject 1 Shearman &

Redfield on Negligence (6th Ed.) §§ 219 and 219a, as follows:

"It is the duty of one who employs young persons in his service to take notice of their apparent age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they ought not to be exposed. This is a duty which cannot be delegated; and any failure to perform it leaves the master subject to the same liability, with respect to such risks, as if the child were not a servant. For this purpose, the master must instruct such young servants in their work and warn them against the dangers to which it exposes them, and he must put this warning in such plain language as to be sure that they understand it and appreciate the danger. * * * The principles governing the employment of minors are, to a large degree, also applicable to the employment of inexperienced, ignorant, feeble, or incompetent servants. A master having notice of any such defect in a servant, no matter what his age may be, is bound to use ordinary care to instruct the inexperienced or ignorant and to avoid putting the feeble to work too heavy for their strength, and generally to refrain from exposing them to risks which they are not fit to encounter. When the master has notice of such ignorance or inexperience on the part of the servant as would make the ordinary risks of the business especially perilous to that servant, he must give the servant explicit warning of the danger, and not allow him to undertake the work without a full explanation of its perils."

[2, 3] This being the rule of obligation, and applying the principle uniformly prevailing with us that on a judgment of nonsuit, the facts which make in favor of plaintiff's claim should be accepted as true, and construed in the light most favorable to him. We are of opinion that the evidence of record affords a permissible inference that there has been in this instance a negligent breach of duty on the part of defendant, constituting an actionable wrong, and that on the facts as now presented the judgment of nonsuit is erroneous. This will be certified that the said judgment will be set aside, and the case submitted to the jury on appropriate issues.

Reversed.

(183 N. C. 430)

RUTLEDGE v. A. T. GRIFFIN MFG. CO.
(No. 225.)

(Supreme Court of North Carolina. May 3, 1922.)

1. Husband and wife § 16—Evidence held not to show claimed possession was adverse to possessor's wife.

In an action of trespass, in which plaintiff relied upon title by adverse possession of his predecessor, evidence held not to show that the possession so relied on was adverse to the possessor's wife, which would not give title.

2. Trespass § 45(5)—Evidence as to location of land and injury by cutting timber competent.

In an action for trespass by cutting timber, it was competent to show where the land was situated and what damages had been done to it, not only that which arose from the cutting and removing timber, but to what extent the remaining land had been injured or depreciated in value.

3. Appeal and error § 1053(5)—Evidence as to alteration of deed to defendants held harmless under charge.

Evidence in action of trespass that description in deed to defendant had been altered so as to include the tract in controversy, was not prejudicial to defendant, where court charged that the only issue for the jury, aside from the damages, was adverse possession.

4. Trespass § 45(2)—Alteration of deed competent on question of good faith in claiming land.

In an action of trespass by cutting timber, evidence that defendant had altered the deed to it, so as to make the description include the land in controversy, is competent on the question of defendant's good faith in claiming the land and denying the trespass and as showing the true location of defendant's land to be different from what it was claimed to be.

5. Evidence § 502—Witnesses § 271(1), 369—Manager of defendant, denying trespass, can be cross-examined as to alteration in defendant's deed, as to value and damages, and to show bias.

In an action for trespass by cutting timber, where the plaintiff had introduced evidence by defendant's grantors that the deed to defendant had, since they executed it, been altered so as to include the tract in controversy, defendant's manager, who denied the trespass and testified as to comparative value of the land and timber and damages, could be cross-examined with reference to alteration, as to value and damages, and to show his animus, feeling, or bias.

6. Trial § 103—Exception to testimony consisting of several distinct parts is too general.

An exception to testimony, which consists of several distinct parts without indicating more particularly the ground of the exception, is too general.

Appeal from Superior Court, Duplin County; Lyon, Judge.

Action by O. M. Rutledge, trading as Rutledge & Co., against the A. T. Griffin Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Stevens, Beasley & Stevens, of Warsaw, and Teague & Dees, of Goldsboro, for appellant.

John A. Gavin, of Kenansville, and Rouse & Rouse, of Kinston, for appellee.

WALKER, J. This is an action, in the nature of an action for trespass, to recover damages from the defendant for cutting and

removing timber from that portion of the plaintiff's land, known as the J. F. Watkins tract of land, which lies between Poley branch and the high-water mark of the mill pond, lying north of the Poley branch. The plaintiff acquired the title to this timber by mesne conveyances, from J. F. Watkins, for the timber of the J. F. Watkins tract of land, which included the timber alleged to have been unlawfully and wrongfully cut and removed by the defendant, that is, the timber in controversy being on the land between the Poley branch and the high-water mark of the branch on the north side, and the jury found that the defendant committed the trespass by cutting and removing the timber as alleged.

[1] In order to establish ownership of the timber, the plaintiff introduced evidence tending to show that J. F. Watkins had been in the adverse and continuous possession of the land for more than 40 years before his death, in 1913, claiming it as his own and as belonging to him in his own right, and the case was submitted to the jury by the court only in this view, that is, whether J. F. Watkins had acquired title to the land by such an adverse possession of it by him. This fact, it seems to us, eliminates many of the objections made and questions raised by the defendant. One of its contentions being that the adverse possession of J. F. Watkins could not be considered as against his wife, Mrs. Watkins, who was the daughter of Daniel B. Newton: But we do not understand from the record that it ever was so allowed to have effect. It does not even appear that his wife had any title to the land, or that she even claimed any, but all that does appear, in that respect, tends to show the contrary to be the case.

We may refer to one part of the evidence from which it would appear that the wife did not claim the land, nor did her children, but, at J. F. Watkins' death, the tract of land on which the timber in controversy stood, was divided by order of court among his heirs alone, without any claim or suggestion that Mrs. Watkins was interested at all in it. It appears from the syllabus of the case relied on by the defendant, that it was there held, as follows:

"The possession of lands by the husband, under a deed made to him by his wife, void for noncompliance with Rev. § 2107, is for the benefit of the wife, and during the continuance of the marriage relation during her life cannot be considered as adverse to her and ripen title in him by sufficient adverse possession. Semble, after her death his possession would be adverse possession against her heirs; and *quære* as to whether it would be such before demand is made for possession." *Kornegay v. Price*, 178 N. C. 441, 100 S. E. 883.

The principle of that case does not apply here, as it does not appear that J. F. Watkins held in opposition to his wife, or ad-

versely to her, or that she had any title, but that he held, in his own right, and adversely to every one. The title having thus vested in J. F. Watkins, he conveyed the land to L. D. Atkins, who, with his wife, conveyed it to M. T. Murray, and the latter, with his wife, to the plaintiff.

[2, 3] It was of course competent to show where the land was situated, that had been trespassed upon by cutting the trees, and what damage had been done to it, not only that which arose from cutting and removing the trees, but how, and to what extent, the remaining land had been injured, or depreciated in value, by the acts of trespass, so that the full amount of the damage could be estimated. It was also competent, and pertinent, to show where the "high-water mark" and Poley branch were, as they were alleged to have been called for in the deed. There was something said about tampering with the deed of H. J. Faison and wife to the defendant, those witnesses having testified that they had only conveyed to the defendant the timber to the high-water mark of the mill pond, which was the southern boundary of their land; and that the deed then exhibited was not the one they signed and delivered to the defendant; that the sheets were now of different width, one of the four sheets not being like the others; and that the deed was torn; but, as we have said, this evidence proved to be harmless, owing to the careful and discriminating manner in which the learned judge charged the jury, and restricted their attention solely to the question as to the adverse possession of J. F. Watkins, the cutting of the timber and the damages.

[4] If the defendant had mutilated the deed of Faison and wife, or defaced it in any material way, we do not see why it was not competent to show it, upon the question of the defendant's good faith in claiming the land, and denying the trespass; and as impeaching the validity of the defense, and as showing the true location of the defendant's land to be different from what it was claimed to be. And further, it was admissible to show that the alleged spurious deed differed from the original as signed by Faison and wife, and in what respects it differed, so as to establish the real boundaries of the land as they conveyed it. In this connection, the plaintiff contended that, notwithstanding the testimony of H. J. Faison and wife that the paper, exhibited to the court by the defendant as the deed from them, was not the original deed, so delivered to the defendant, the defendant failed to offer any evidence explanatory of the appearance of the paper and of the other facts testified by H. J. Faison and wife, tending to establish the falsification of the said paper, and that the deed to the defendant's grantor, H. J. Faison, limits his boundaries to the high-water mark, yet the defendant is undertaking, in this action, to claim title to the timber on the land be-

tween the high-water mark and the run of Poley branch, by virtue of a conveyance which its grantors declare bears a substituted page which changes, as the witnesses testify, the true description by erasing the words "high-water mark," and substituting therefor the run of Poley branch. This evidence, as to the alteration of the deed, was not used, so far as we can discover from the record, for any purpose to which it was not relevant, even if it was met with proper objection at the time it was offered.

We will not consider the alleged alteration, with reference to its legal effect upon the continued validity of the deed itself, but only so far as it may have influenced the jury in determining the location of the lands in controversy, and upon the question whether there had been a trespass by the defendant.

[5] The objections to the testimony of A. T. Griffin were not well taken. He had denied the trespass by the defendant company, of which he was the general manager, and testified to the comparative value of the timber, and it was competent to cross-examine him as to those matters with reference to the Faison deed to the defendant, in order to test the value of his testimony, and especially as to the value of the land and timber and the damages (*Gay v. Railroad & Lumber Co.*, 148 N. C. 336, 62 S. E. 436), and to show his animus, feeling, or bias. *Bailey v. Winston*, 157 N. C. 252, 72 S. E. 966.

[6] Numerous exceptions were taken to testimony, consisting of several distinct parts, without indicating more particularly the ground of the objection. This we have held to be too general. *Holmes v. R. R. Co.*, 181 N. C. 497, 106 S. E. 587; *Kennedy v. Trust Co.*, 180 N. C. 225, 104 S. E. 464.

Upon a review of the case and a due consideration of the exceptions noted by the defendant, we are of the opinion that it was correctly tried.

No error.

(183 N. C. 438)

MOORE v. CHICAGO BRIDGE & IRON WORKS. (No. 445.)

(Supreme Court of North Carolina. May 8, 1922.)

1. Negligence §101—Doctrine of comparative negligence stated.

The doctrine of comparative negligence is applicable only for the purpose of mitigating the damages in cases arising under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), and C. S. § 3467.

2. Master and servant §227(1)—"Contributory negligence" defined.

Contributory negligence defeating recovery for injuries to an employee, is the negligent act of plaintiff, which, concurring and co-operating with the negligent act of defendant, becomes the real, efficient, and proximate cause of the

injury or the cause without which it would not have occurred.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contributory Negligence.]

3. Negligence §1—"Negligence" defined.

Negligence is doing other than or failing to do what a reasonably prudent man would have done under the same or similar circumstances, or a want of due care.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

4. Master and servant §229—"Due care" defined.

The same rule of due care, which the employer is bound to observe, applies equally to the employee, and due care means commensurate care under the circumstances when tested by the standard of reasonable prudence and foresight.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Care.]

5. Negligence §65—Contributory negligence may be due to acts of omission or commission.

Contributory negligence may be due either to acts of omission or commission.

6. Negligence §117—Contributory negligence must be pleaded and proved.

Under C. S. § 523, contributory negligence must be pleaded and proved by defendant.

7. Appeal and error §843(1) — Errors not likely to arise on new trial not considered.

Alleged errors which will probably not arise on a new trial need not be considered.

Appeal from Superior Court, Mecklenburg County; Ray, Judge.

Action by Ralph Moore against the Chicago Bridge and Iron Works. Judgment for plaintiff, and defendant appeals. New trial.

Civil action to recover damages for an alleged negligent personal injury. Plaintiff, an employee of the defendant company, was engaged with other servants in the work of erecting a steel tower and water tank for the Standard Bonded Warehouse Company in the city of Charlotte. At the time of the injury plaintiff, together with other employees, was undertaking to move a long pole, similar to a telegraph pole, from the platform of the warehouse to the scaffold around the water tank. The pole was being conveyed on a two-wheeled dolly, or small wooden hand truck. When the wheels of the dolly came to the rail at the end of the platform it was necessary, in order to get the wheels over the rail and upon the bridge leading to the tower—an elevation of five or six inches—to place two short boards or planks in proper position so as to easily push the dolly from the platform up to and upon the bridge. The plaintiff selected the plank

for the wheel on his side, placed it himself, and was helping to push the truck or dolly up the boards, so placed, when the dolly careened or tilted towards him, and he either jumped off or was knocked off the platform, and fell a distance of five or six feet to a lower platform, with the result that his leg was broken. Defendant pleaded assumption of risk, the fellow-servant rule, and contributory negligence, in that the plaintiff by his own carelessness and negligence in placing the plank, etc., brought about his own injury. From a verdict and judgment in favor of plaintiff, the defendant appealed, assigning errors.

El. R. Preston and Wade H. Williams, both of Charlotte, for appellant.

D. E. Henderson and T. A. Adams, both of Charlotte, for appellee.

STACY, J. (after stating the facts as above). There are a number of exceptions appearing on the record, but we deem it unnecessary to consider them seriatim, as, in our opinion, a new trial must be awarded for error in the charge on the issue of contributory negligence. Upon this phase of the case his honor instructed the jury as follows:

"So, if you find that the plaintiff in the case, under the contentions which the court will later lay down for you, was guilty of contributory negligence and contributed to the degree that he was guilty, yet it does not predominate, then the defendant is not entitled to have an issue of contributory negligence answered in its favor; it must prevail by an outweighing of the contentions of the plaintiff that he did not contribute."

[1] As we understand this excerpt, to which the defendant has excepted, it embodies and carries with it a statement of the principle of comparing the negligence of the plaintiff with that of the defendant. This doctrine is applicable with us, and then only for the purpose of mitigating the damages or as a partial defense, in cases arising under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) and our own statute (C. S. § 3467). *Williams v. Mfg. Co.*, 175 N. C. 226, 95 S. E. 366. The instant case comes under neither enactment.

[2-6] Contributory negligence, such as will defeat a recovery in a case like the one at bar, is the negligent act of the plaintiff, which, concurring and co-operating with the negligent act of the defendant, thereby becomes the real, efficient, and proximate cause of the injury, or the cause without which

the injury would not have occurred. Negligence is doing other than, or failing to do, what a reasonably prudent man would have done under the same or similar circumstances. In short, it is a want of due care; and there is really no distinction, or essential difference, between negligence in the plaintiff and negligence in the defendant, except the plaintiff's negligence is called contributory negligence. The same rule of due care which the defendant is bound to observe applies equally to the plaintiff; and due care means commensurate care, under the circumstances, when tested by the standard of reasonable prudence and foresight. The law recognizes that contributory negligence may be due either to acts of omission or to acts of commission. In other words, the lack of diligence, or want of due care, on the part of the plaintiff may consist in doing the wrong thing at the time and place in question, or it may arise from inaction or from doing nothing when something should have been done. The test is: Did the plaintiff fail to exercise that degree of care which an ordinarily prudent man would have exercised or employed, under the same or similar circumstances, and was his failure to do so the proximate cause of his injury? If this be answered in the affirmative, the plaintiff cannot recover in a case like the one at bar. *O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 40. Of course, it is needless to add that, under our statute (C. S. § 523), where contributory negligence is relied on as a defense, it must be set up in the answer, and the defendant is required to prove it on the trial. That is to say, the defendant must properly plead the negligence of the plaintiff as a defense, and he must also assume the burden of proving his allegation of contributory negligence. *Jackson v. Railroad*, 181 N. C. 153, 106 S. E. 495; *Fleming v. Railroad*, 160 N. C. 196, 76 S. E. 212. See, also, *Taylor v. Lbr. Co.*, 173 N. C. 112, 91 S. E. 719, on the question of proximate cause.

His honor may have had in mind what was said in *Vann v. Railroad*, 182 N. C. 570, 109 S. E. 556, but there the court was speaking of the passive and inactive negligence of the plaintiff, and not such as would make him "guilty of contributory negligence," to use the language employed in the charge here.

[7] As the other exceptions, in all probability, will not arise on another trial, we shall not consider them now.

New trial.

ADAMS, J., concurs in the result.

(183 N. C. 436)

MIMS v. SEABOARD AIR LINE RY. CO.
et al. (No. 411.)

(Supreme Court of North Carolina. May 3, 1922.)

1. Appeal and error ⇨432—Time for docketing appeal not extended by agreement of parties.

Where a case was tried in April, 1921, the appeals should have been docketed and heard at the term preceding the spring term, 1922, or at least the record proper should have been docketed and motion made for certiorari.

2. Appeal and error ⇨660(1)—Writ of certiorari to bring up record discretionary.

A writ of certiorari in aid of case docketed at the proper term is a discretionary one, and may not be dispensed with by agreement of counsel.

Appeal from Superior Court, Anson County; Ray, Judge.

Action by Lonnie O. Mims against the Seaboard Air Line Railway Company and others. From judgment for defendants, plaintiff appeals. No error.

Plaintiff, express messenger on train No. 13, running from Wilmington to Charlotte, was injured in a wreck on the night of May 2, 1919; said wreck occurring about two miles west of Lilesville and being caused by a derailment of the train.

James S. Manning, of Raleigh, McLendon & Covington, of Wadesboro, and Douglass & Douglass, of Raleigh, for appellant.

B. Vance Henry, of Wadesboro, and McIntyre, Lawrence & Proctor, of Lumberton, for appellees.

STACY, J. Seaboard passenger train No. 13, running from Wilmington to Charlotte, was wrecked on the night of May 2, 1919, at a point approximately two miles west of Lilesville in Anson county. Investigation made on the night of the wreck showed that the train had been derailed by means of a "drawbar" unlawfully placed on the railroad track by some person or persons, at that time, unknown to the defendants. Plaintiff was an express messenger in the employment of the defendant American Railway Express Company, and was in charge of the express car on the wrecked train. He brings suit against the American Railway Express Company, the Seaboard

Air Line Railway Company, and the Director General of Railroads, to recover damages for injuries alleged to have been sustained in said wreck. The jury having answered the issues of negligence in favor of the defendants, there was a judgment dismissing the action and taxing the plaintiff with the costs.

We have carefully examined the record and have been unable to find any reason for disturbing the result below. Upon the merits, we think the judgment must be affirmed. No reversible error has been shown.

[1, 2] It also appears that this case was tried in April, 1921. The appeal, therefore, should have been docketed and heard at the last term; or, at least, the record proper should have been seasonably docketed here and motion duly made for a certiorari. This latter writ is a discretionary one, and counsel may not dispense with it by agreement. *Ex parte McCade* (at the present term) 111 S. E. 3; *State v. Johnson* (N. C.) 110 S. E. 782; *State v. Hooker* (N. C.) 111 S. E. 351. Animadverting upon a similar state of facts in *State v. Trull*, 169 N. C. 370, 85 S. E. 137, the present Chief Justice, speaking for a unanimous court, said:

"We note that this trial was had in June, 1914. Under the statute and rules of the court this appeal was required to be docketed at the fall term of this court before the call of the docket of the district to which it belongs, under penalty of dismissal. Rules 5 and 7, 140 N. C. 540, 544; Revisal, 591; *Pittman v. Kimberly*, 92 N. C. 562, and numerous cases there-to cited in the Anno. Ed., and *Burrell v. Hughes*, 120 N. C. 277, citing numerous cases and with numerous annotations in the Anno. Ed. It appears in the record that the solicitor agreed with the prisoner's counsel that the case might be postponed and docketed at this term [spring term, 1915]. This was an irregularity, and was beyond his authority. The statute must be complied with and the cause docketed at the next term here after the trial below. If in any case there is any reason why this cannot be done, the appellant must docket the record proper and apply for a certiorari, which this court may allow, unless it dismisses the appeal, and may then set the case for trial at a later day at that term or continue it, as it finds proper. It is not permitted for counsel in a civil case, nor to the solicitor in a state case, to assume the functions of this court and allow a cause to be docketed at a later term than that to which the appeal is required to be brought by the statute and the rules of this court."

No error.

(183 N. C. 793)

STATE v. PASOUR. (No. 436.)

(Supreme Court of North Carolina. March 8, 1922.)

1. Criminal law \Rightarrow 752½—Denying nonsuit, entire evidence considered in considering a motion for nonsuit.

By C. S. § 4643, on consideration of a motion for nonsuit, a consideration of the entire evidence is required.

2. Criminal law \Rightarrow 752½—Admitting killing forestalled motion to dismiss as in nonsuit.

In a prosecution for second degree murder, where defendant moved to dismiss as in nonsuit, but admitted the killing, testifying that he acted in self-defense defendant's own testimony forestalled his motion to dismiss.

3. Homicide \Rightarrow 13, 23(1)—Intentional killing with deadly weapon implies malice and constitutes second degree murder.

The intentional killing of a human being with a deadly weapon implies malice and, nothing else appearing, constitutes murder in the second degree.

4. Homicide \Rightarrow 151(1), 152—Where implication of malice raised by admission of killing, burden on defendant to show facts excusing homicide or reducing it to manslaughter.

The intentional killing of a human being with a deadly weapon implying malice, when this implication is raised by admission of the killing, the burden is on defendant to show facts sufficient to excuse or reduce to manslaughter.

5. Witnesses \Rightarrow 379(2)—Evidence of statements made by witness admitted to impeach.

In a prosecution for murder, testimony concerning statements made by defendant's brother relative to certain marks or scratches on the body of the deceased, was competent in contradiction and impeachment of the brother's preceding testimony.

Appeal from Superior Court, Gaston County; Ray, Judge.

Joe Pasour was convicted of second degree murder, and he appeals. No error.

The indictment charged the defendant with the murder of Eli Pasour, his father. The state prosecuted only for murder in the second degree or manslaughter. The jury returned a verdict for murder in the second degree, and, from the judgment pronounced, the defendant appealed.

The defendant admitted that he shot and killed the deceased with a pistol, and introduced evidence tending to show self-defense.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

ADAMS, J. [1-4] Both before and after he had introduced evidence, the defendant moved to dismiss the prosecution as in case of nonsuit, and duly excepted to the court's denial of his motion. The exceptions therefore require a consideration of the entire evidence. C. S. § 4643; State v. Killiam, 173 N. C. 792, 92 S. E. 499. The defendant admitted that he fired the fatal shot, but testified that he acted in self-defense. The intentional killing of a human being with a deadly weapon implies malice and, nothing else appearing, constitutes murder in the second degree. When this implication is raised by an admission or proof of the fact of killing the burden is on the defendant to show, to the satisfaction of the jury, facts and circumstances sufficient to excuse the homicide or to reduce it to manslaughter. State v. Capps, 134 N. C. 627, 46 S. E. 730; State v. Barrett, 132 N. C. 1005, 43 S. E. 832; State v. Quick, 150 N. C. 820, 64 S. E. 168; State v. Yates, 155 N. C. 450, 71 S. E. 317; State v. Orr, 175 N. C. 773, 94 S. E. 721; State v. Brinkley, 183 N. C. —, 110 S. E. 783. For these reasons the defendant's own testimony necessarily forestalled his motion to dismiss the action.

[5] A witness for the state was permitted to testify, over the defendant's objection, concerning statements made by the defendant's brother, Morris Pasour, relative to certain marks or "scratches" on the body of the deceased. The defendant's exception which was duly entered, is without merit. The evidence was competent in contradiction and impeachment of Morris' preceding testimony. The other exceptions require no discussion. Dr. Wilkins properly indicated the brother that admitted the killing and evidence as to any peculiarity of the deceased a short time before his death, so far as the record discloses, was irrelevant and remote. Besides, the proposed answer of the witness is not shown.

Upon examination of the exceptions and the record we find no error.

No error.

(183 N. C. 789)

STATE v. BROWN et al. (No. 434.)

(Supreme Court of North Carolina. May 8, 1922.)

1. Criminal law §752½—On motion for nonsuit, state's evidence is taken as true.

On a motion of accused for nonsuit, the evidence of the state must be taken as true, with the most favorable inferences that the jury was authorized to draw from it.

2. Intoxicating liquors §238(2)—Evidence held to take to the jury landowner's guilt of manufacturing and permitting use for manufacture.

Evidence that a still was found on the land of accused, to which path led from the house torn down by accused, and in the construction and operation of which materials from the house were used, with evidence tending to show accused had visited the still on various occasions, held sufficient to take to the jury the question of the guilt of the accused, or permitting use of his premises for the manufacture of liquor and of manufacturing.

3. Intoxicating liquors §238(2)—Evidence held to take to the jury guilt of assistant to landowner, a manufacturer.

Evidence that one defendant had been seen in company with the other who owned the land on which the still was found, on nearly all occasions on which the landowner was seen in the vicinity of the still, with admissions that the former defendant had received some of the liquor, held sufficient to submit to the jury warranting the inference he was aiding and abetting the landowner in the sale and manufacture of the liquor so as to have been guilty of manufacturing. C. S. § 3409.

4. Criminal law §1069(6)—Appeal must be docketed or certiorari applied for at proper term.

Where the case was tried at the June term and the record was not docketed nor any certiorari applied for at the fall term of the Supreme Court, and in fact the appeal bond not filed until the following March, and the appeal not docketed until April, the appeal should be dismissed.

Appeal from Superior Court, Mecklenburg County; McElroy, Judge.

T. H. Brown and another were convicted of violating the prohibition law, and they appeal. Appeal dismissed.

The defendants excepted for the refusal to nonsuit. The evidence for the state condensed tends to show the following facts:

That about April 10, 1921, the deputy sheriff and four officers named, in consequence of information received, went out to a farm owned by the mother of Brown, but under his control and management, and found there a 50-gallon still, two large vats of still beer, and all kinds of barrels, slop vats, funnels, buckets, and everything used in connection with making whisky. The still was a good

one, built on a brick furnace and cased up with brick. They also found a lot of provisions there such as ham, cheese, coffee, light bread, and a great number of empty sugar sacks. They found the vats full of beer that was working, about 2,000 or 3,000 gallons. This beer was ready for the still. The still was hot, and the fire was burning beneath it. The officers put out the fire by pulling the wood out from under the furnace. The still was about 50 yards from the edge of a meadow where the defendant Brown was in the habit of cutting hay. At that date, April 10, the hay had not been cut, but near by was an old stack place, where the hay the year before had been stacked. Across this meadow and about 100 yards from the still was an old house place. The old house had been torn down, and the timbers sawed into wood, and there was a large pile of that wood down at the still. The officers carried some of the wood found at the still up to the old house place and compared with the wood lying there, and found that it was the same and sawed the same length. The chimney of this old house had also been torn down, and the brick used at the still appeared to be the same as that remaining in the old chimney at the house.

There was a road to the old house, and a well-beaten path led therefrom to the still. The road stopped at the old house place, and the path ran from that place to the still and stopped there. The officers found the still by following that path. They found a lantern setting on the woodpile at the old house place. It was black with smoke, had beer slops on it, and had evidently been used at the still. The wood at the still, when compared with that at the house place, was found to be the same size and length, and was sawed in the same way. Deputy Sheriff Festerman went back there a few days later, and found the same things there, except that they had been moving the vats out. Most of them had been moved away. He testified further that he saw the defendant Lee Smith drive up in a Ford truck just as he was leaving.

"He never said anything to me. He saw us, and turned off through an old field. I saw two men in the truck with him, but I don't know who they were. He sorter drove through the old field and stopped. I don't know what had become of the lumber and stuff that had been moved away, but it had been moved. Part of the furnace had been carried out into the old field."

The defendant Brown had had this house torn down about two or three weeks before the still was discovered, and part of the timber sawed up and left there. Two days before the still was discovered, three negro boys saw the defendants Smith and Brown, go down to the still. They drove their automobile up to the old house place, then got out

of the car, came down the road, turned up the edge of the thicket, and went into the still. They stayed there about 5 or 10 minutes, then left. The boys, noticing this, after they left followed them, found a path, then took the path, and went to the still.

Both defendants denied that they knew anything of this still. They admitted that they were at the old house place, and had walked down in the meadow at the time that the three boys saw them, but claimed to have gone there to look after the hay of last year's cutting. The defendant Brown testified that his hayyard was about 135 yards from the still, and said:

"When I got out of my automobile that day I did not go in the direction of the still place at all; I went in the other direction. * * * We did not go into the thicket at all, and I did not see any path leading to the still until after it was captured."

He admitted he had hauled the lumber and some of the slops from the still after the still was cut up, and that he gave his codefendant Smith some of the slops.

The defendant Smith admitted that he got about a quart of liquor which was made at this place, and said:

"Some boys found some liquor down there on Tuesday evening, and brought it to my house. They took the most of it; at least some one did. I do not know who got the balance. I got less than a quart."

There was some evidence introduced by the defendant in explanation or contradiction of some of the above testimony, but the jury did not give it credence, and found the defendant Brown "guilty of permitting a distillery to be erected on his premises and manufacturing liquor," and Smith they found guilty of manufacturing. Judgment and appeal.

F. M. Redd and D. B. Smith, of Charlotte, for appellants.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. [1,2] On this motion for nonsuit, the evidence of the state must be taken as true with the most favorable inferences that the jury was authorized to draw from it. As to the defendant Brown, the evidence was sufficient to be submitted to the jury both on the charge of knowingly permitting land in his possession and under his control to be used as a place for the manufacture of liquor, and also for manufacturing. He admits that he was in and about this meadow frequently a short time before the still was discovered; that he directed the tearing down of the house and the sawing up of some of its timbers on its site, and was himself in and about the place while this work was going on. The state's evidence established clearly that there was a well-beaten path from this house to the still; that the

firewood used at the still came from the pile admittedly sawed under direction of the defendant; that setting on this pile of wood at the house was a lantern smoked, and beer besprinkled which bore traces of having been used at the still; and that the brick used in the furnace came from the chimney of this old house.

In *State v. Jones*, 175 N. C. 709, 95 S. E. 576, Walker, J., for the court, held that one was guilty of manufacturing if he furnished the still, or the corn, or the coal and wood to make the fire, or any other material used in the manufacture of liquor. A bill similar to the one in this case was passed upon and sustained by the court at last term by Hoke, J., in *State v. Mundy*, 182 N. C. 910, 110 S. E. 93.

[3] The defendant Smith, according to the evidence, was identified with Brown in the whole affair. He was with him on nearly every occasion where Brown is shown to have appeared at or near the still. Smith shared not only in the beer left at the still, but in the whisky which had been made there, and was seen by two of the officers under suspicious circumstances, apparently going there to haul off the lumber after the still was cut up.

The evidence was sufficient to submit to the jury, and would have authorized the inference that the parties were at the still that morning before day, preparing for the manufacture of whisky, and made their escape before the officers got there, one of them carrying the lantern to the old house place, but blowing it out and setting it upon a pile of wood after they had reached the open. Upon the evidence, taken as the law requires on a motion of this kind in its most favorable aspect, and with the most favorable inferences which the jury can draw therefrom in favor of the state, we could not say that there was no evidence fit to be submitted to the jury against the defendant Smith, although the evidence is not as full and complete against him as against his codefendant. They were evidently associated, and there was evidence to convict Smith of aiding and abetting, and hence guilty of the charge of manufacturing (C. S. § 3409), as found by the jury.

[4] We have stated and discussed this case because it was argued before us, which would not have been done if we had been advertent to the fact that this case was tried at June term, 1921; that the record was not docketed nor any certiorari applied for at the fall term, and a certiorari would not have issued unless on good cause shown. Indeed the appeal bond below was not filed until March 11, 1922, and the appeal was not docketed here until April 6, 1922.

Under the always uniform ruling of the court the appeal should have been dismissed. This has been often reiterated and several cases have been dismissed at this term ac-

cordingly. The reason of the rule and the necessity for its uniform observance was restated as late as last week in *State v. Barksdale* (N. C.) 111 S. E. 711. The court will make no discrimination between litigants in the requirements which we have found necessary and have always adhered to.

Appeal dismissed.

(188 N. C. 450)

GAITHER v. E. H. CLEMENT CO.
(No. 386.)

(Supreme Court of North Carolina. May 8, 1922.)

1. Master and servant §101, 102(8)—Master must exercise ordinary care.

While the master is not the insurer of servant's safety, he must exercise ordinary care to provide reasonably safe instrumentalities and reasonably safe places for work, and the duty is discharged by exercising that degree of care that an ordinarily prudent man would exercise for his own safety.

2. Master and servant §107(1)—Master's duty applies to simple tools.

Where the tools are of simple construction, the master's responsibility for failure to exercise ordinary care to provide reasonably safe tools may generally be referred to his actual or constructive knowledge of defects from which injury may reasonably be expected to result.

3. Master and servant §185(6)—Servant making tools not a fellow servant.

The master's duty to provide reasonably safe tools is not delegable, and a servant who makes or sharpens a tool used by another is the representative of the master, and not a fellow servant.

4. Master and servant §229—Servant must exercise reasonable care to avoid obvious danger.

Where the danger is obvious, and the servant has as good an opportunity as the master of seeing the danger, and can avoid it by the exercise of reasonable care, he cannot recover against the master as a consequence of conditions which constituted the danger.

5. Master and servant §285(5), 289(39)—Negligence and contributory negligence as proximate cause of injury by flying piece of steel held for jury.

Where there was evidence that defendant negligently furnished a defective drill which stuck in a hole drilled through a concrete floor, and that, when plaintiff, under directions of defendant, attempted to knock the drill back, a piece of it flew off and injured his eye, held, that the question whether defendant's negligence or plaintiff's negligence in using a hammer was the proximate cause of the injury was for the jury.

6. Master and servant §296(10)—Charge on servant's duty to inspect tool held improper.

Defendant's requested instruction that it was the duty of plaintiff to inspect the tool used when the injury occurred, omitting all reference to the exercise of due care, was properly declined when considered in connection with plaintiff's right to assume that defendant had performed its duty.

7. Trial §295(7)—Instructions considered as whole.

Where in personal injury action the court charged that the plaintiff could not recover if his negligence was the proximate cause or contributed to the injury, the further charge that plaintiff may be guilty of contributory negligence, and yet that negligence would not be the proximate cause of the injury, was not prejudicial to defendant in view of the rule that instructions must be considered in their entirety.

8. Master and servant §293(3)—Charge held erroneous as making master's duty absolute.

An instruction that it was the duty of the master to provide reasonably safe instrumentalities and reasonably safe places for work, omitting the essential element of ordinary care, held erroneous as making the master's duty absolute.

Appeal from Superior Court, Guilford County; Webb, Judge.

Action by W. B. Gaither against the E. H. Clement Company. From a judgment on the verdict for plaintiff, defendant appeals. New trial ordered.

Plaintiff alleged that he was injured by the negligence of the defendant. Defendant denied negligence, and pleaded plaintiff's contributory negligence and assumption of risk. The issues of negligence, contributory negligence, assumption of risk, and damages were answered in favor of the plaintiff. Judgment on the verdict, and appeal by the defendant.

The plaintiff's statement of facts is substantially as follows:

"The plaintiff, at the time of his injury, was in the employ of the defendant as a carpenter, having had no experience in concrete work. The defendant was engaged in erecting a brick and concrete building, and had laid the concrete floors in the building, same having been poured in forms made of wood and supported by 2-inch boards held up by timbers 4x4. For some reason it became necessary to drill holes through the second floor of the building, and the defendant's superintendent, Cooper, ordered the plaintiff and a fellow servant to do so. The concrete of which the floor was composed had been set up three or four days, but the part where the plaintiff was working, and in which the holes had to be drilled, had been run two or three weeks before. The wooden forms were still underneath the concrete. In order to drill the holes, and do the work required of the plaintiff, the defendant furnished him a drill made of some of the reinforcing iron left over from use in the concrete. The plain-

tiff was aided in this work by a fellow workman—one held the drill and the other hit it with a hammer. The drill was $2\frac{1}{2}$ or 3 feet long and about $1\frac{1}{2}$ inches in diameter. One end was flattened out and sharpened, the flat end being wider than the body of the drill. The plaintiff and his fellow servant, after drilling one or two holes, were undertaking to get the drill out of the hole where it had become stuck. It could not be driven through because the top had become battered and flattened so that it would not pass through the hole; neither could it be pulled back, as the point had become stuck in the wooden form underneath the concrete. The defendant's superintendent, Cooper, gave orders for the plaintiff to go underneath and knock the drill back, while his fellow servant stayed on top and held it. In obedience to this order, the plaintiff went underneath, got a step ladder, went upon it, and with a hammer weighing about $2\frac{1}{2}$ pounds, struck the end of the drill; whereupon, with the first stroke, a piece flew off the drill and hit him in the left eye, putting it out. It was not light underneath the floor. His eye had been in good condition up to that time."

J. Lawrence Jones, of Charlotte, and F. P. Hobgood, Jr., of Greensboro, for appellant.
Wilson & Frazier and R. C. Strudwick, all of Greensboro, for appellee.

ADAMS, J. The complaint states four phases of the defendant's alleged negligence, but at the trial the plaintiff relied mainly on the asserted negligent failure to provide for him a suitable drill and a safe place in which to work. After the plaintiff's witnesses had testified, the defendant, declining to offer evidence, made a motion to dismiss the action as in case of nonsuit. In support of the motion it now insists: (1) That the injury was an accident; (2) that, even if the general rule prescribing the employer's duty as to furnishing implements applies where the tools are of simple construction, still, granting the defendant's negligence in the respects complained of, there was no proximate causal relation between such negligence and the plaintiff's injury; and (3) that the plaintiff, disregarding the safe way of driving back the drill, chose the dangerous way by using a hammer for that purpose.

[1] The master is not an insurer of the servant's safety, but he is required to exercise ordinary care to provide reasonably safe instrumentalities wherewith, and reasonably safe places wherein, the servant shall do his work. In the discharge of this duty he meets the requirements of the law if he exercises that degree of care which a man of ordinary prudence would exercise having regard to his own safety, if he were providing such appliances or places for his own personal use. Marks v. Cotton Mills, 135 N. C. 290, 47 S. E. 432; Nail v. Brown, 150 N. C. 535, 64 S. E. 434; Mercer v. R. Co., 154 N. C. 401, 70 S. E. 742, Ann. Cas. 1912a, 1002. In Mercer's Case, Allen, J., said:

"This duty applies alike to the simple and the complicated tools, but the authorities agree that, after performing this duty, the law does not impose the same obligations with reference to the two classes of tools. When the tools and appliances are complicated, the employer must inspect them from time to time, and must see that they are maintained in a reasonably safe condition." Fearington v. Tobacco Co., 141 N. C. 83, 53 S. E. 662.

[2, 3] With reference to simple tools, the question of the employer's responsibility may generally be referred to his actual or constructive knowledge of defects from which injury may reasonably be expected to result. This principle has been frequently applied, as, for example, where the employer had provided a hammer that was not suitable for the work intrusted to the employee (Young v. Fiber Co., 159 N. C. 376, 74 S. E. 1051), where a pin intended to secure a wheel on the spindle of a truck had been materially worn by long use (Cotton v. R. Co., 149 N. C. 227, 62 S. E. 1093), where a ladder used to clean out a vat had become worn and defective (Reid v. Rees, 155 N. C. 231, 71 S. E. 315), and where a defective chisel had been furnished for cutting slack rivets from an oil tank (Mercer v. R. Co., supra). That there had been in some of these cases an opportunity for inspection is unimportant, for the reason that in the instant case the defendant not only manufactured the drill, but provided material that was not suitable for the purpose. Rogerson v. Hontz, 174 N. C. 27, 93 S. E. 376; Thompson v. Oil Co., 177 N. C. 279, 93 S. E. 712; Hensley v. Lumber Co., 180 N. C. 573, 105 S. E. 174. So likewise as to the question whether the servant who made or sharpened the drill was a competent workman. The master's duty with regard to providing reasonably safe and suitable tools is not delegable, and such servant must be regarded as the representative or alter ego of the defendant, and not as a fellow servant of the plaintiff. Cheson v. Lumber Co., 118 N. C. 60, 23 S. E. 925; Bolden v. Ry. Co., 123 N. C. 617, 31 S. E. 851; Tanner v. Lumber Co., 140 N. C. 479, 53 S. E. 287; Harmon v. Contracting Co., 159 N. C. 28, 74 S. E. 632; Mincey v. R. Co., 161 N. C. 470, 77 S. E. 673; Clements v. Power Co., 178 N. C. 55, 100 S. E. 189.

[4, 5] The defendant contends, however, that the hurt inflicted could not have been foreseen; that it was an accident, and that there was no causal relation between the alleged negligence and the plaintiff's injury. As we have said, there was evidence tending to show that the defendant negligently furnished a defective drill, and that the plaintiff, in obedience to instructions, attempted to "knock it back through the boards or wood * * * whereupon a piece flew off the drill and hit him in the left eye." The defendant says that the plaintiff only assumed that the particle of steel came from

the drill; but the jury found it to be a fact. The defendant says that the proximate cause of the injury was the plaintiff's negligent use of the hammer; but this was a matter for the consideration of the jury. The principle discussed in *Martin's Case*, 128 N. C. 264, 38 S. E. 876, 83 Am. St. Rep. 671, is not applicable where the employer has actual or constructive knowledge that the defect in a simple tool which he provides is of a kind importing menace of substantial injury (*Thompson v. Oil Co.*, supra); and where there is evidence of concurring negligence on the part of the plaintiff and of the defendant the question of proximate cause must ordinarily be referred to the jury. True it is that, where the danger is obvious, and the servant has as good an opportunity as the master of seeing the danger, and can avoid it by the exercise of reasonable care, the servant cannot recover against the master for injuries received in consequence of conditions which constituted the danger. *Labbatt on Master and Servant*, § 333; *Mincey v. R. Co.*, supra. But upon the evidence here we cannot hold as a conclusion of law that the alleged negligence of the plaintiff was the proximate cause of his injury. *Isaiah Miles* testified that the drills in general and approved use for work in concrete were made of octagon and tool steel; that the drill furnished the plaintiff was made of re-enforcing steel, or scrap metal, and was more easily battered than one made from octagon steel; "if you hit it on the end it is going to break somewhere." And *Costner* said that after he had sharpened the drill its point was scaly and blue. The plaintiff's alleged negligence, the safe and the dangerous way of doing the work, and the cause of the injury were not exclusively questions of law. The evidence necessarily carried to the jury the various contentions of the parties, and his honor therefore properly declined the defendant's motion to dismiss the action.

[8, 7] In view of what has been said, it is unnecessary to refer to the defendant's request for a peremptory instruction upon the second and third issues beyond saying that each of them embraced elements that were determinable only by the jury; and the defendant's prayer for the further instruction that it was the duty of the plaintiff to inspect the drill omits all reference to the exercise of due care, and, when considered in connection with the plaintiff's right to assume that the defendant had performed its duty, it was properly declined. Nor can we concur in the contention that the defendant was prejudiced by his honor's observation that—

"A plaintiff may be guilty of contributory negligence and yet that negligence would not be the proximate cause of the injury."

The word "contributory" was inadvertently used by his honor in defining "proximate

cause," and not in his instructions upon the second issue; and to conclude that the jury were misled would be practically equivalent to an abolition of the established rule that instructions to the jury must be considered in their entirety. *Maney v. Greenwood*, 182 N. C. 583, 109 S. E. 636; *In re Hinton's Will*, 180 N. C. 206, 104 S. E. 841. The necessity of adhering to this rule is apparent when we consider the specific instruction that the plaintiff could not recover if his negligence proximately caused or contributed to his hurt.

The seventh and eighth exceptions are addressed to the following instruction:

"Now the law says, gentlemen, that it is the duty of the master, if he employs a servant, to furnish him a reasonably safe place to work and, if he does not and the plaintiff is injured by the failure, by reason of the master failing to furnish the servant a reasonably safe place to work or the employee a safe place to work, and if such failure is the proximate cause of his injury, then the law says he can recover, if the defendant, the employer, was guilty of negligence. The law also says that it is the duty of the master to furnish the servant with reasonably safe tools and appliances with which to do the work, and, as a general rule, if he does not, and he is injured by reason of his failure to furnish him reasonably safe tools and appliances to work with, if he is injured, the law says the party can recover."

We think these exceptions should be sustained. In *Bailey's Law of Personal Injuries* (2d Ed.) § 162, the character and extent of the master's duty are defined as follows:

"The underlying doctrine of the master's duty towards his servant, with respect to the character of the appliances furnished and place of work, as well as other duties that rest upon him, is that of the exercise of ordinary care. His duty does not extend to providing reasonably safe places and appliances, but only to the exercise of reasonable care to provide such, and in determining the liability of the master in the matter of their sufficiency this rule should be the guiding test."

In *Shearman & Redfield's Negligence* the doctrine is stated in this language:

"The duty of the master is to use reasonable or ordinary care to secure the safety of the servant while engaged in the service, and to that end to use reasonable or ordinary care to provide and maintain safe places to work and reasonably safe machinery, tools, and appliances." Section 183a.

In *Hicks v. Mfg. Co.*, 138 N. C. 325, 326, 50 S. E. 705, it is said:

"An employer of labor * * * is required to provide for his employees, in the exercise of proper care, a reasonably safe place to work and to supply them with machinery, implements and appliances reasonably safe and suitable for the work in which they are engaged."

Again, in *Harmon v. Contracting Co.*, 159 N. C. 28, 74 S. E. 634:

"It is a primary duty of the master to exercise ordinary care in supplying his servant with reasonably safe tools and implements and a reasonably safe place in which to perform his work."

And in *Smith v. R. Co.*, 182 N. C. 296, 109 S. E. 25, the principle is reiterated:

"The court instructed the jury 'that, under the law, it was the duty of the defendant to furnish to the plaintiff, while in its employment, a safe place to do his work and reasonably safe implements with which to do the work required of him.' His honor corrected this charge afterwards by instructing the jury that he should have told them that the defendant was required to furnish only 'a reasonably safe place for the servant to do his work,' but left it otherwise intact. It is not the absolute duty of the master to furnish even a reasonably safe place for the servant to do his work, but the true and correct rule is that he must use ordinary care to provide for him such a place. *Choctaw O. & G. R. Co. v. McDade*, 191 U. S. 64; *Garner v. R. R.*, 150 U. S. 359; *Washington & G. R. Co. v. McDade*, 135 U. S. 570; *B. & O. R. R. v. Baugh*, 149 U. S. 368. See, also, *Powell v. Anderson S. & T. P. Co.*, 256 Pa. St. 618, and *Kryner v. Gold Mining Co.*, 184 Fed. 43."

To the same effect are the following additional cases: *Pigford v. R. Co.*, 160 N. C. 98, 75 S. E. 860, 44 L. R. A. (N. S.) 865; *Ammons v. Mfg. Co.*, 165 N. C. 449, 81 S. E. 452; *Steele v. Grant*, 166 N. C. 641, 82 S. E. 1038; *McAtee v. Mfg. Co.*, 166 N. C. 456, 82 S. E. 857; *Ainsley v. Lumber Co.*, 165 N. C. 126, 81 S. E. 4; *Tate v. Mirror Co.*, 165 N. C. 278, 81 S. E. 328; *Rogers v. Mfg. Co.*, 157 N. C. 485, 73 S. E. 227; *Bradley v. R. Co.*, 144 N. C. 557, 57 S. E. 222; *Marks v. Cotton Mills*, supra; *Ensley v. Lumber Co.*, 165 N. C. 691, 81 S. E. 1010. Isolated expressions may be found which, if literally construed, would make the master's duty absolute; but evidently in these cases a formal statement of the principle was not deemed necessary. *Alley v. Pipe Co.*, 159 N. C. 330, 74 S. E. 885; *Avery v. Lumber Co.*, 146 N. C. 595, 60 S. E. 646.

[8] The instructions excepted to are at variance with these authorities. His honor inadvertently omitted therefrom the essential element of ordinary care, and imposed upon the defendant the positive duty of providing a place and implements of a designated character. Therein is error which entitles the defendant to a new trial.

Let this be certified to the end that the matters in controversy may be submitted to another jury.

New trial.

STACY, J., concurs in the result reached by a majority of the court, that the verdict

and judgment rendered herein should not be allowed to stand, and further is of the opinion that the defendant's motion for judgment as of nonsuit should have been allowed.

The plaintiff was an experienced carpenter. He undertook to drive the drill back by going underneath the floor and striking it on the sharp end with a steel hammer, and this without using a block of wood to soften the impact, or without taking any precaution for his own safety, or for the protection and preservation of the tools he was using. Can there be any doubt but what this act of carelessness on his part was the proximate cause of the injury? *Thompson v. Construction Co.*, 160 N. C. 390, 76 S. E. 266; *Wright v. R. Co.*, 155 N. C. p. 325, 71 S. E. 306.

(118 S. C. 430)

SEARLES v. AULD. (No. 10879.)

(Supreme Court of South Carolina. April 26, 1922.)

1. Vendor and purchaser ⇨82—Modification as to consideration may be made by parol.

A contract providing for delivery of shares of corporate stock in payment for land could be modified by parol so as to provide that a note be taken in lieu of the stock.

2. Vendor and purchaser ⇨349—Pleading held insufficient to show breach of seller.

A complaint in an action by purchaser to recover damages for breach held insufficient on demurrer where it alleged a tender of corporate stock as a part of the purchase price, it appearing that the contract was modified so as to provide that a note delivered to defendant was taken in lieu of the stock, but it not appearing from the complaint that plaintiff was entitled to tender such shares and obtain a redelivery of the note, though there was an allegation that defendant informed plaintiff that he could not comply.

3. Vendor and purchaser ⇨8, 144(2)—Vendor under contract need not have title at date of execution; title sufficient if good at date of performance.

A contract of sale of land is valid and binding on the purchaser, though the defendant at the time of making the contract does not have title; it being sufficient if, upon the date of compliance and upon a proper tender by the purchaser, the seller be ready to comply with the proper deed and a title free from the requisite incumbrances.

4. Appeal and error ⇨120(4)—Plaintiff held entitled to ask to amend on affirmance of judgment sustaining demurrer.

On appeal in an action for damages for breach of contract to convey land, where it appeared that defendant retained a note, held that plaintiff, on affirmance of a judgment sustaining a demurrer to his complaint, was entitled to ask for an order allowing him to amend his complaint if so advised.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by A. Searles against F. G. Auld. Judgment for defendant, and plaintiff appeals. Affirmed, and remanded to permit plaintiff to amend complaint.

The order sustaining the demurrer was as follows:

A hearing was had with both parties present upon a demurrer in the above cause; the principal issue made therein being that in the modified agreement as set forth in the complaint it appeared on the face thereof that the plaintiff had no legal right when making a tender of the balance of the purchase price to demand back a certain note which, in accordance with such modification, had been executed and delivered by plaintiff to defendant, in lieu of certain shares of stock which by their original contract were to have been assigned as a part of the purchase price on the date set for compliance.

[1, 2] Such a modification can be made by parol. 39 Cyc. 1351. Plaintiff, the purchaser, must allege the terms of the contract and compliance on his part therewith, before he can recover damages for an alleged breach, or for deceit, of the vendor, or he must show tender in accordance therewith and a readiness to perform. *Id.* 1558, 1561. In the instant case it was all right for the plaintiff to have tendered something more than the modified agreement called for, to wit, the shares of stock, but, unless there was a provision in such agreement that on the date finally set for compliance, he could tender such shares and obtain a redelivery of the note, which had been admittedly given in lieu of such shares, he could not demand such redelivery. His doing so excused defendant from complying. *Baker v. Gasque*, 3 Strob. 25.

The mere fact that he alleges in paragraph 7 that defendant informed him that he (defendant) could not comply is not sufficient, when taken in connection with the context, which shows that a tender was attempted, to show that defendant refused because of some impossibility to comply, which would have excused tender on part of plaintiff. It only shows that defendant could not comply because plaintiff had not made a proper tender.

[3] The fact, as alleged, that defendant at time of making the contract did not have title, is not sufficient to indicate an impossibility of compliance on his part at the date set for same. Such contracts are made under the same conditions every day. It is sufficient if, upon the date of compliance and upon a proper tender by the purchaser, the seller be ready to comply with the proper deed and a title free from the requisite incumbrances. *Miller v. Cramer*, 48 S. C. 232, 26 S. E. 657; *Mobley v. Quattliebbaum*, 101 S. C. 221, 85 S. E. 585.

D. W. Galloway, of Columbia, for appellant.

Moffatt & Marion, of Columbia, for respondent.

WATTS, J. [4] For the reasons assigned by his honor County Court Judge Whaley, it is the judgment of this court that the judgment of the county court should be affirmed,

but, however, it be remanded to the county court in order that the appellant be allowed to ask for an order allowing him to amend his complaint if he be so advised.

GARY, C. J., and FRASER, COTHRAN, and MARION, JJ., concur.

COTHRAN, J. (concurring). In my opinion the order of the court below sustaining the defendant's demurrer to the complaint should be reversed for the reasons following:

The complaint alleges, in substance, that on March 30, 1920, Auld contracted in writing to sell Searles two certain parcels of land containing in the aggregate 77.8 acres for \$6,000, upon the following terms: \$50 cash; \$250 on May 25; \$500 in certain stock at \$125 per share on November 1st; \$450 cash on December 28, 1920; at the latter date, upon compliance with the foregoing terms, Auld was to execute and deliver to Searles a deed covering the property and take from him his bond and mortgage for the remainder of the purchase price, \$4,750, payable \$2,000 on January 1, 1922, and \$2,750 on January 1, 1923, with interest on the deferred payments from January 1, 1921, at 7 per cent., Searles to be allowed credit upon payments made prior to December 28, 1920, at 7 per cent.—that the deed was to convey the property with full covenants of warranty, dower renounced and free from incumbrances; that Searles paid an attorney \$60 to examine the title, who reported that Auld did not have title to the property; that Searles made the cash payment of \$50 and also the \$250 payment due May 25, 1920; that, instead of the stock deliverable on November 1st, Auld agreed to take Searles' note for \$500, which was executed and delivered to Auld on November 1st (the maturity date not being stated in the record); that on December 28th, when the \$450 payment was due and the papers referred to were to be executed, Searles tendered to Auld the \$450 in cash and the \$500 of stock deliverable on November 1st under the original agreement, and demanded a deed of the land and a return of the note, which by agreement had been substituted for the stock; that Auld informed Searles that he could not comply with his contract to convey the land; that the payments in cash of \$300 and the note for \$500 were obtained by Auld from him through the false representation that he could and would deliver to him a good title to the land, knowing at the time that he could not do so; that the damages sustained were \$360 (including the attorney's fee of \$60) actual damages, and \$2,000 punitive damages. The prayer for judgment was for \$360 actual damages, the surrender of the \$500 note, and \$2,000 punitive damages.

The parties had a perfect right to change the terms of the contract, and when they

agreed that, instead of the stock deliverable November 1st, Auld would take the note of Searles for \$500, and that agreement was consummated, they made a valid amendment to the original contract, and it became as if that provision had formed a part of it. So, when Searles went to Auld on December 28, 1920, to demand his deed, it was his duty to tender not only the \$450 cash due on that day, but the amount of his \$500 note. He had no right, in the absence of an agreement restoring the terms of the original contract, to tender the stock and demand his note. The stipulations of the parties were concurrent, and, before either could sue the other for a breach, he must put himself in the attitude to demand performance by doing what he had agreed to do. 27 R. O. L. 456; 39 Cyc. 1551.

It is not alleged in the complaint that Auld did not have title to the land at the time of the alleged tender. The statement that he informed Searles "that he could not comply with his contract" was in reply to an insufficient tender by Searles and doubtless expressed an unwillingness rather than an inability. But, even if he did not have title, that fact did not excuse Searles from putting himself rectus in curio by making a proper tender.

But there is a more serious and difficult matter involved. It is thus alleged in paragraph 9 of the complaint:

"That said sum of \$300 and the note for \$500 was [were] obtained from the plaintiff through the false representation that the defendant could and would deliver the plaintiff a good and sufficient title to said premises above described, well knowing at the time that he could not execute such title."

It is further alleged in paragraph 10:

"That the defendant herein falsely and fraudulently obtained the money as above set forth."

"Misrepresentation or fraud as to the title of the vendor to the property contracted for is material, and, if not a misrepresentation of law, avoids the contract induced thereby and entitles the purchaser to rescind." 39 Cyc. 1264.

This general statement is subject to the qualification:

"If the title is defective, or if he [vendor] has no title at the time of entering into the contract, but such defects are cured at the time

fixed for performance, * * * a rescission will not be permitted." 39 Cyc. 1410.

And this qualification is itself thus qualified:

"The rule that a contract of sale will not be rescinded for want of or a defect in title, if the vendor tenders a good title at the time fixed for performance by the contract of sale, is very generally held not to apply when the vendor has been guilty of fraud."

The purchaser may therefore rescind the sale if the vendor has made a misrepresentation as to his title at the time of the contract and fails to make the defect good at the time of performance, or when such misrepresentation had been fraudulently made, regardless of his ability to make the defect good at the time of performance.

The latter alternative not being fully covered by the allegations of the complaint, it was not error to sustain the demurrer. The allegations of fraud relate only to promises, and not to representations of fact.

The complaint attempts to state facts entitling the plaintiff to the remedy of rescission of the contract on account of the fraudulent misrepresentation as to title and the remedy for a breach of the contract. These remedies are apparently inconsistent. The first repudiates the contract, and the other recognizes its validity. It may be, (as to which no opinion is expressed) that the plaintiff may be required to elect. 39 Cyc. 2000.

The result of this appeal which leaves the defendant in possession of \$300 of the plaintiff's money and his note for \$500 without anything to show for it in the plaintiff's hands does not commend itself to my idea of justice, if they were obtained by a fraudulent misrepresentation.

I think, therefore, that if the judgment should be affirmed, the case should be remanded, with leave to the plaintiff to file an amendment or supplemental complaint as he may be advised, the supplemental complaint setting up the fact of a valid tender if such be accomplished, and with leave to the defendant to answer as he may be advised, and to move that the plaintiff be required to elect which remedy he shall pursue; this court not being concluded by the ruling upon this last motion.

FRASER, J., concurs.

(119 S. C. 23)

POOLE et al. v. BAGWELL et al.
(No. 10854.)

(Supreme Court of South Carolina. April 11, 1922.)

Schools and school districts §68—**State Board acts as appellate tribunal in locating sites, and may not investigate outside record presented.**

The State Board of Education, in considering an appeal from a decision of a county board of education which affirmed the action of district trustees in locating a schoolhouse, acts as an appellate tribunal; and, where such state board acted on a personal investigation by one of its members and an ex parte statement of a prominent educator from the locality interested, and not on the record as presented to it, it acted without authority, in view of Civ. Code 1912, §§ 1707, 1736.

Original proceeding by W. D. Poole and others, Trustees of Zion School District, in certiorari to review the action of the State Board of Education in reversing a decision of a county board of education on the appeal of Charles Bagwell and others, taxpayers, locating a schoolhouse. Decision of State Board reversed.

Brown & Boyd, of Spartanburg, for petitioners.

Evans & Galbraith, of Spartanburg, for respondents.

COTHRAN, J. Certiorari proceedings in the original jurisdiction of this court to review the action of the State Board of Education on an appeal by the respondents herein from the action of the county board of education in reference to the location of a schoolhouse in Zion school district.

The local trustees unanimously selected a certain location; the opponents appealed to the county board of education; this board confirmed the action of the trustees; the opponents then appealed to the State Board. The latter acted, not upon the record for appeal, but sent one of their members upon a tour of personal investigation. He made a report favoring the location insisted upon by the opponents of the location selected by the trustees and approved by the county board. The State Board, evidently acting upon this report and an ex parte statement of a distinguished educator of that county, reversed the action of the county board of education.

The State Board of Education is an appellate tribunal in such matters and is limited to the questions raised as they appear in the record for appeal. Sections 1707, 1736, vol. 1, Code of Laws, A. D. 1912. They were without power to make an independent investigation of their own. *Sarratt v. Cash*, 103 S. C. 531, 88 S. E. 256. Upon the record before them the action of the county board should have been sustained.

The judgment of this court is that the action of the State Board of Education under review be reversed, and that of the county board of education be sustained.

GARY, C. J., and FRASER, J., concur.

(119 S. C. 25)

SAVANNAH GUANO CO. v. HOME BANK OF BARNWELL et al. (No. 10848.)

(Supreme Court of South Carolina. April 11, 1922.)

1. Appeal and error §687—**Order recommitting to master is essential to exception to master's construction of the order.**

An exception that the master erred in retrying a case, because the order recommitting it to him contemplated only that he reproduce his original report, which had been lost, cannot be sustained, where the order recommitting the case to the master is not in the record.

2. Appeal and error §1044—**A construction of order of reference by master held not prejudicial.**

The construction by the master of an order recommitting the case to him as requiring a retrial, instead of a reproduction of his original report, which had been lost, was not prejudicial to defendant, where the trial judge based his findings on the evidence unaffected by the findings of the master.

3. Motions §19—**Notice unnecessary for orders made in term time.**

An exception that no notice in writing was given to defendant's attorney, who was not in court when the order was obtained, cannot be sustained, where it appeared the order was made in term time, since a written notice is unnecessary for such order, and especially where it appears that the appellant was not prejudiced by the want of legal notice.

4. Principal and agent §64(1)—**Contract held to show principal was entitled to payment to agent.**

On an accounting between a principal and its sales agent, where the contract provided that, if a purchaser of the principal's goods, who was also indebted to the agent on another account, made a payment without specific application, it should be applied to the indebtedness due the principal, the payment made by the purchaser was properly accredited to the principal, where there was no attempt to show an application by the purchaser.

5. Principal and agent §11(3)—**Settlement with agent held not binding.**

Where defendant claimed it had a settlement with the agent of plaintiff, but its contract with plaintiff expressly provided that no representations by any agent of plaintiff should be binding on plaintiff, unless in writing duly approved by an executive officer of plaintiff, the alleged settlement was not binding, in the absence of any attempt to show it was agreed to by plaintiff.

6. Appeal and error ⇐877(3)—Charging costs against person not party held not prejudicial to appellant.

Defendant, against whom a judgment was rendered, cannot complain that the costs were adjudged against the purchaser from him, who was not a party to the action.

Appeal from Common Pleas Circuit Court of Barnwell County; James E. Peurifoy, Judge.

Action by the Savannah Guano Company against the Home Bank of Barnwell and the Farmers' Union Mercantile Company. Judgment for the plaintiff against the Farmers' Union Mercantile Company, and the latter appeals. Affirmed.

James E. Davis, of Barnwell, for appellant.

G. M. Greene, of Barnwell, for respondent.

FRASER, J. The statement in this case on appeal is as follows:

"The respondent, the Savannah Guano Company, brought this action against the defendants above named by the service of a summons and complaint on the 15th day of March, A. D. 1917, and issue being joined between the defendant, the Home Bank, and said plaintiff respondent, an order was made by the circuit court referring all the issues raised by the pleadings to the master of said court.

"A reference was held on the 9th day of November, 1917, and while Mr. B. H. Cave, one of plaintiff's witnesses, was testifying, Mr. W. T. Aycock, of the Farmers' Union Mercantile Company, took exceptions to the course the testimony was developing, and complained that he had been misled, and an advantage was being taken of him, whereupon G. M. Greene, Esq., attorney for the plaintiff, requested the master to adjourn the reference, and stated that he would waive default of the Farmers' Union Mercantile Company, allow it to answer, and protect any rights it might have in the premises. Said reference was adjourned until the 16th day of March, 1918, at which time Mr. Davis, attorney for the Mercantile Company, answered for that defendant and interposed a demurrer, copy of which is incorporated herein.

"The master reserved his judgment upon the demurrer and proceeded with the testimony, which, in narrative form, is incorporated herein. After argument of counsel, the master filed his report, in which he dismissed the complaint as against the bank and found that the appellant must account to the plaintiff for the sum of \$73.25, and recommend judgment accordingly. To this finding both sides filed exceptions.

"When the case was reached on the calendar of the circuit court, it was discovered that the report of the master was not in the record. Mr. Greene, the plaintiff's attorney, procured from the court an order recommitting the cause to the master for the purpose of making another report. (It will be noted that no notice was given appellant's attorney of this intended action, and said attorney was not in court when said order was obtained.)

"The master, pursuant to the order recommitting the cause as aforesaid, called a reference, in which he gave all parties notice, and proceeded to retry the case upon a carbon copy of the original testimony, and against the protest of the defendant appellant held that his construction of said order was not to reproduce the lost report, but to retry the case de novo, notwithstanding the said order of recommitment contained the provision that the master take a carbon copy of the testimony and make another report.

"The master filed his report under this last-named order of recommitment, to which the defendant filed exceptions, all of which are incorporated herein, and the cause coming on to be heard before his honor, Judge Peurifoy, the exceptions of the defendant Home Bank were sustained, and the master's findings of law and fact were reversed, and the complaint as to said defendant dismissed; but the exceptions of the Farmers' Union Mercantile Company were overruled, and judgment rendered against it for \$243.20, with the further finding that T. D. Creighton pay the costs, and, in the event that he cannot respond, then appellant be adjudged to pay said costs. * * *

"From the decree and judgment the Farmers' Union Mercantile Company gave timely notice of its intention to appeal to the Supreme Court, and now comes and excepts to said judgment upon the grounds set out in the exceptions herein set forth."

[1, 2] I. The first exception is:

"That the master erred in retrying this case, and filing the report herein excepted to, for the reasons:

"(a) That the order recommitting the cause to said master contemplated that he reproduce his report originally filed, as stated in the report, and not a different conclusion of law and fact, as contained in said report, and his honor, the circuit judge, erred in overruling said exception."

This exception cannot be sustained. The order recommitting the case to the master is not in the record, and we cannot say that the master erred in his construction of the order. This exception cannot be sustained for the further reason that the trial judge based his finding on the evidence in the case, unaffected by the findings of the master.

[3] II. The second exception is:

"That it appears (and is a fact) that in his original report, stated by him to have been lost, he, the said master, dismissed the complaint against the defendant Home Bank, and recommended that the Farmers' Union Mercantile Company account for \$73.25, and it is respectfully submitted that, in giving judgment against the defendant Farmers' Union Mercantile Company, the said master exceeded his authority under the order of recommitment, and his honor should have so held. The defendant Farmers' Union Mercantile Company further excepted to the master's findings; that said court erred in recommitting this cause, without notice to defendant or its attorney, in this:

"(a) It is admitted that no notice in writing was given defendant's attorney.

"(b) It is admitted that defendant's attorney was not in court when the order was obtained, and his honor erred in not sustaining the foregoing exception to the master's report."

This exception cannot be sustained, for the reason that no written notice is necessary for orders made in term time, and it appears that the appellant was not prejudiced by the want of written notice.

[4] III. The third exception was withdrawn at the hearing. The fourth exception is:

"His honor erred in not sustaining subdivision C of the Farmers' Union Mercantile Company's exceptions, which is as follows: 'It appears from the testimony that there was an agreement between the plaintiff and the defendant Farmers' Union Mercantile Company, who were the agents of the plaintiff, that they would divide the losses and profits; that it was a custom of many years standing among the manufacturers of guano and the merchants, to whom they sold originally, that they did divide these losses as well as profits, and had a full settlement, and the master erred in holding otherwise and giving judgment against said defendant.'"

This exception cannot be sustained. The contract provides:

"It is understood and agreed that, where a purchaser of our fertilizer is indebted to you, individually, in addition to the amount owing us, if said purchaser directs that any payment he may make shall be applied to his debt to us, or makes no specific application of the payment, then the payment shall be at once applied to his indebtedness to us; otherwise, it shall be applied to his indebtedness to us and to you pro rata."

There was no attempt to show that the purchaser gave any directions as to the application of the payments, and under the express provisions of the contract the amount collected were due to the plaintiff.

[5] IV. The appellant claims that it had a settlement with the agent of the plaintiff. The contract further provides:

"This contract, to be binding upon us, must be approved by one of the executive officers of this company. All previous communications between us, either written or verbal, with reference to the subject-matter of this contract, are hereby abrogated, and no statements or representations on your part, or of any agent of yours, or of any agent of ours, nor any modification of this agreement, shall be binding upon us, or either of us, unless the same shall be in writing, duly accepted by you, and approved by an executive officer of this company."

There was no attempt to show that the plaintiff agreed to the alleged settlement.

[6] V. The next allegation of error was that the purchaser, Creighton, was not made a party, and that Creighton was required to

pay the cost of the case. That does not affect the appellant, and was not prejudicial to it.

VI. The statement of the account is not entirely clear. The appellant has not shown error in the amount of the judgment.

The judgment is affirmed.

GARY, C. J., and COTHRAN, J., concur.

WATTS, J., did not participate on account of sickness.

(119 S. C. 19)

SOUTHERN BRIDGE CO. v. ASKEW, Supervisor of Union County, et al.
(No. 10872.)

(Supreme Court of South Carolina. March 18, 1922.)

Bridges 20(6)—Contractor's deposit not returned when not justified in withdrawing bid.

In an action to recover back the amount of a check which accompanied plaintiff's bid for the building of a bridge for defendant, under Act Feb. 17, 1917 (30 St. at Large, p. 648), it was error to direct a verdict for plaintiff where there was evidence that defendant accepted plaintiff's bid, and plaintiff was not justified in withdrawing it.

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Union County; Thos. S. Sease, Judge,

Action by the Southern Bridge Company against J. V. Askew, Supervisor of Union County, and others. From a directed verdict for plaintiff, defendants appeal. Reversed, and remanded for a new trial.

Jno. K. Hamblin, of Union, and R. L. Douglas, of Chester, for appellants.

Sawyer & Kennedy, of Union, for respondent.

COTHRAN, J. Action to recover \$1,000, with interest from June 30, 1919, that being the amount of a certified check delivered by the plaintiff as a bidder upon certain bridge-work to be let by the defendants, who were constituted a commission to build a bridge over Broad river by act (30 Stat. 648).

In response to an advertisement calling for bids, the plaintiff submitted the bid on June 30, 1919, accompanying it with the certified check payable to the defendants. The plaintiff's contention is that without fault upon its part the bid submitted was not accepted, no contract was entered into, and that it is entitled to recover the value of said check which the defendants have appropriated to their own use.

The defendants contend that the plaintiff's bid was accepted and the contract duly awarded to the plaintiff; that it has refused to comply therewith; and that as a

consequence the deposit has been forfeited to the defendants. They also set up a counterclaim for \$4,623.01, loss sustained in the breach of the contract by the plaintiff.

At the close of all the testimony the circuit judge directed a verdict in favor of the plaintiff for the full amount claimed. The defendants have appealed.

It will serve no useful purpose to review the very complicated facts in this case. It is sufficient to say that, after a careful consideration of them, we are of opinion that there was sufficient evidence tending to show an acceptance of the plaintiff's bid by the defendants and an unjustified withdrawal of it by the plaintiff, to require a submission of the case to the jury, and that there was error in the direction of a verdict.

The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

GARY, O. J., and WATTS, J., concur.

FRASER, J. I cannot concur with Mr. Justice COTHRAN. The cardinal facts are: The defendant desiring to build a bridge, advertised for bids. The plaintiff put in a bid. The plaintiff was required to put up a certified check to insure good faith. There were several bids. After the bids were opened, the plaintiff was notified: "Your bid on Lockhart Bridge tentatively accepted; can send representative to Columbia Thursday." The delay was caused by checking up the plans and specifications. When the plans and specifications were checked up, it was found that the plans were too weak to support the required weight. The plaintiff was notified that its plans were unsatisfactory as they stood, and it was necessary to strengthen the structure. This the plaintiff refused to do and withdrew its offer and demanded the return of its check. The defendant refused to return the check. This suit was brought, and the defendant not only denied its obligation to return the \$1,000, but set up a counterclaim for damages for breach of the contract. On motion, the presiding judge held that no contract had been proven and directed a verdict for the plaintiff. From the judgment based upon this verdict the defendant appealed.

In my judgment the trial judge was right. The price to be paid for the work and the work to be done are essential elements for the making of a contract. The plaintiff offered to build a bridge according to certain specifications. When the defendant notified the plaintiff that it did not accept the specifications, it rejected the bid. That the defendant was willing to increase the compensation in accordance with what it deemed a just basis did not remedy the trouble.

The plaintiff never offered to build the bridge the defendant intended to build, and the defendant did not agree to accept the bridge that the plaintiff offered to build. The minds of the parties did not meet on the thing to be done, or the price to be paid and there was no contract.

I know of no such thing as a "tentative acceptance" of a bid. The rule is clear and well stated in *Ruling Case Law*, vol. 6, p. 608:

"Qualified or Conditional Acceptance.—In order that there may be a meeting of the minds which is essential to the formation of a contract, the acceptance of the offer must be substantially as made. There must be no variance between the acceptance upon offer. Accordingly a proposal to accept, or an acceptance and the terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. The acceptance must likewise be unequivocal and unconditional. If to the acceptance of a proposal a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be made or requested, there is a rejection of the offer. Having in effect rejected the offer by his conditional acceptance, the offeree cannot subsequently bind the offeror by an unconditional acceptance."

It is said that the defendant was damaged by the subsequent rise in price of materials. The plaintiff was not solely responsible for the delay, and there is no reason suggested for throwing that loss on the plaintiff.

For these reasons I dissent.

(118 S. C. 487)

OLIVER v. DAVIS, Agent. (No. 10865.)

(Supreme Court of South Carolina. April 11, 1922.)

Appeal and error ~~664~~(1)—Statements of trial judge as to instruction accepted.

Where there is a conflict between the circuit judge and the stenographer as to the exact language of the charge, the statement of the trial judge will prevail.

Appeal from Common Pleas Circuit Court of Orangeburg County; I. W. Bowman, Judge.

Action by Bertha I. Oliver against James C. Davis, as Agent under Transportation Act 1920 (41 Stat. 461) § 206. Judgment for plaintiff, and defendant appeals. Affirmed.

Lyles & Lyles, of Columbia, and Moss & Lide, of Orangeburg, for appellant.

J. H. Hydrick, A. J. Hydrick, E. C. Mann, and W. C. Wolfe, all of Orangeburg, for respondent.

FRASER, J. This is an action for damages for personal injuries to a passenger. There are only two questions in the case, and the consideration of them does not require a statement of the facts.

I. When there is a conflict between the circuit judge and the stenographer as to the exact language of the charge, must this court accept the statement of the trial judge or the stenographer? The answer is that the statement of the trial judge shall prevail. It is not clear that there is a conflict in this case. The question is decided against the appellant.

II. Was the verdict excessive? This court cannot say it was so excessive as to warrant setting aside a judgment based upon it. This question is decided against the appellant.

The judgment appealed from is affirmed.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

(119 S. C. 10)

WISE v. WISE. (No. 10863.)

(Supreme Court of South Carolina. April 11, 1922.)

Husband and wife \Leftarrow 283(3)—**Wife held entitled to alimony.**

Where a husband had beat his wife, and on her return home from a visit sent her a message not to return home, as he might do something which he would regret as long as he lived, though the wife returned home, on leaving she was entitled to alimony.

Appeal from Greenwood County Court; C. C. Featherstone, Judge.

Suit by Lucinda Wise against F. J. Wise. From judgment for plaintiff, defendant appeals. Affirmed.

Tillman, Mays & Featherstone, of Greenwood, for appellant.

Grier, Park & Nicholson, of Greenwood, for respondent.

FRASER, J. This is an action for alimony. The defendant and plaintiff have been man and wife for about 40 years. Not only the husband, but the wife, also, have been and still are "preachers of the gospel." It seems that they have never lived in peace for any length of time. Twenty years ago the husband beat his wife, and 11 years ago he struck her, according to his own statement. According to the statement of the wife, the husband has continued the practice until she left him. In March, 1920, the wife

went to Pittsburg, Pa., to see her daughter. She went with the husband's consent, or at least without objection on his part. The letters that passed between them during her absence were bitter. In one of his letters he wrote: "Just free me, and I will go to another state and get a divorce." The wife did not consent to the divorce, but returned to Greenwood, where they lived. On her return she was handed a letter from her husband. This letter or statement of the husband's grievances was severe. The written statement was a severe arraignment of the wife's life. This written statement was accompanied by a verbal message advising her not to return home as he (the husband) might do something that would cause him to regret as long as he lived. The husband denies that he threatened to kill her. He admits that he said:

"Go tell your mother, if she is not going to stay here, to get her a house and move. I did not say I was going to kill her."

The wife did return to the house, but left it in a few days, and brought this action for alimony. The husband says that his wife is crazy. The case was heard by Judge Featherstone, who granted alimony and counsel fees.

In *Wise v. Wise*, 60 S. C. 447, 38 S. E. 802, we find that where the wife shows "personal violence actually inflicted or menaced, and affecting life or health," she has made out her case as to this requirement. It is true the wife has condoned the past whipping and striking, and it is now too late for her to base her right to alimony on that score; but when the husband has shown himself capable of striking his wife, notwithstanding the fact that he was a minister of the gospel, it shows that he is capable of personal violence. His warning not to return to his home carries with it a threat that the wife had the right to heed.

The appellant states in his answer and on the stand that he is willing to take his wife back; but there is not one word in the case to show that his heart is filled with anything but malice toward his wife. If the wife is crazy, the husband must support her. The record fully sustains the trial judge, and his judgment is affirmed. This does not prevent a reconciliation. It does not prevent those who would show to others "the Prince of Peace" from leading others in the paths of peace. A reconciliation would be the most powerful sermon either could preach.

GARY, C. J., and COTHRAN, J., concur

(118 S. C. 510)

MacDONALD et al. v. FAGAN et al.
(No. 10849.)

(Supreme Court of South Carolina. April 11, 1922.)

1. Wills §470 — "intention" as shown by whole will governs.

The "intention" of the will as a whole, which signifies the meaning of the words used, governs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Intention.]

2. Wills §488 — Extraneous circumstances considered if terms are ambiguous.

If the meaning of the words used in a will is clear, the words are controlling, but if they are not clear the surrounding circumstances may be resorted to to determine the intention.

3. Wills §587(1)—Surplus of proceeds of sale of property held part of residue.

Where a will by one item bequeathed certain legacies to be paid from the proceeds of the sale of property when it was manifest the legacies would not exhaust the proceeds, the surplus of the proceeds passed under a subsequent item of the will, giving the residue to testator's wife.

4. Wills §587(1)—Residuary clause held to complete bequest of proceeds of sale.

If an item in a will bequeathing the proceeds of the sale of certain property was incomplete because the bequest manifestly would not exhaust the proceeds, the incompleteness was supplied by a subsequent item bequeathing the residue of the estate, which was as effective for that purpose as if it had been made an additional clause of the item containing the specific bequests.

5. Wills §462—Courts cannot supply omissions.

If an item in a will is incomplete because of a mistake of the copyist, the courts have no power to supply the omission.

6. Wills §470—Every clause must be given effect.

Every clause in a will must be considered and given full force and effect.

7. Wills §585(3)—Devise of interest in hotel to wife for life held not to prevent her taking surplus of sale under residuary clause.

Where testator devised his interest in a hotel, which he owned jointly with his brother, to his wife for her life, and manifested his confidence in his wife by making her and her brother his executors, and provided that the property be sold, on the death or remarriage of his wife, by the executors or the survivor, and that certain specific bequests be paid from the proceeds, and thereafter inserted an item giving his wife the residue of his estate, which item could only apply to the surplus of the proceeds of the sale of the property, such surplus passes to the wife's legatees after her death under the residuary clause.

8. Wills §449—Presumption is against intestacy.

When a man leaves a will, not only does the general law presume that there was no intestacy, but Civ. Code 1912, § 3559, also provides that no man shall be considered as having died intestate as to land and personal estate acquired after the execution of his will.

9. Wills §486—Hardship, resulting from casualty not contemplated by testator, cannot be considered.

A hardship, resulting to legatees under a will from the burning of the hotel property, from the sale of which legacies were to be paid, cannot be considered in construing the will, since such casualty was not contemplated by the testator.

10. Wills §453—Artificial rules yield to just meaning of language.

When the clear intention of a will produces a hardship, that hardship must be endured, but when the language of the will is clear and the result is just, mere artificial rules, if they point another way, must give way.

Appeal from Common Pleas Circuit Court of Richland County; N. F. Rice, Judge.

Suit by William J. MacDonald and others against Patrick Fagan and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

The following is the decree of Judge Rice in the court below:

The Hotel Jerome, located in the city of Columbia, at the northwest corner of Main and Lady streets, is one of the best known hostleries in this state. For many years now it has supplied the needs and wants of the traveling public, and it still retains its justly earned popularity.

Jerome Fagan, after whom the hotel was named, and his brother, Thomas, were the owners, each one-half in fee in the realty, and in the personality contained in the said hotel. On the 10th day of November, 1898, Jerome Fagan executed his last will and testament in proper form, and three days later died. The said will was duly admitted to probate, and the matter now before the court is the construction of its terms in so far as it relates to the ownership of the one-half interest of the said Jerome Fagan in the said hotel, or the proceeds thereof, after it has been sold as directed in said will, and certain legacies paid.

The hearing was had before me at the spring term of court for said county. Mrs. Lillie Fagan, the wife of Jerome, never remarried, is now dead also. No children, so far as the record shows, were born to Jerome and his wife. Mrs. Lillie Fagan also left a will, and the contest now on is between her heirs, legatees, and devisees, and the heirs, legatees, and devisees of her said husband, Jerome. After the death of the latter, and some 18 or 20 years ago, the building, known then also as the Hotel Jerome, was destroyed by fire—the writer of this opinion was stopping there as a guest at the time—and later was rebuilt with the proceeds of insurance and other funds borrowed or sup-

plied by Mrs. Fagan for the purpose. This phase of the matter, however, is, as I understood at the hearing, not involved in the present litigation, and will not be passed upon by me.

The plaintiffs in this case contend that under the terms of said will of Jerome Fagan, his wife, Lillie, took a life estate in the one-half interest of Jerome in the said hotel and the fee in the proceeds of its sale, after her death or remarriage, subject, however, to the payment of certain legacies set out in item 3 of said will. This I understood from the arguments is the position taken by the attorneys for the plaintiffs, although the complaint in paragraph 8 sets out that Mrs. Fagan was the owner of Jerome's one-half interest in fee in the said hotel lot and building, subject only to the payment of the legacies above mentioned. From a practical standpoint I think it makes little difference as to which of the views mentioned might be a proper construction.

The defendants, on the other hand, claim that as to the proceeds of sale of Jerome's one-half interest in said hotel property, after payment of said legacies, there is an intestacy, and that therefore the heirs at law of Jerome Fagan are entitled thereto, and that Mrs. Fagan, his wife, could not dispose of it by will or otherwise. The legacies mentioned in item 3 of said will aggregate \$4,300, and excluding the gifts to Mrs. Fagan, constitute all of the direct devises or legacies provided in his said will by the testator. At the same time it is admitted, as I understand, that the said interest of Jerome in the property was at that time worth much more than the sum mentioned. This fact must undoubtedly have been known to Jerome at the time he made his will.

It is elementary that in construing a will the intention is to be sought, and if it does not conflict with some settled rule of law, then such intention must be given effect. In ascertaining such intention we will first examine the terms of the will itself. If there are conflicting clauses they must be reconciled if possible. Again, in the search for the intention every part of the will must be considered, and due consideration given thereto. In other words, it must be construed as a whole, and not in parts.

The testator, in item 1 of his will, devises to "his beloved wife, Lillie Fagan," all of his interest in the property above described in the following words: "For and during the term of her natural life," etc. In item 2 he disposes of his interest in the personalty connected with the hotel to his wife on the same terms and limitations as are set out in item 1. In item 3 he provides legacies amounting to \$4,300 to be derived from the sale of his interest in the hotel, realty, and personalty, after the death or remarriage of his wife. Items 4, 6, and 7 are gifts to his wife in fee, about which there is no contention. Item 5 makes provision for improving the hotel property and conducting same. In item 8, however, he provides "all the rest and residue of my estate, real and personal, I devise and bequeath to my wife, Lillie Fagan." This last item is what is known to the law as a residuary clause, and on it the plaintiffs base their case. The defendants, as already stated, claim an intestacy as to the property in dispute. In *Fraser v. Hamilton*, 2 Desaus. 574, it is said: "When a man sets about making his will,

it is to be presumed he means to dispose of the whole of his property, and not to die intestate as to any part of it, and that when he uses general words he means to dispose of everything he has." Again, in *Welborn v. Townsend*, 31 S. C. 413; 10 S. E. 98, the court says: "Where there is a will, the policy of the law is not in favor of declaring a partial intestacy, unless the reasons for such result are clear and indisputable."

The principles announced in the cases cited are so generally recognized and supported by the authorities that I do not deem it necessary to burden this opinion with other decisions on the point.

The purpose and intent of a residuary clause, general in its terms, is to dispose of all property of the testator not before specifically disposed of, and under it all of his property and property rights not expressly excluded by devise to some other persons will pass. See *Hopkins v. Mazyck*, Rich. Eq. Cas. 279; *Fraser v. Hamilton*, supra.

Under the residuary clause of the testator above set out all of his property and property rights of every nature, not already disposed of by the terms of his will, passed to his residuary legatee or devisee.

The words used by him are "all of the rest and residue of my estate, real and personal," etc., and such words are ample to pass the property in question. See *Cruger v. Heyward*, 2 Desaus. 429; *Stuckey v. Stuckey*, 1 Hill, Eq. 308; *Fraser v. Hamilton*, supra; *Swinton v. Eggleston*, 3 Rich. Eq. 201.

It will not do to say that, if the testator had wished to simply give his wife his one-half interest in the hotel, burdened with the payments of the legacies mentioned in item 3, he could have done so in terms so clear as not to admit of a doubt. He had the right to dispose of his property in any lawful way he chose, no matter how eccentric or peculiar the terms of the will may be.

In *Hopkins v. Mazyck*, supra, it is said: "Testator, having a power of appointment under his father's will, devised lands to his sons, respectively, during their lives, with remainder to such children as they might have at their deaths; and with cross-remainders among the sons, 'in case of the death of any of them under twenty-one and unmarried.' By a residuary clause, he devised 'the rest, residue and remainder of my estate, whatsoever, and wheresoever, including any estate not hereinbefore particularly devised, which I may have derived under the will of my father, unto my said sons and their heirs forever.' Held, that the residuary clause carried the ultimate fee, or reversion, in the lands, to the sons."

Commenting upon the method employed by the testator in his will to dispose of his property, the court, says, at page 280 of Rich. Eq. Cas.: "However strange it may appear to us, that he should devise to them [his sons] the ultimate reversion, upon the failure of their own and their children's estates, yet there is nothing to prevent it from having legal effect."

So in the case before us, if Jerome Fagan saw fit to give his wife his interest in the hotel for life, and at the same time vest in her the right to the proceeds of sale of said interest, after the payment of certain legacies, there is nothing to prevent it from having legal effect,

and in the opinion of this court the conclusion seems irresistible that this is what he did.

It appears to me, and I so hold, that the devise or gift is not of the ultimate reversion of the said hotel property itself, after the payment of the legacies specified, but of the proceeds of sale remaining after the payment of said legacies. The only safe way to pursue in the construction of the will is to take the testator to mean what he says. He instructs the property to be sold on the death or remarriage of his wife.

This can only mean that it was then to be converted into money. The purpose of a residuary clause being then to dispose of that part of his estate not already disposed of, what portion of Fagan's estate had he failed to dispose of at the time he wrote the residuary clause of his will? The answer is the proceeds of sale of his interest in the hotel, less the legacies. There might be other property undisposed of also.

Who is the residuary legatee? Mrs. Fagan. Such proceeds then undoubtedly passed to her. It does not alter the case to observe that Mrs. Fagan, having the enjoyment and possession of the life estate, could not be benefited by giving to her a right in the proceeds of sale after the payment of said legacies, because at the time she would be dead. Such right was a right of property, and could be sold by her or otherwise disposed of so as to secure the enjoyment thereof during her life.

I conclude, therefore, that at the time of her death, Mrs. Fagan had a vested interest in the proceeds of sale of the one-half interest of her husband, Jerome Fagan, in the said Hotel Jerome, after the payment of the legacies provided for in item 3 of said will, and that as to said one-half interest the heirs of Jerome Fagan have no legal title.

I do not think that the above conclusions are in any way in conflict with the principles of construction announced in *Adams v. Verner*, 102 S. C. 7, 86 S. E. 211; *Lawrence v. Burnett*, 109 S. C. 422, 96 S. E. 144, and other cases to the effect that where an estate is given by will in words of clear and ascertained legal significance, it will not be enlarged, cut down, or destroyed by superadded words in the same or subsequent clauses, unless they raise an irresistible inference that such was the intent of the testator.

So ordered. And it is further ordered that any of the parties hereto have leave to apply at the foot of this decree for any order necessary to carry into effect the provisions of the said will, provided such order be not in conflict with the terms of this decree.

R. O. Purdy, of Sumter, and C. L. Blease, E. A. Blackwell, and D. W. Robinson, all of Columbia, for appellants.

Weston & Aycock and Lyles & Lyles, all of Columbia, for respondents.

FRASER, J. Jerome Fagan made his will, that reads as follows:

"State of South Carolina.

"I, Jerome Fagan, of the city of Columbia, in said state, being of sound mind, memory and understanding, but feeble in body and well knowing the uncertainty of life, do make, pub-

lish and declare this to be and contain my last will and testament, hereby revoking all instruments of a like nature heretofore made by me.

"Item 1. I devise unto my beloved wife, Lillie Fagan, all of my right, title and interest (the same being the one-half thereof in fee as tenant in common with my brother Thomas) in and to all and singular the property known as the Hotel Jerome including the lot of land connected therewith and belonging thereto, situate, lying and being on the northwest corner of the intersection of Main and Lady streets in the city of Columbia, fronting on said Main street and extending back along the line of said Lady street, for and during the term of her natural life or widowhood, and from and immediately after her death or remarriage it is my will and desire that my interest in said property be sold at public outcry on such terms as my executors or the survivor of them may think discreet and proper, and the proceeds thereof to be divided as is hereinafter provided in item 3 of this my last will and testament.

"Item 2. I devise unto my said wife under the same limitations as is set forth in the preceding item of and concerning my interest in the realty aforesaid, i. e., for and during the term of her natural life, or widowhood, all of my right, title and interest in and to the personal property which may be in the Hotel Jerome at the time of my death, consisting of the appointments, fixtures, furniture, bedding, linen, culinary articles, together with the office furniture and other paraphernalia connected within or in any wise used about said Hotel Jerome, as well as all accounts, debts, claims or demands which may be outstanding or owing to said hotel business and management at the taking effect of this instrument, and from and immediately after my said wife's death or remarriage, it is my will and desire that my interest in said personalty and choses in action (my interest therein being the one half thereof, my brother Thomas being the owner of the other half) be sold at public outcry on such terms as my executors, or the survivors of them, may think discreet and proper, and the proceeds thereof be divided as is hereinafter provided in item 3 of this my last will and testament.

"Item 3. Out of the proceeds of the sale of the property, real and personal, mentioned in the two foregoing items of this my last will and testament, I make the following bequests in money:

"1. To the children of my nephew, John O'Hara, the sum of two thousand dollars, to be divided equally among the child or children of a deceased child to take its parent's share.

"2. To my niece, Mrs. Janie Deck, of Macon, Georgia, the sum of five hundred dollars.

"3. To my nephew, Patrick Fagan, of County Meath, Ireland, five hundred dollars.

"4. To Nannie Fagan, sister of Patrick, of the same county in Ireland, five hundred dollars.

"5. To my sister, Bridget Hickey, of County Meath, Ireland, seven hundred dollars.

"Item 4. There is deposited in my name in the Carolina National Bank, Columbia, S. C., the sum of two thousand dollars, which I bequeath to my wife, Lillie Fagan, with the request that she give out of said sum of two thousand dollars, five hundred dollars to St. Peter's Catholic Church of Columbia, the same

to be expended by the pastor thereof as he may see fit for the benefit of the church and congregation.

"Item 5. There are two deposits by my brother Thomas and myself under the firm name of Fagan Brothers in the course of business as keepers of the 'Hotel Jerome' to be disposed of, one being in the Central National Bank of Columbia, S. C., and the other in the Carolina National Bank of Columbia, S. C., the deposit in the latter named bank being some \$5,000.00. It is my will and desire that my executors, or the survivor of them, shall use so much of said moneys coming to my estate (and I am entitled to the one-half thereof) as will with a like amount to be expended by my brother Thomas complete the improvements now under way in and upon the 'Hotel Jerome' as set forth in the plans and specifications thereof; and upon the completion of said work and improvements any and all sums remaining over and coming to my estate therefrom I wish to go into the hotel business now conducted by my brother Thomas and myself, and to be controlled and expended by my wife and my brother Thomas in managing the same.

"Item 6. All bonds and stocks of what kind or nature soever I may own at the time of my death, I bequeath to my dearly beloved wife, Lillie Fagan, and I devise to her all of my right, title and interest in the real property situate, lying and being in the city of Columbia on the corner of Gervais and Gates streets.

"Item 7. And I bequeath to her, the said Lillie Fagan, my interest in a bond for \$4,000.00, secured by a mortgage of Main street property, where J. M. Van Metre conducts his furniture business, which said bond and mortgage, made and executed by said Van Metre as a part of the purchase money of the land on which said mortgage is a lien, belongs one half to me, the other half to my brother, Thomas.

"Item 8. All the rest and residue of my estate, real and personal, I devise and bequeath to my wife, Lillie Fagan.

"Item 9. I nominate, constitute and appoint my said wife, Lillie Fagan, and her brother, William MacDonald, of New York, executors of this my last will and testament.

"In witness whereof I have hereunto written my name and affixed my seal at the city of Columbia the tenth day of November, 1898."

"Jerome Fagan. [L. S.]"

(Properly witnessed.)

The only question in the case is the construction of item 8.

[1, 2] There are two fundamental principles that need no citation of authority to support them: (1) The intention of the will as a whole governs. (2) Intention is a term of art, and signifies the meaning of the words used. If the meaning of the words used is clear, then they are controlling. Sometimes the words used are not clear. In that event surrounding circumstances may be resorted to from the necessity of the case. Taken alone, the words of item 8 admit of no doubt. The whole will must, however, be considered, and every part given its full weight.

[3] The controversy is over the surplus that is sure to remain after the payment of

the legacies specified in item 3. The appellants claim that the testator is intestate as to this surplus, and they claim it as the heirs at law of the testator. The respondents claim it under the will of Mrs. Lillie Fagan, now dead, as covered by and included in the residuary bequest. The words used in item 8 are unquestionably broad enough to include the surplus. "All the rest and residue of my estate, real and personal," include all of his property not specifically devised or bequeathed. That is as clear as it can be. The surplus proceeds of sale after paying the \$4,200 of bequests is not devised in item 3, and, not being disposed of by any other item, must go to the residue. The testator had two ways open to him. He could either provide for the surplus in item 3, or by another clause, general, sweeping, all-inclusive, thereby dispose of this surplus. He adopted the latter plan.

The appellant urges two objections to this view: First, that item 3 is manifestly incomplete; and, second, the will by specific provision gives Mrs. Fagan, his wife, only a life estate in the hotel property.

[4] I. Item 3 may be incomplete taken by itself. The will must be taken as a whole. If item 8 had been added as subdivision 6 to item 3, then it would have been impossible for the most critical to say item 3 was incomplete. It is difficult to see how item 8 is to be defeated by reason of its separation from item 3 by other items. If item 8 had been added as subdivision 6 to item 3, then the residue might have been confined to the surplus proceeds of sale of the hotel property. Item 8 is not a subdivision of any other item. It is a general item, and applies to any surplus, to anything, and so written as to include any and all property not given to another.

[5, 6] If, however, it is held that item 3 is incomplete, and that it was a mistake of the copyist, then it is too clear for any one to doubt that the courts have no power to supply the omission. The case fails to show that there was any other property upon which item 8 could operate, except the surplus proceeds of the sale of the hotel property. Item 8 must dispose of this surplus, or it is meaningless. Every clause of a will must be considered and given full force and effect.

[7] II. It is said that Mr. Fagan gave to his wife a life estate only in the Hotel Jerome property. According to the express language of his will Mr. Fagan gave to his wife an estate for life or widowhood in his one-half interest in the hotel property itself, and the residue of the proceeds of sale after the payment of the \$4,200 of bequests. That is what the will says shall be done with his property. That is the plain English of it. The will as a whole bears out that idea. There is no item except item 3 that does not provide for his wife, Lillie Fagan. The wife is made executrix. The executor is not

Thomas Fagan, the brother of the testator, but William MacDonald, the brother of Mrs. Fagan, and a nonresident of this state. Practically the power of sale is given to Mrs. Fagan. It is said that the life estate precludes its exercise by Mrs. Fagan. This overlooks the fact that Mrs. Fagan's rights in the property itself might terminate upon her second marriage. The intensity of the testator's love and regard for his wife and the fullness and completeness of his surrender of his property to his wife is shown by the provision that, notwithstanding the fact that the testator realized that after his death his wife might marry again, still after her second marriage he directed that the sale should be managed by her.

The will shows another significant thing. The will shows that the testator contemplated a continuance of the hotel business by his wife and his brother. It makes provision for improvement of the property for a more efficient conduct of the business. He makes the legacies a charge on the hotel property; that property she is most likely not to sell.

[8] When a man leaves a will, not only does the general law presume that there is no intestacy, but the statute (section 3559, Code of 1912) provides that no man shall be considered as having died intestate as to land and personal estate acquired after the execution of his will. Here every presumption is against intestacy, and it would be strange indeed if this testator should be adjudged intestate as to a portion of his estate when he emphasizes the completeness of the gift of the residue by making it a separate item.

When we consider the fact that the wife is the supreme object of the testator's bounty, we would be confronted with this anomaly: The will contemplates the continuance of the hotel business; it contemplates that the wife shall continue the hotel business. It is not the case of a testator who has accumulated sufficient property to allow his widow to live in comfort, and it may be in idleness, for the balance of her life; that she is simply to enjoy the fruits of his labor as long as she shall live, and then over to other objects of his bounty. The will contemplates that the wife shall continue to carry on his business, a business that is a strenuous business, an increasing business, requiring the exercise of every power, a life of whole-hearted and intelligent service; and yet, when this life of hard and responsible labor is over, Mrs. Fagan is to turn over the property and business which she has preserved and enlarged to kinsmen of his own, to whom he has given in words but a small portion.

The will shows on its face that the testator believed that his wife would be able to

carry on the business successfully, without the presence of her coexecutor. It is the only reasonable construction of the paper that the testator believed that Mrs. Fagan could do the duty assigned to her. Whence arose this belief? It could only come from their past lives. The will states that the testator was feeble of body, and yet a strenuous business was done. A novice at the helm would sink the ship. The will does not contemplate a novice. When Mrs. Fagan shall die, the business shall end. It follows indisputably that Mrs. Fagan was the ruling spirit of the business, according to the will. We are asked to hold that this will, that in every item save one breathes a spirit of love and devotion to, and respect for, his wife, shall be construed to bind this wife to a life of unmerited servitude to those who are not of her blood.

[9] Something is said about the burning and rebuilding of the hotel. That has no place here, as it was not contemplated by the testator, and any hardship arising therefrom must be endured.

[10] Courts should not make wills. It is their province to construe them. When the clear intention of a will produces a hardship, then the hardship must be endured. But when, as in this will, the language is clear and the result just, mere artificial rules, even if they pointed in another way, must give way. Those rules, however, are not in conflict here with justice. No authorities are quoted in this opinion. A "review of the authorities" is seldom profitable. It takes a master mind to "review the authorities" completely, and a master mind frequently to understand the opinion after the work is done. If authorities are needed, they will be found in the clear and convincing opinion of the circuit judge. (Let the decree of Judge Rice be reported.)

The cases that refer to an estate by implication have no bearing on this case. "All the rest and residue of my estate, real and personal, I devise and bequeath to my wife, Lillie Fagan" leaves nothing for implication. It is a directly positive, unlimited gift. There are no lapsed legacies to confuse the mind. The testator devises to his wife a life estate, or until she remarries, in the hotel itself. He then directs a sale of the hotel itself, and disposes of a part of the proceeds of sale. He then gives the rest and residue of his estate to his wife. This residue, so far as the case shows, can refer only to the surplus proceeds of sale. In order to defeat the claim of the wife to this residue, it would be necessary to ignore the residuary clause.

The judgment appealed from is affirmed.

GARY, C. J., and WATTS and COTHRAN, JJ., concur.

(119 S. C. 51)

STROM v. PAYNE, Director General of Railroads, Agent, et al. (No. 10856.)

(Supreme Court of South Carolina. April 11, 1922.)

1. Railroads ⚡267 — Engineer and fireman liable for failure to give statutory signals.

As the statute requires the engineer and fireman of a train to blow the whistle or ring the bell on the approach of the train to a crossing, their failure to give such signals renders them personally liable for injuries resulting therefrom as a proximate cause.

2. Railroads ⚡312(3)—Liability of company for omission of signals dependent on liability of employees.

The liability of the operator of a railroad for failure to give the statutory crossing signals is dependent on the liability of the engineer or fireman for such failure, and if the latter are not liable the former cannot be.

3. Trial ⚡423 — Error in instruction held cured by withdrawal of issues.

Where, in an action against the Director General of Railroads and the engineer and fireman of a train, there were certain allegations of negligence for which the engineer and fireman were not responsible, the error in the charge of the court that the jury could find against any one of the defendants was cured, where plaintiff, before the case was submitted to the jury, withdrew all issues of negligence, except that of failure to give the statutory signals, as to which act all of the defendants might be held liable.

4. Trial ⚡194(17)—Instruction held not objectionable as a charge on the facts.

Where, in an action against the Director General of Railroads and the engineer and fireman of a train for injuries resulting from failure to give the statutory signals at a crossing, the plaintiff withdrew the issue of negligence as against the fireman, an instruction by the court to the effect that "the engineer is the responsible man" was not objectionable as a charge on the facts.

5. Trial ⚡327—Verdict held sufficiently definite as to specification of defendants.

In an action against the Director General of Railroads and the engineer of a train, for injuries resulting from failure to give the statutory signals at a crossing, a verdict, "We find for the plaintiff against Walker D. Hines and Capers Madden," held sufficient, though it failed to indicate that Walker D. Hines was Director General of Railroads; the omission being a mere clerical error.

6. Appeal and error ⚡724(5) — Exception merely referring to record held insufficient.

Exceptions which do not state any error, but merely refer to portions of the record, cannot be considered on appeal.

Appeal from Common Pleas Circuit Court of Edgefield County; Frank B. Gary, Judge.

Action by Walter T. Strom against John Barton Payne as Director General of Rail-

roads, Agent, and others. Judgment for plaintiff, and the defendant named appeals. Affirmed.

N. G. Evans, of Edgefield, for appellant.
George Bell Timmerman and T. O. Callisen, both of Lexington, for respondent.

FRASER, J. [1, 2] This is an action for damages to the plaintiff at a railroad crossing. The engineer and fireman were joined as parties defendant. Many acts of negligence were alleged. The negligence alleged was that there was a want of notice to those who were using the crossing. The plaintiff was a stranger in the neighborhood and to the whole surroundings. He alleges that he was on the railroad track, and the train was upon him before he knew of the danger. Among other specifications of negligence, there was alleged a failure to blow the whistle or ring the bell. The engineer and fireman were not in any way connected with some of the allegations of negligence. It was their duty under the statute to blow the whistle or ring the bell, and if they did not do so, and the injury resulted from such failure, as the proximate cause, then they were responsible. If they performed this duty, then (for that cause) the Director General was not liable. The liability of the Director General (for that cause) depended upon the liability of the engineer or fireman. There were other specifications of negligence, however, for which the engineer and fireman were in no way liable.

[3] When the presiding judge came to charge the jury, he told them that they might find against any one of the defendants. That charge was correct, taking the whole complaint and the whole evidence. The conflict among the witnesses was as to the statutory signals. After his honor had charged the jury that they could find against any one of the defendants, the plaintiff's attorney said that he did not think a verdict against the Director General alone would be good. He also stated that he did not think that the fireman was responsible, but that the jury could find against the Director General and the engineer as the responsible man. The practical effect was to reduce the issue to the statutory signals and to withdraw the claim against the fireman.

I. The first assignment of error is that the presiding judge made inconsistent charges. As above explained, the charges are not inconsistent. The defendant was not prejudiced by reducing the issue to one specification of negligence.

[4] II. The next specification of error is the claim that the judge charged on the facts when he said, "The engineer is the responsible man." The statute makes the engineer and fireman responsible for the ringing of the bell and the blowing of the whis-

tle, and there was no objection to the withdrawal of the action against the fireman.

[5] III. The next exception is as to the form of the verdict. The verdict was:

"We find for the plaintiff * * * against Walker D. Hines and Capers Madden."

The words "Director General" were omitted. That was a mere clerical error, that cannot produce confusion. The whole record shows that the verdict was against Mr. Hines in his official character, and not as an individual.

[6] IV. The fourth and fifth exceptions do not state any error, but merely refer to other portions of the record, and cannot be considered.

The judgment is affirmed.

GARY, C. J., and COTHRAN, J., concur.
WATTS, J., did not participate on account of sickness.

(119 S. C. 39)

BANK OF ANDERSON v. BREEDIN.
(No. 10859.)

(Supreme Court of South Carolina. April 11, 1922.)

1. Bills and notes \S 343—In absence of notice of defects in discounted note, court properly directed verdict for plaintiff.

In the absence of evidence that a bank, which discounted a note sued on by it, or its president, who, in his capacity as a real estate dealer, was advised by defendant of a proposed agreement with the payee, in consideration of whose performance the note was executed, had notice of any defect or any other notice of the completed contract than the note itself, the court properly directed a verdict for plaintiff.

2. Appeal and error \S 1050(1)—Proof of reasonableness of attorney's fees held not prejudicial in suit on note.

In a suit on a note providing for 10 per cent. attorney's fees, proof of the reasonableness thereof was not prejudicial to defendant, even if plaintiff was not required to prove it reasonable.

Appeal from Common Pleas Circuit Court of Anderson County; George E. Prince, Judge.

Action by the Bank of Anderson against C. S. Breedin. Judgment for plaintiff, and defendant appeals. Affirmed.

L. W. Harris, of Anderson, for appellant.
J. M. Paget, of Anderson, for respondent.

FRASER, J. The case contains the following statement:

"This is a suit on a note given by defendant, C. S. Breedin, to Chas. R. Moore, and alleged to have been discounted by the said Chas. R. Moore at the Bank of Anderson. Upon defendant's failure to pay same suit was instituted. At the June term of court of common

pleas his honor Judge Geo. E. Prince directed a verdict for plaintiff for full amount asked for in the complaint. Notice of intention to appeal was duly served.

"Synopsis of Complaint.

"That plaintiff is a corporation duly chartered by and under the laws of South Carolina, doing a general banking business; that on February 17, 1920, the defendant executed and delivered to Chas. R. Moore his promissory note for \$1,500, due 30 days from date [setting out note], with name of Chas. R. Moore indorsed on the back thereof. The note contains the provision that, if collected by suit or placed in the hands of an attorney for collection, to pay 10 per cent. attorney's fees for collection; that before the maturity of said note and for value the said Chas. R. Moore discounted same to this plaintiff, who is the legal owner and holder thereof; that same is long past due, no part of which has been paid. Prayer was for principal, interest, and attorney's fee of 10 per cent. and costs.

"Synopsis of Answer.

"(1) General denial; (2) denial of delivery; (3) denial of consideration; (4) failure of consideration; (5) want of consideration; (6) denial that plaintiff purchased note in open market; (7) alleged that note was made in consideration for services to be performed by Chas. R. Moore in putting a land sale for this defendant, which services were never performed; that plaintiff before it became owner of said note, if it became owner thereof, had knowledge that the services had not been performed and would not be performed; (8) that plaintiff had notice of the failure of consideration, want of consideration, nondelivery of note, or facts which would have put them upon inquiry of such matters of equity existing between the said C. S. Breedin and Chas. R. Moore, and that they cannot now be heard to say that they are purchasers for value and without notice of such equities."

At the close of the testimony the presiding judge directed a verdict for the plaintiff. From the judgment entered on the verdict the defendant appealed.

There are two questions before us. The first is:

I. Was it error to direct a verdict for the plaintiff?

It was not. The objection to the direction of the verdict was based upon the following extract from the testimony of the appellant:

"A. I told Mr. Clinkscales that I was entering into an agreement with Chas. R. Moore, of the Southern Land Auction Company, to promote the sale of a piece of Church street property that I was interested in; that Mr. Moore wanted \$1,500 for expenses, which we figured on a bit, regarding the amount, as I considered it excessive; and he was to do certain things, and that I wouldn't give him the cash because I didn't know whether he would carry out his part of the contract or not; and for that reason I didn't pay him in cash, but I would give him a note to secure my word

that he would be paid if he performed his part of the agreement. I believe that covers it."

[1] It appears in the record that Mr. Clinkscales, the president of the plaintiff bank, was himself engaged in real estate business, and the conversation was not held with Mr. Clinkscales as president of the bank. It further appears that the conversation was held before the appellant and Moore had completed their bargain. It further appears that the first note was rejected because it was not written on the forms prepared by the plaintiff bank. There is no evidence that even Mr. Clinkscales had any other notice of the completed contract between the parties than the note that was discounted. The appellant objected to the amount, and yet he did agree to the amount. He objected to payment before the work done, and yet he did make an unconditional obligation to pay before the work was done. There is no evidence that either Mr. Clinkscales or the bank had any notice of any defect in the note, and the only thing for his honor to do was to direct a verdict for the plaintiff.

[2] II. The other assignment of error is as to attorney's fees.

The note provided for it, and it appears that it was alleged in the complaint. The amount of it was in the note. It may be that the plaintiff was not required to prove that 10 per cent. was reasonable, unless the amount of it had been attacked; but proof that it was reasonable was certainly not prejudicial.

The judgment is affirmed.

WATTS, J., did not participate, on account of sickness.

COTHRAN, J. (concurring). Action upon a note executed and delivered by the defendant, C. S. Breedin, to one Charles R. Moore, dated February 17, 1920, due 30 days after date, for \$1,500, and 10 per cent. attorney's fees. Although the "case" and both arguments state that the note was payable "to Charles R. Moore" without words importing negotiability in the commercial sense, it appears to have been treated throughout as a negotiable promissory note, and it will be so considered in this discussion. On the day of its execution the payee, Charles R. Moore, negotiated a transfer of the note to the plaintiff bank, indorsing it in blank and receiving from the bank \$1,490 in cash. The vice president and cashier of the bank, P. E. Clinkscales, handled the transaction.

The sole point at issue between the parties was whether or not the bank was a holder in due course. Upon this issue the defendant testified that he was the owner of certain real estate in the city of Anderson; that he wished to have it developed and sold; that on the day before the note was

given he discussed with Clinkscales, cashier of the bank, his proposed plans; told him that he was entering into an agreement with Moore to promote the sale of the property; that Moore wanted \$1,500 for expenses of surveying, blueprints, electrotyping, advertising, engagement of experts, and so forth; that he regarded the amount as excessive, and was not willing to advance the money, but was willing and would give Moore a note for \$1,500 to hedge against a violation of the agreement; the note being payable at a date beyond the time at which Moore was to perform his agreement.

The next day he completed the agreement with Moore and gave him a note similar to the one in suit, except that it was made out upon a blank form of another bank. Moore attempted to discount this note with the plaintiff bank, but they preferred to have a note made out upon their own forms. Moore returned to Breedin and informed him of the desire of the bank, and the note in suit was executed. Breedin was thus informed of the purpose of Moore to discount the note.

Moore immediately took it to the plaintiff bank, handling the matter with Clinkscales, the cashier, indorsed it in blank, and got the proceeds of the discount.

Clinkscales in his testimony admitted that he had a conversation with the defendant on the day before the note was given, during which they discussed the method of handling the property.

The contention of the plaintiff bank was that the conversation with Clinkscales was not participated in by him as an officer of the bank or in any wise connected with the business of the bank and substantially that, if Clinkscales had in this private interview acquired any information or was chargeable with notice of any defect in the note or any defense thereto, such notice was not imputable to the bank. The circuit judge sustained the bank's contention and directed a verdict for the full amount of principal, interest, and attorney's fees. The defendant has appealed.

Two questions arise in the consideration of the appeal:

(1) Is the knowledge of the consideration of the note acquired by the cashier imputable to the bank?

(2) If so, does the knowledge on the part of the assignee of a negotiable note, transferred for value before maturity, that the consideration of the note is executory, affect his position as a holder in due course?

As to the first question: Clinkscales, the cashier, was informed the day before the note was given of the condition upon which it was to be given. It will be presumed that he had this knowledge, so recently acquired, present in his mind when the note was discounted. Although the knowledge was ac-

quired in a casual conversation, in no wise connected with the business of the bank, and before the transaction in question was negotiated, it will under these circumstances be imputed to the bank.

In *Pomeroy*, Eq. Jur. (4th Ed.) § 672, it is said:

"Where the transaction in question closely follows and is intimately connected with a prior transaction in which the agent was also engaged, and in which he acquired material information, or where it is clear from the evidence that the information obtained by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction, the foregoing requisite becomes inapplicable; the notice given to or information acquired by the agent in the former transaction operates as constructive notice to the principal in the second transaction, although that principal was a complete stranger to and wholly unconnected with the prior proceeding or business."

The text is supported by cases from Alabama, Washington, California, Illinois, Circuit Court of Appeals, Colorado, Georgia, Iowa, Kansas, Maryland, Minnesota, Mississippi, New Jersey, New York, North Dakota, Oregon, Texas, Utah, and Wisconsin. The author in the same section further remarks:

"If the agent acquired the information in a former and independent transaction, then it is prima facie presumed that he does not retain it present to his mind and memory while engaged in the subsequent transaction in behalf of a principal whom it is sought to charge with notice; but this presumption may be overcome by evidence. If, therefore, it be clearly shown by the evidence that the agent did in fact retain the previously acquired information present to his mind and memory while engaged in the subsequent transaction on behalf of his principal, then all the essential elements of the general rule are existing, and the principal is thereby charged with constructive notice. This is, as it seems to me, the true rationale of the doctrine in all its phases and applications, and is fairly deducible from the decided cases."

As remarked by Justice Bradley, delivering the opinion of the court in *Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167:

"The question how far a purchaser is affected with notice of prior liens, trusts, or frauds, by the knowledge of his agent who effects the purchase, is one that has been much mooted in England and this country."

He points out that Lord Hardwicke in *Warwick v. Warwick*, 3 Atk. 291, thought that the rule could not be extended so far as to affect the principal by knowledge of the agent acquired previously in a different transaction, and remarks, "Supposing it to be clear that the agent still retained the knowledge so formerly acquired, it was certainly making a very nice and thin distinc-

tion," and that Lord Eldon did not approve of Lord Hardwicke's view, which has since been overruled by the Court of Exchequer Chamber, and concludes:

"So that in England the doctrine now seems to be established that, if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust, or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time; if he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time and other circumstances. Knowledge communicated to the principal himself he is bound to recollect, but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject."

The principle thus announced by the Supreme Court of the United States has been approved in the following cases: *Fidelity Co. v. Courtney*, 186 U. S. 362, 22 Sup. Ct. 833, 46 L. Ed. 1193; *American Co. v. Society*, 130 Fed. 741, 65 C. C. A. 121; *In re Pease* (D. C.) 129 Fed. 455; *Gustafson v. Railroad Co. (C. C.)* 128 Fed. 85; *Bank of Overton v. Thompson*, 118 Fed. 801, 56 C. C. A. 554; *Schollay v. Drug Co.*, 17 Colo. App. 126, 87 Pac. 182; *McClelland v. Saul*, 113 Iowa, 208, 84 N. W. 1035, 86 Am. St. Rep. 370; *Schwind v. Boyce*, 94 Md. 510, 51 Atl. 47; *Equitable Co. v. Sheppard*, 78 Miss. 217, 28 South. 845; *Fowler v. Randall*, 99 Mo. App. 407, 73 S. W. 933; *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 243, 561; *Goodenough v. Warren*, 5 Sawy. 502, Fed. Cas. No. 5534; *Brown v. Coal Co.*, 72 Fed. 101, 18 C. C. A. 444; *Louisville Co. v. R. Co.*, 75 Fed. 469, 22 C. C. A. 378; *Christie v. Sherwood*, 113 Cal. 526, 45 Pac. 821; *Campbell v. Bank*, 22 Colo. 177, 43 Pac. 1011; *Life Ass'n v. Farley*, 102 Ga. 720, 29 S. E. 622; *Snyder v. Partridge*, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 137; *Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. 147; *Cox v. Pearce*, 112 N. Y. 637, 20 N. E. 566, 8 L. R. A. 564; *Brothers v. Bank*, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 935.

In *Mechem on Agency*, § 721, it is said:

"The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it, provided, however, that such notice or knowledge will not be imputed: (1) Where it is such as

it is the agent's duty not to disclose; and (2) where the agent's relations to the subject-matter, or his previous conduct, render it certain that he will not disclose it; and (3) where the person claiming the benefit of the notice, or those whom he represents, collude with the agent to cheat or defraud the principal."

There can be no doubt as to the proposition that knowledge of a fact communicated to an agent, while he was acting for his principal, in the line or scope of his employment, is chargeable to the principal; but this is only one of several conditions under which the question arises as to imputation to the principal of the agent's knowledge. Others are as follows: (1) Where the information was communicated to the agent before his relation to the principal as such was created; (2) where the information was communicated to the agent after that relation began, but not under circumstances justifying the conclusion that he was at the time acting for his principal, in the line or scope of his employment.

Both of these contingencies are to be qualified by the further inquiry whether or not the main transaction concerning which the question becomes material was transacted in person by the agent whose previous knowledge is sought to be imputed to the principal.

It is perfectly apparent that, if the agent did not personally transact the matter under investigation, the imputation to the principal of his knowledge acquired before the agency was created or acquired afterwards, but in his private, and not representative, capacity, could not with any degree of reason be insisted upon.

But it presents a very different aspect when the agent, with knowledge of the damning circumstances, acquired either before the agency began or afterwards in his private capacity, personally consummates the transaction.

"And so it is held that knowledge casually obtained by a corporate agent will not be imputed to the corporation unless the corporation acts through such agent in a matter in which the information possessed by him is pertinent." 21 R. C. L. 841; Willard v. Denise, 50 N. J. Eq. 482, 28 Atl. 29, 35 Am. St. Rep. 788.

In *Akers v. Rowan*, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705, the case was not one in which the agent whose knowledge was sought to be imputed to the bank of which he was solicitor and a director had personal charge of the transaction as to which the question of notice was material. The principal ground upon which the notice to the attorney was held not imputable to the bank

was that it had been acquired in a confidential manner.

In *Knobelock v. Bank*, 50 S. C. 259, 27 S. E. 962, the court held that the knowledge of an agent while engaged in a fraud for his own benefit, in which the principal is not in any way a participant, cannot be imputed to the principal—a declaration as to which there cannot be a doubt and which has no application to the point under discussion in the case at bar.

In the case of *Farmers' Bank v. Whitehead*, 105 S. C. 100, 89 S. E. 657, the facts are meagerly reported, but it must be assumed from the statement at page 106 of the opinion (89 S. E. 659) that Ragsdale, president of the bank, had first become the personal owner of the note and then discounted it on his own account at the bank which had no notice of any defect; that, if Ragsdale did have such notice, it should not be imputed to the bank. This is entirely in accord with the rule as stated herein, for it would be unreasonable to expect Ragsdale, who was acting in his own interest, to give the bank notice of a defect. Besides, it was held there that as a matter of fact Ragsdale had no such notice.

2. As to the second question: The information thus imputed to the bank was that the note was given in consideration of an executory contract which, in the nature of things and implied in the term "executory," had not at that time been performed, and as declared in 3 R. C. L. 1067:

"The courts universally hold that knowledge that a note was given in consideration of the executory agreement or contract of the payee, which has not been performed, will not deprive the indorsee of the character of a holder in due course, unless he also has notice of the breach of that agreement or contract."

The text is supported by an array of authorities. Especially is this doctrine applicable to a case, as this is, where the maker of the note actively assisted the payee in negotiating a discount and transfer of the note. The defendant in turning into the channels of commerce a negotiable note, and actively assisting in the launching, assumed the risk of the payee's default in his undertakings. It is not improbable that the defendant co-operated with the payee in having the note discounted in order to raise the necessary funds with which to carry out these undertakings, and the fact that he died suddenly before they could be accomplished was a misfortune which should not be visited upon the bank which with the defendant's knowledge and active participation parted with its money.

(119 S. C. 31)

CURETON et al. v. LITTLE et al.
(No. 10861.)(Supreme Court of South Carolina. April 11,
1922.)**1. Wills \S 602, 603(1)—Clauses construed as granting a conditional fee.**

Clauses giving lands to each of two sons and a daughter during natural life and afterwards to his or her "bodily heirs," there being nothing in the remainder of the will to show that the words were intended to mean "children," held to give fee conditional estates.

2. Wills \S 602, 603(1)—Subsequent clauses providing for distribution of estate held to except prior devises of conditional fee.

Subsequent clauses for distribution in a will held to except prior devises of fee conditional, and to provide for distribution of the remainder of the estate and for children of testator born subsequent to the will.

3. Wills \S 590—Estate devised by clear and unequivocal terms will not be changed by superadded words, unless showing a clear intent to so do.

Where an estate is given by will in words of clear and ascertained legal significance, it will not be enlarged, cut down, or destroyed by superadded words in the same or subsequent clauses, unless they raise an irresistible inference that such was testator's intent, and superadded words of doubtful import must be rejected.

Appeal from Common Pleas Circuit Court of Greenville County; George B. Prince, Judge.

Action by Kate H. Cureton in her own right and as executrix of the will of Hugh S. Cureton, deceased, and others against Hugh C. Little and others, involving the construction of a will. From a decree in favor of the plaintiffs, the defendants appeal. Affirmed.

So much of the will as is necessary for a proper construction thereof is as follows:

"Item 2: I will to my son, Paschal D. Cureton, during his natural life and afterward to his bodily heirs [description omitted]. I also will to my son, Paschal D. Cureton, during his natural life and afterwards to his bodily heirs [description omitted]."

"Item 3: I will to my son, John M. Cureton, Jr., during his natural life, and afterwards to his bodily heirs [description omitted]."

"Item 4: I will to my daughter, Edna R. Cureton, during her natural life and afterwards to her bodily heirs [description omitted]."

"Item 5: I will that the proceeds of the above lands, which I have willed to Paschal D. Cureton, John M. Cureton, Jr., and Edna R. Cureton, during their natural lives and afterwards to their bodily heirs, be not taken for any debt or debts contracted by them."

"Item 7: I will and direct that so soon as each one of my sons, Paschal D. Cureton and John M. Cureton, Jr., become twenty-one years

of age that they enter into possession of the lands named in sections two and three, respectively, of this will, and that Edna R. Cureton enter into possession of the Jenkins Place, willed in section four, so soon as she becomes twenty-one years of age, or so soon as she becomes married.

"Item 8: I will all the real and personal property which I have now or may have, except that which I have already willed to my three children, Paschal D. Cureton, John M. Cureton, Jr., and Edna R. Cureton, to my wife, Kate H. Cureton, during her natural life. At the death of my wife, I will and direct that all my estate, both real and personal, that may be left after supporting the family and educating my children, shall be equally divided among my children living at my wife's death and the children of any of my children that may die in the lifetime of my wife, by four disinterested and competent men to be selected by my children without the aid or interference of any court. If any one of my children should die without living children, then his or her portion is to be returned back to by estate and to be controlled by my executrix during her life and after her death to be divided among my children or their bodily heirs. The children of a deceased child to take the parent's share.

"Item 9: Also I will and direct that all my property, both real and personal left for final distribution among my children after the death of my wife, be not taken for any debt or debts contracted by them or their heirs.

"Item 10: If there should be born unto me any other children then they shall be made equal to the children I now have out of my property not already willed or given to Paschal D. Cureton, John M. Cureton, Jr., and Edna R. Cureton, and if all my children should die without heirs and if my wife should also die I will that my estate go to John M. Cureton, Sr., during his life, and afterwards to my sisters, M. A. Stokes, S. A. Greene and Lucy Elvira Cureton and their children."

The following is the master's report:

To the Court of Common Pleas:

The master to whom this case was referred to take the testimony and to hear and determine all the issues raised by the pleadings, and to report his conclusions thereon both of law and fact, to the court with leave to report any special matter, begs to report that he has held a reference and taken the testimony, which is herewith submitted.

The master finds from the testimony that all the parties are properly before the court, and that the facts alleged in the complaint are substantially true, except as to paragraphs 6, 8, and 9 of the complaint, and the parties to the action have agreed that the issues raised in these paragraphs shall remain open until the main issue raised by the pleadings is decided by the court, to wit: The construction of the will of Hugh S. Cureton, deceased. It appears that the said Hugh S. Cureton, died on or about the 29th day of November, 1891, leaving of force his last will and testament, dated July 21, 1891, which was admitted to probate in common form by the judge of the court of probate of this county on December 21, 1891. It

appears further from the testimony that at the date of the will and even at the death of the testator the plaintiff, Paschal D. Cureton, had no children, neither did the plaintiffs, John M. Cureton, Jr., nor Edna C. Manly; that neither of the latter two have ever had any children. But the plaintiff, Paschal D. Cureton now has a son, the defendant, Paschal D. Cureton, Jr., who is about two years of age. The only question to be determined by the court is whether the plaintiffs, John M. Cureton, Jr., Paschal D. Cureton, and Edna C. Manly, each takes a fee conditional estate under items 2, 3, and 4 of said will, or whether they take a life estate with the remainder to their children as purchasers. Item 2 is as follows: "I will to my son, Paschal D. Cureton, during his natural life and afterwards to his bodily heirs, one hundred acres of land, including my residence, dividing line to be run as nearly parallel to the present lower line of my home place as possible to get the said one hundred acres. I also will to my son, Paschal D. Cureton, during his natural life, and afterwards to his bodily heirs, fifty-one acres of land lying opposite my present residence and on the eastern side of the Fork Shoals road, being the land which I purchased of Newton Sullivan." The language used by the testator in items 3 and 4 is the same as that employed by him in item 2. The phraseology of these items is such as is commonly and properly used to create a fee conditional estate. The testator has used technical words, "heirs of the body" or "bodily heirs," as the case may be, mean all lineal descendants to the remotest posterity, and are words of limitation and not of purchase, unless the instrument clearly shows that they were used in a restricted sense, as to indicate "children." Therefore there can be no doubt that, if these three items in the will stood alone, the rule in *Shelley's Case* would apply, and the plaintiffs, John M. Cureton, Jr., Paschal D. Cureton, and Edna C. Manly, would take fee conditional estates. *Bethea v. Bethea*, 48 S. C. 440, 26 S. E. 716; *Surles v. McLaurin*, 94 S. C. 308, 77 S. E. 944; *Adams v. Verner*, 102 S. C. 7, 86 S. E. 211. But it is contended that the testator by the use of certain words to be found in the subsequent clauses of his will intended that the words "bodily heirs" as used by him in items 2, 3, and 4 should be construed to mean "children," and that each of the plaintiffs, John M. Cureton, Jr., Paschal D. Cureton, and Edna C. Manly, take a life estate with the remainder to their children, as purchasers. The testator in the first part of item 8 of his will gave all of his property, real and personal, except that which he had already willed to his three children, John M. Cureton, Jr., Paschal D. Cureton, and Edna C. Manly, to his wife, Kate H. Cureton, during her natural lifetime and at her death he directed that what was left after supporting the family and educating his children should be divided between his children living at his wife's death, and the children of any of his children that might die in the lifetime of his wife.

Now if the testator had stopped at this point it would be obvious that he intended to except the devises mentioned in items 2, 3, and 4 therefrom, but he concludes this item by the use of the following language: "If any one of my children should die without living children, then his or her portion is to return back to my es-

tate and to be controlled by my executrix during her life and after her death to be divided among my children or their bodily heirs. The children of a deceased child to take the parent's share." And the following words appear at the conclusion of item 10: "And if all my children should die without heirs, and if my wife should also die, I will that my estate go to John M. Cureton, Sr., during his natural life, and afterwards to my sisters, M. A. Stokes, S. A. Greene, and Lucy Elvira Cureton, and their children." It is contended that these concluding words in items 8 and 10 show that it was not the intention of the testator to use the words employed by him in items 2, 3, and 4 in their technical sense, but that they were used in a restricted sense denoting "children." The following principles are well established in this state in the construction of wills: "When a gift is made in one clause of a will in clear and unequivocal terms, the quantity or quality of the estate given should not be cut down or qualified by words of doubtful import found in a subsequent clause. To have that effect, the subsequent words should be at least as clear in expressing that intention as the words in which the interest is given." *Walker v. Alverson*, 87 S. C. 60, 68 S. E. 968, 30 L. R. A. (N. S.) 115. "Where an estate is given by will in words of clear and ascertained legal significance, it will not be enlarged, cut down, or destroyed by superadded words in the same or subsequent clauses, unless they raise an irresistible inference that such was the intent of testator." *Adams v. Verner*, 102 S. C. 7, 86 S. E. 211. "Where an estate is devised by clear and unequivocal terms, superadded words of doubtful import must be rejected." *Adams v. Verner*, 102 S. C. 7, 86 S. E. 211.

It is the opinion of the master that there is nothing in these subsequent clauses of the will to show that it was the intention of the testator to cut down or destroy the estate already granted to his three children. It is true that "heirs of the body" and "bodily heirs" in some cases in this state have been construed to mean "children," yet it is equally true that the word "children" has been construed to have been used in the sense of "bodily heirs" in order to effectuate the intention of testator or grantor. *Branyan et al. v. Tribble et al.*, 109 S. C. 58, 95 S. E. 137, and *Dillard v. Yarbboro*, 77 S. C. 227, 57 S. E. 841.

The master, therefore, finds and concludes that each of the plaintiffs, John M. Cureton, Jr., Paschal D. Cureton, and Edna C. Manly, take a fee conditional estate, and that, the plaintiff Paschal D. Cureton having a child, he can now convey a good title to the land devised to him in item 2 of his father's will, and that the other plaintiffs, John M. Cureton, Jr., and Edna C. Manly, upon the birth of children to each of them, can make a good title to the land devised to them in items 3 and 4 of the will.

The following is the opinion of the common pleas circuit court:

This case comes before me upon exceptions to the master's report, and, after hearing argument of counsel, I am of the opinion that all of the exceptions should be overruled, and that the report of the master should be sustained.

(119 S. C. 1)

GIBBES MACHINERY CO. v. NIAGARA
FIRE INS. CO. (No. 10877.)(Supreme Court of South Carolina. April 25,
1922.)

[1] The testator has used technical words in items 2, 3, and 4 of the will, and it is clear under the decisions of the Supreme Court that each of the plaintiffs herein, Paschal D. Cureton, John M. Cureton, Jr., and Edna C. Manly, take fee conditional estates. There is nothing in the subsequent clauses of the will to show that the testator intended to use the words employed by him in items 2, 3, and 4 in a restricted or limited sense, so as to denote "children."

[2] In addition to this I am of the opinion that the testator in the subsequent clauses of his will excepted the devises mentioned in items 2, 3, and 4 therefrom. That all the other property which he might own at his death, and which he gave to his wife for life, should go as directed in items 8 and 10 of his will, but not the property which he had already devised to his children, Paschal D. Cureton, John M. Cureton, and Edna Cureton, now Edna C. Manly.

[3] In the case of *Adams v. Verner*, 102 S. C. 7, 86 S. E. 211, the Supreme Court (quoting from the syllabus) has declared: "Where an estate is given by will in words of clear and ascertained legal significance, it will not be enlarged, cut down, or destroyed by superadded words in the same or subsequent clauses, unless they raise an irresistible inference that such was the intent of the testator," and in this same case the court has further declared, "Where an estate is devised by clear and unequivocal terms, superadded words of doubtful import must be rejected."

The authorities cited by the master sustain his conclusions. It is therefore ordered and adjudged that the report of the master be, and the same is hereby, confirmed in every respect.

J. Frank Eppes, of Greenville, for appellants.

Oscar Hodges, of Greenville, for respondents.

GARY, C. J. For the reasons assigned by his honor, the circuit judge, the judgment of the circuit court is affirmed.

WATTS, FRASER, and COTHRAN, JJ., concur.

COTHRAN, J. I concur upon the ground that items 8, 9, and 10 of the will were not intended to apply to the estates devised in 2, 3, and 4. I think that the doctrine of *Adams v. Verner*, 102 S. C. 7, 86 S. E. 211, should be limited to devises which carry, directly, complete estates, as "to A. and his heirs," or "heirs of his body," and should not be applied to cases of this character, "to A. for life, remainder to the heirs of his body," where a fee conditional can only be established by invoking the rule in *Shelley's Case*. In such cases the inquiry should be wide open, whether the technical words were intended to be so used, or in the sense of children. Report master's report and circuit decree.

Insurance \Leftrightarrow 580(2) — Insurer paying insurance to mortgagor with knowledge of mortgage, though not of its provisions for insurance for mortgagee, liable to mortgagee.

Where mortgagor of auto took out fire policy thereon, payable to himself, reciting it was mortgaged to a certain company for a certain amount, and such mortgage was recorded, and contained agreement of mortgagor to insure and assign policy to mortgagee, the insurer, paying the policy to the mortgagor, after inquiring of the mortgagor as to the status of the mortgage, and being put on inquiry as to provision of mortgage as to insurance, though having no actual knowledge thereof, is liable to the mortgagee for the policy's proceeds.

Cotthran, J., dissenting.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by the Gibbes Machinery Company against the Niagara Fire Insurance Company. From order granting defendant a new trial, plaintiff appeals. Reversed.

Hunter A. Gibbes and Graydon & Graydon, all of Columbia, for appellant.

Melton & Belser, of Columbia, for respondent.

FRASER, J. The appellant sold an automobile to one H. L. Gregory, and took a mortgage on the machine for a part of the purchase money. The mortgage contained an agreement by the mortgagor that he would insure the machine and assign the policy of insurance to the appellant. This mortgage was duly recorded. The policy of insurance noted the fact that the machine was mortgaged to the appellant, but did not make the loss payable to the appellant. The machine was burned, and the adjuster applied to the appellant for information as to the status of the mortgage debt. The company paid the policy to the mortgagor, and this suit is brought by the appellant for the proceeds of the policy. The appellant demurred to the complaint. The demurrer was overruled. The defendant moved for a nonsuit. This also was overruled. The plaintiff moved for a direction of a verdict. This was granted. The trial judge ordered a new trial on the ground that he had made a mistake of law in directing a verdict.

There is evidence that the adjuster knew of the existence of the mortgage itself, and went to the mortgagee to get information in regard to the mortgage, and got it. Even if the company was not required to make inquiry, it did inquire. The bare fact that they came to inquire threw the mortgagee off

his guard. Why should the company inquire if it was not for the purpose of complying with the terms of the mortgage? When the company had notice of the mortgage itself, they were chargeable with notice of all the facts that a reasonable inquiry would have revealed. A simple question, "Have you any interest in this insurance policy?" was all that was required. The provision that the mortgaged property shall be insured for the benefit of the mortgagee is a very common practice, and the provision to be expected.

In *Gandy v Insurance Co.*, 52 S. C. 231, 29 S. E. 657, we find:

"Now, it is clear the third proposition is not sound, for it required the agent to have actual knowledge of the actual existence of the other policy; whereas, if the agent had only such information which, if pursued, would have led to actual knowledge of the existence of the other policy, that would have been sufficient notice of the other policy."

Here there was actual notice of the mortgage and an inquiry, the only apparent purpose of which was to comply with the terms of the mortgage. The authority above cited is full to the point.

The complaint stated the above facts, and was not demurrable. It was tried as an equity case would have been tried by the court on a direction of a verdict. The evidence complained of was not prejudicial, in that it did not affect the real issue.

The order granting a new trial is reversed.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. (dissenting.) Action by the mortgagee of an automobile, partly destroyed by fire, to require an insurance company, which insured the car at the instance of the mortgagor, and paid the loss to him, to account to the mortgagee for the amount so paid. The facts appear to be as follows:

On February 11, 1920, the plaintiff sold to one H. L. Gregory an automobile, taking from him a mortgage to secure the unpaid portion of the purchase price. The mortgage was recorded on February 12th. By the terms of the sale and a stipulation in the mortgage Gregory was required and agreed to insure the car for the protection of the mortgagee. He had the car insured, but did not have attached to the policy a clause providing that the loss, if any, should be payable to the mortgagee, as he was obligated to do. At the time of the issuance of the policy, the insurance company had knowledge of the fact that it was under mortgage to the plaintiff. The policy, dated February 16th, contains a notation, "Mortgage to Gibbes Machinery Company, Columbia, S. C. \$1,300.00," and the agent's report to the company of the policy has the same notation. On April 27th the car was damaged by fire. On May 18th proofs of loss were made up by Gregory and the insurance adjuster.

They fixed the loss at \$2,000. The proofs of loss showed that at the time of the loss the plaintiff had a mortgage on the car; also that, in consideration of the payment of the loss to Gregory, he assigned his interest in the car to the insurance company. On June 27th the insurance company paid the loss, \$2,000, to Gregory, took possession of the car, and sold it without the knowledge or consent of the plaintiff. On the day the proofs of loss were made out, the insurance adjuster called at the plaintiff's place of business, and got information as to the purchase of the car, and the mortgage on it and was told by the plaintiff the purchase price of the car and the amount unpaid on the mortgage. He testified that:

"There was no loss payable clause in the policy and under the circumstances he felt bound to pay the money to the assured H. L. Gregory, which he recommended should be done and which was done shortly after the loss."

Both the insurance agent and the adjuster testified that they knew nothing of the particular terms of the mortgage or of any agreement between Gregory and the plaintiff. The testimony for the plaintiff tended to show that at the time of the sale of the car Gregory agreed to insure the car for its benefit, and a stipulation to that effect was also contained in the mortgage. There was no testimony tending to show that the insurance company had any knowledge of this agreement prior to its payment of the loss to Gregory except what might be implied from the record of the mortgage. The entire purchase price matured before the proofs of loss were made out.

The complaint contains two alleged causes of action: The first is based upon the theory that the insurance company, before it paid the loss to Gregory, had notice of the agreement by Gregory to insure the car for the protection of the plaintiff, and relief is accordingly sought by the establishment of an equitable lien upon the proceeds of the insurance. This is an equitable cause of action. In *Swearingen v. Insurance Co.*, 56 S. C. 355, 34 S. E. 449, the court declared:

"This is an action by a mortgagee against an insurer and the mortgagor, to enforce an alleged equitable lien upon the proceeds of an insurance policy on the mortgaged premises taken out by the mortgagor in her own name. * * * The right asserted by plaintiff was a mere equity, and the issues should have been tried by the judge as chancellor."

The second alleged cause of action is based upon the conduct of the insurance company, after payment of the loss to Gregory, in taking possession of the damaged car, and converting it to its own use, to the damage of the plaintiff \$300, and punitive damages \$1,000. This is a legal cause of action.

The case was called for trial before the county judge and a jury. The defendant de-

murred to the first cause of action upon the general ground and upon the ground of a misjoinder of parties defendant, and to the second cause of action upon the latter of the above grounds. The demurrers may be disposed of by the remark that the first ground to the first cause of action is without specification; that it should not have been sustained in any event for the reason that the alleged agreement by Gregory to insure the car for the benefit of the plaintiff constituted an equitable lien upon the proceeds of the insurance, which the company, upon receiving notice thereof before payment to Gregory, was obliged to respect (*Swearingen v. Insurance Co.*, 52 S. C. 309, 29 S. E. 722), and that the second ground of demurrer to the first cause of action and the ground of demurrer to the second could not have been sustained, for the reason that misjoinder of causes of action, and not misjoinder of parties, is a ground of demurrer (*Lowry v. Jackson*, 27 S. C. 318, 8 S. E. 473). This disposes of the defendant's exceptions 1 and 2.

At the conclusion of the plaintiff's testimony the defendant moved for a nonsuit as to the first cause of action upon various grounds which need not be stated. This motion was refused.

At the close of the testimony the presiding judge upon motion directed a verdict in favor of the plaintiff for the full amount due upon the mortgage.

Thereafter, upon motion of defendant, a new trial was ordered for the reasons stated by the presiding judge in his order which will be reported. From this order the plaintiff has appealed; the defendant also has appealed from the order refusing the demurrers and nonsuit, and has given notice of additional grounds to sustain the order granting a new trial.

The plaintiff's exceptions present the following propositions:

(1) That the record of the mortgage which contained the undertaking of Gregory to insure the car for the benefit of the plaintiff was constructive notice to the insurance company of said undertaking, the company having actual knowledge of the existence of the mortgage.

(2) That the actual knowledge on the part of the insurance company of the mortgage and of the fact that it was past due fixed liability upon the insurance company.

(3) That the passing of the legal title to the car upon condition broken vested the plaintiff with a legal as well as an equitable lien upon the insurance money.

(4) That the passing of the legal title to the car upon condition broken vested the plaintiff with the legal title to the insurance money.

(5) That the conduct of the insurance company in taking an assignment and the possession of the car after the fire and selling

the same made it responsible to the plaintiff for the entire mortgage debt.

(6) That the provisions of the policy requiring the insured to furnish a statement of the interests of all concerned in the car, and that all acts of the insured and of the company should be for the benefit of all concerned, imposed upon the company the duty of protecting the interests of the plaintiff of whose mortgage it had notice.

As to the first proposition: The recording acts are designed to protect those who have acquired or are about to acquire rights of property in or liens upon particular property in question, subsequent creditors or purchasers without actual notice of superior claims. They alone are intended to be affected by the acts; they alone are required to search the records; to them alone are the recording acts applicable and to them only are the records constructive notice. So far as the contract of insurance proper is concerned, an insurance company sustains neither the relation of subsequent creditor nor purchaser to the owner, and is not obligated to search the records for a possible agreement between the mortgagor and the mortgagee. In reference to a stipulation in the policy that upon payment of a loss the property shall be assigned to the insurance company, it, of course, can enjoy this right subject to the claims of prior recorded liens. The presiding judge was right in holding, in his order granting a new trial, that the record of the mortgage was not constructive notice to the insurance company of the agreement between Gregory and the plaintiff that the car should be insured for its protection. See authorities cited by him.

As to the second proposition: There can be no doubt from the written stipulation of Gregory in the mortgage to insure the property for the protection of the plaintiff that the plaintiff had an equitable lien upon the proceeds of insurance; but the availability of that lien depended upon notice to the insurance company of the existence of the agreement; it did not depend, as this proposition states, upon knowledge on the part of the insurance company of the existence and overmaturity of the mortgage. As is said in *Swearingen v. Insurance Co.*, 56 S. C. 355, 34 S. E. 449:

"The equitable lien of a mortgagee on the proceeds of an insurance policy to the mortgagor, under an agreement to insure for the mortgagee's benefit, extends only to those having notice of such lien"

—referring, of course, to the equitable lien.

As to the third proposition: This cannot be true for the reasons stated in *Joyce on Ins.* § 23:

"It is well settled that insurance is a personal contract whatever the subject-matter of the insurance may be. It is a contract by which the insurer undertakes to indemnify or pay

money to the insurer in the manner and subject to the conditions agreed upon. This obligation does not run with the property whether it be real estate or personalty, neither does it pass with the title unless assigned with the consent of the insurer."

See *Annely v. De Saussure*, 26 S. C. 497, 2 S. E. 490, 4 Am. St. Rep. 725.

As to the fourth proposition: This is denied upon the same ground.

As to the fifth proposition: The only effect such conduct could have had was to make the insurance company liable for the value of the damaged car. *Bank v. Pates & Allen*, 108 S. C. 361, 94 S. E. 881. If the property has been recovered by the plaintiff this statement is subject to modification.

As to the sixth proposition: The clause of the policy invoked requires the insured to render a statement of the interest of the assured and of all others in the property, not in the insurance. It does not appear that this was not done, or that the interests of the plaintiff as mortgagee were not properly presented to the insurance company; in fact the contrary appears. The liability of the insurance company depends upon its notice of the equitable lien on the insurance money, not upon its knowledge of any interest the mortgagee may have had in the property.

The defendant's exceptions 4, 5, 6, 7, 8, and 9 involve the refusal of the defendant's motion for a nonsuit, and must be overruled for the reason that the motion was directed alone to the first cause of action which was equitable, and in such case the remedy is by motion to dismiss, and not for nonsuit. *Railway Co. v. Beaudrot*, 63 S. C. 286, 41 S. E. 299, and cases therein cited.

The judgment of this court should be that the order appealed from be affirmed.

(153 Ga. 273)

MURPHY HARDWARE CO. v. RHODE ISLAND INS. CO.

RHODE ISLAND INS. CO. v. MURPHY HARDWARE CO.

(Nos. 2813, 2834.)

(Supreme Court of Georgia. April 14, 1922.)

(*Syllabus by the Court.*)

Insurance §145(1).—Petition on contract to keep property insured by renewals held insufficient.

The court erred in overruling the general demurrer to the petition in this case. This ruling is substantially controlled by that made in the following cases: *Croghan v. New York Underwriters Agency*, 53 Ga. 109; *Remspeck v. Pattillo*, 104 Ga. 772, 30 S. E. 962, 42 L. R. A. 197, 69 Am. St. Rep. 197; *Phoenix Insurance Co. v. Hamilton*, 110 Ga. 14, 35 S. E. 305; *Athens Mutual Insurance Co. v. Evans*, 132 Ga. 703, 64 S. E. 993; *Manis v. Pruden*, 145 Ga. 239, 88 S. E. 967. This ruling disposes

of the entire case, and it is unnecessary to pass upon the questions made in the main bill of exceptions.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by the Murphy Hardware Company against the Rhode Island Insurance Company. Judgment of nonsuit. Plaintiff brings error, and defendant brings a cross-bill of exceptions. Judgment reversed on the cross-bill, and writ of error on the main bill dismissed.

Murphy Hardware Company filed a petition against Rhode Island Insurance Company, praying for specific performance of a contract to insure against the loss by fire of a number of bales of cotton stored in a warehouse, and for a judgment in the amount of the value of the cotton so destroyed. The petition as amended alleges, in substance, that the insurance company issued a policy insuring the plaintiff's cotton in the sum of \$5,000, from 12 o'clock noon August 15, 1918, to the same hour on February 15, 1919; that the agent of the insurance company at the time further agreed with plaintiff that on or before the expiration of this policy he would renew the insurance on said cotton from time to time in like amounts for periods of 90 days until such time as petitioner should instruct the defendant to cancel the same, and that the premium thereafter would be paid when required by the said agent, according to the custom and usage at Moultrie, Ga., where such agent was doing business and representing said insurance company, until the petitioner had disposed of the cotton, and that defendant would issue said insurance on the same form of policy as the one then being issued; that in compliance with the terms of said oral contract the defendant did, on the 15th of February, 1919, renew the insurance by issuing to the petitioner its policy of insurance in the precise language and form as the previous policy, expiring on the 15th day of May, 1919, and that thereafter, on the 15th day of May, the defendant, through its agent at Moultrie again renewed its policy covering said cotton in the same language and form as employed in the previous policies, which said last policy expired on the 15th day of August, 1919; that the premiums on all of said policies were duly paid by the insured, and the renewed policies were issued to the petitioner in compliance with the verbal contracts previously made by said agent of the insurance company to keep the property of the petitioner insured until notified to cancel the policies; that on the 15th day of October, 1919, the said cotton was destroyed by fire while stored in the warehouse at Coolidge, Ga., as aforesaid; that on the next day, October 16, 1919, after the property insured thereby had been destroyed by fire, pe-

petitioner notified Dupre-Moore Company, agent for the defendant insurance company at Moultrie, that the said cotton had been destroyed, and was in turn then notified by the said agent that the policy of insurance had not been renewed, and that the company was not liable for any insurance on the property destroyed; that this was the first knowledge petitioner had of the failure to renew the policy; that petitioner then tendered to the agent of the company the full amount of the premium due for the renewal of the policy for a period of 90 days from August 15, 1919, which tender the defendant refused. Petitioner stated to defendant's agent that it was prepared, ready, willing, and able to pay the amount of the premium for the policy at said time; but the defendant refused to accept the same, on the ground that the company's liability terminated on August 15, 1919. Petitioner alleges that it has performed all the conditions imposed upon it by the terms of the policy issued to it and by the terms of the policy which the defendant agreed to issue and rewrite, and imposed upon it by law; that the property, at the time of its destruction by fire was insurable, and the risk had not been increased; that the agreement entered into by the agent of the defendant insurance company with plaintiff was in no way antagonistic to or inconsistent with the duty of said agent to the defendant company, and not contrary to public policy on the ground of dual agency; that the general custom of such business in Moultrie was, that, on short-time policies of the character herein mentioned, agents of insurance companies would enter into oral agreements with insurers to renew and reissue policies on the expiration of same, conditioned upon the insurability of the property, until notified not to so renew or that the property had been sold.

The defendant denied every allegation of the plaintiff's petition, except that it was a foreign corporation having an office and doing business in the city of Moultrie, and also interposed a general demurrer to the petition. The general demurrer was overruled, and the defendant excepted. The case proceeded to trial, and the plaintiff introduced evidence tending to prove the allegations of its petition, whereupon the defendant moved for a nonsuit, which was granted. The plaintiff excepted.

Hill & Gibson, of Moultrie, for plaintiff in error.

Shipp & Kline, of Moultrie, and Bryan & Middlebrooks, of Atlanta, for defendant in error.

GILBERT, J. Judgment on cross-bill of exceptions reversed. Writ of error on main bill of exceptions dismissed.

All the Justices concur.

CHRISTIAN v. CHRISTIAN. (No. 2804.)

(Supreme Court of Georgia. April 14, 1922.)

(Syllabus by the Court.)

1. Divorce \S 243—Decree for alimony not void because no provision made for support of children.

Mrs. Bunnie Christian filed her petition against her husband, George R. Christian, showing that in an action for divorce a final verdict and decree had been rendered, and in the decree it was adjudged that she should have a certain amount payable monthly as alimony. No provision was made in the decree for alimony for the support of the two minor children. There was a default in the payment of alimony, and the wife prayed that the husband be required to pay the alimony or be punished for contempt of court. The petition with a demurrer and answer were heard by the judge at chambers in vacation, and thereupon the rule against the defendant was made absolute, and it was ordered and adjudged that, upon failure of the respondent to comply with the decree of the court as to the payment of alimony, rendered at the previous term of the court, he be committed to the common jail of the county and there kept in custody until he should comply with the decree of the court. The respondent excepted to this ruling, on the ground that the court erred "in assuming jurisdiction to hear and determine said case in vacation, there being no proceedings pending before the court which gave him jurisdiction to try and determine said case," and on the further ground that the property situated in Macon county that was owned by the defendant at the time the decree was rendered was subject to levy and sale, and it appeared from the evidence that the judgment allowing alimony and attorney's fees was a superior lien upon the land and took priority over a certain deed introduced in evidence. It was also insisted that the decree allowing alimony to the wife, in which no provision was made for the support of the children, was void. *Held*, the decree allowing the wife \$40 per month as alimony and certain stated attorney's fees was not void merely because no provision was made therein for the support of the children.

2. Divorce \S 269(2, 12)—Decree for alimony enforceable by contempt proceedings whether a lien on real property or not; contempt proceedings for nonpayment of alimony may be heard in vacation.

Whether the decree for alimony was a lien upon certain real property of the defendant or not, the wife in whose favor the decree for alimony was rendered could enforce the payment of the same by proceedings against the husband for contempt of court in failing to comply with the decree, and the court had jurisdiction to hear and dispose of such proceedings in vacation. *Wilkins v. Wilkins*, 146 Ga. 382, 91 S. E. 415, and cases cited; *Van Dyke v. Van Dyke*, 125 Ga. 491, 54 S. E. 537; *Briesnick v. Briesnick*, 100 Ga. 57, 28 S. E. 154.

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Suit by Bunnle Christian against G. R. Christian. Judgment for plaintiff, and defendant brings error. Affirmed.

J. J. Bull & Son, of Oglethorpe, for plaintiff in error.

R. L. Greer, and John M. Greer, both of Oglethorpe, for defendant in error.

BECK, P. J. Judgment affirmed. All the Justices concur.

(153 Ga. 260)

JONES v. STATE. (No. 2724.)

(Supreme Court of Georgia. April 14, 1922.)

(Syllabus by the Court.)

Criminal law \S 823(1)—Failure of judge to tell jury recommendation as to punishment was blinding held cured by another instruction.

Frank Jones was convicted of the murder of Beatrice Edwards by unlawfully and maliciously shooting and killing her with a pistol. He excepted to the overruling of his motion for new trial. In the brief filed by his counsel in this court it is stated: "The only ground of the motion for new trial which we shall contend that a new trial should be given on is on the sixth ground of the amended motion for a new trial, which is an exception to the judge's charge." The sixth ground of the amendment to the motion assigns error upon the following instruction to the jury: "If you find that he is guilty, the form of your verdict will be, 'We, the jury, find the prisoner guilty,' which means guilty of murder. You could recommend, if you saw fit to do so, that he be confined in the penitentiary for life." The error assigned is, "that the court failed to charge the jury in connection therewith that, in the event they saw fit to recommend that the defendant be confined in the penitentiary for life, said recommendation was binding upon the court. That the defendant was entitled to have this law charged fully, as, without said explicit instruction, the jury was not aware as to the force and effect to be given said recommendation."

Pen. Code 1910, \S 63, declares: "The punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend," etc. Prior to giving the instruction as to the form of the verdict to which exception is made, the court had instructed the jury that "the punishment for murder shall be death, but may be confinement in the penitentiary for life if you shall so recommend." The statute uses the language, "but may be confinement in the penitentiary for life * * * if the jury trying the case shall so recommend." In view of the language of the statute, and of the entire charge to the jury on the subject of their recommendations to life imprisonment if they should see fit to make it, it is not in the least likely that the jury understood that a recommendation to life imprisonment made by them would not be binding on the court.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Frank Jones was convicted of murder, and he brings error. Affirmed.

H. Mercer Jordan, of Savannah, for plaintiff in error.

Walter C. Hartridge, Sol. Gen., of Savannah, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

FISH, C. J. The refusal of a new trial was not error. Judgment affirmed. All the Justices concur.

(153 Ga. 47)

MAY v. SORRELL et al. (No. 2536.)

(Supreme Court of Georgia. Feb. 28, 1922.)

(Syllabus by the Court.)

1. Exceptions, bill of \S 58(4)—Motion to dismiss properly denied on showing that party acknowledged service of bill of exceptions by mark, etc.

The motion to dismiss the bill of exceptions, because Bonus Turner, one of the defendants, was neither served with a copy thereof nor acknowledged service thereof, is overruled; he having acknowledged service by his mark, and having made and filed his affidavit in this court, in which he states that he did so acknowledge service, and that, if his former acknowledgment was insufficient, he desires to acknowledge same, and asks this court to pass upon all questions involved.

2. Appeal and error \S 273(1)—Exceptions not plainly specifying errors not considered.

Exceptions pendente lite, which do not plainly specify the errors complained of, cannot be considered by this court.

3. No error in overruling motion for new trial.

The trial court did not err in overruling the plaintiff's motion for new trial on any of the grounds thereof, to the effect that the judge had expressed any opinions on questions of disputed fact, or had illegally admitted or rejected evidence, or had erred in instructions to the jury, or in omissions to instruct the jury, or that the verdict was contrary to the evidence or the law.

(Additional Syllabus by Editorial Staff.)

4. Injunction \S 35(1)—Grantee under insufficient deed, paying price in full, held to have sufficient title to defeat suit to restrain his interference with sale of timber.

Where plaintiff conveyed land to T. by a deed embracing the land in dispute, though, as claimed not intended to do so, and T. sold to defendant by a title bond containing an insufficient description, and defendant paid T. in full for the land, he had such a title, under Civ. Code 1910, \S 4634, relative to specific performance, as could be relied on to defeat plaintiff's action to enjoin him from interfering with plaintiff's sale of the timber on the land, though the deed to T. described the land as

containing 40 acres, more or less, while the boundaries embraced 92 acres.

5. Boundaries \S 3(5)—Grantee by metes and bounds obtains whole tract, regardless of quantity.

When land is conveyed by metes and bounds, whether there be more or less than the quantity named in the deed, the purchaser obtains the whole of it.

6. Reformation of instruments \S 44—Specific performance \S 120—Evidence of value of timber held admissible.

Where plaintiff sued defendant and T., and sought to reform his deed to T., to exclude certain timber land, and defendant sought to compel specific performance by T. of his contract to convey, evidence that the timber was of little value at the times involved, was admissible, in view of Civ. Code 1910, § 4637, on the question of adequacy of the price paid by defendant, and also on the question whether plaintiff sold T. the land in controversy.

7. Reformation of instruments \S 44—Vendor and purchaser \S 243—Evidence that defendant's grantors were run off place not admissible to show forgery or lack of bona fides.

In a suit to reform a deed and enjoin one claiming to be a subsequent purchaser from interfering with plaintiff's sale of timber, evidence that the negroes from whom defendant purchased were run off the place by white people without cause in order to get their property, was not admissible to disprove defendant's claim of bona fides, or to show that whatever paper title he had was a forgery; the evidence tending to acquit him of participation in the ill usage of the negroes.

8. Trial \S 84(1)—Objection to evidence does not raise question of limiting effect.

How far the jury should be limited in their consideration of evidence was not raised by an objection to its admission.

9. Trial \S 186—Ruling that mortgage was admissible because of recital therein not expression of opinion.

Where a mortgage that defendant claimed to have paid as part of the price of land was objected to on the ground that defendant's vendor had testified that the mortgage had been previously paid, and that there was no proof that it was due and owing, the court's ruling that it was admissible because of a recital therein that the vendor owed the amount of money therein specified was not an expression of opinion, there being no dispute that the mortgage did contain such recital.

10. Specific performance \S 120—Mortgage paid by purchaser admissible, whether description sufficient or not.

Where one claiming title to land by reason of full payment therefor under an insufficient bond for title, and seeking specific performance, claimed that he was to pay incumbrances, and that he did pay a certain mortgage, the mortgage was admissible, whether the description therein was sufficient or not, as he was entitled to credit, whether the mortgage was valid or invalid, if he paid it under the agreement.

11. Specific performance \S 120—Mortgage which defendant claimed to have paid not inadmissible because another witness claimed it had been previously paid.

Where defendant, claiming to have purchased and fully paid for land and seeking specific performance, claimed that a mortgage was paid by him as part of the price, the fact that the vendor testified that the mortgage had previously been paid did not render it inadmissible, as it is not a good objection to relevant testimony that one of the litigants controverts it.

12. Specific performance \S 120—Note which defendant claimed to have paid as part of agreement to purchase land held admissible.

Where defendant, seeking specific performance of a contract to convey land, claimed to have paid a note of the vendor as part of the price, the note was admissible over objections that the vendor had testified he owed nothing on the note, and it was barred by limitations and could not be enforced.

13. Trial \S 186—Statement in ruling on evidence not expression of opinion, when fact undisputed.

Where it was undisputed that, while the legal title to land was in B., J. paid one-half of the price and had an interest therein, the court's statement to that effect in admitting a mortgage given by J., and which defendant claimed to have paid as part of the consideration for a sale of the land to him, was not an expression of opinion.

14. Specific performance \S 120—Evidence as to improvements admissible.

On the question of specific performance of an oral contract to sell land, under which the purchaser claimed to have made full payment, evidence as to improvements made by him on the land and their cost was admissible.

15. Injunction \S 35(1)—Purchaser, defending suit to restrain interference with land, not required to show such title and possession as would ripen into prescriptive title.

One claiming under a purchase of land from the holder of the legal title with full payment of the purchase money was not required to show such paper title and possession thereunder as would ripen into prescriptive title to defeat another's suit for injunction against interference with the land.

16. Alteration of instruments \S 24(1)—Bond for title not inadmissible because of changes, when holder testified they were not made by him.

Where defendant declared on a bond for title as the basis of his claim of title and as the basis of his cross-action for specific performance against the maker, and there was proof by the subscribing officer that he prepared the bond and that it was executed and attested, though he further testified to changes therein not in his handwriting, and defendant testified they were not made by him, and that the bond was in the same condition as when he received it, it was admissible, especially as, under Civ. Code 1910, §§ 4298, 5881, it was admissible, without proof of execution or explanation of

the alterations, in the absence of any denial under oath.

17. Reformation of instruments ¶44—Specific performance ¶120—Instrument which defendant seeks to have reformed and specifically enforced not inadmissible because of insufficient description.

Though a bond for title was void for lack of sufficient description of property, it was admissible in a suit brought to reform it and for specific performance thereof.

18. Adverse possession ¶31—Instruction on prescriptive title held warranted by facts shown by evidence.

Where defendant, after purchasing a tract of land embracing that in dispute, went into possession, cleared, fenced, and cultivated most of the upland, leased the pine trees on the disputed tract for turpentine purposes for three years, and afterwards leased them to another party, who worked them for several years and cut timber for sawmill purposes, and a former owner, who claimed that his deed was not intended to cover the disputed tract, lived near and saw the purchaser cutting timber, it was not error to charge on the subject of prescriptive title from 20 years' possession.

19. Adverse possession ¶17—Cultivation of turpentine farm may be basis of prescriptive title.

The cultivation of a turpentine farm on a tract of land is such an occupancy as may be the basis of a prescriptive title to the land itself; it being a question of fact, depending on the character of the possession, the extent of the visible signs of occupancy, and its continuance.

20. Appeal and error ¶1064(4)—Instruction referring to plaintiff as defendant in cross-action, though inaccurate, not misleading.

Where plaintiff, suing to enjoin defendant from interfering with land, made T. a party and sought reformation of his deed to T., and defendant by cross-action sought specific performance of T.'s contract with him, an instruction that in respect to the matter of specific performance defendant would be the plaintiff and plaintiff the defendant, though not entirely accurate, could not have misled the jury.

21. Appeal and error ¶1066—Instruction on specific performance, hypothesizing admission of contract, not misleading, though unsupported by evidence.

A charge stating the whole of Civ. Code 1910, § 4634, relative to specific performance of a parol contract, if defendant admits the contract, or it be so far executed that the party seeking relief could not be restored to his former position, etc., could not have misled the jury, even though the vendor did not admit the contract, where the rest of the section was clearly applicable.

22. Pleading ¶149—Cross-petition for specific performance against one made a party by plaintiff held maintainable.

Under Civ. Code 1910, § 4522, providing that equity seeks to do complete justice, etc., where plaintiff, seeking to enjoin defendant's interference with land, made his grantee a par-

ty for the purpose of reforming his deed, defendant's answer by way of cross-petition for reformation of his bond for title from plaintiff's grantee and for specific performance of the grantee's contract with him, was maintainable.

23. Estoppel ¶27(1)—Grantee's disclaimer of ownership could not defeat rights of grantee's purchaser.

Where plaintiff conveyed land by a deed embracing that in controversy, but claimed not to have been intended to do so, and defendant bought the land from plaintiff's grantee and paid him therefor, the grantee's subsequent disclaimer of his purchase of the land in dispute or intent to purchase it could not defeat defendant's rights.

24. Appearance ¶20—Nonresident of county, appearing and consenting to be made party, held to have waived objection to jurisdiction.

Where a nonresident of the county, whom plaintiff made a party, voluntarily came in and consented to be made a party, waiving process, service, and all other notice, and filed an answer, without objecting to the court's jurisdiction, he waived his objection to the jurisdiction, under Civ. Code 1910, § 5654.

25. Appeal and error ¶882(2)—Plaintiff could not object to court's jurisdiction of cross-petition against one whom he made a party.

Where plaintiff, suing to enjoin interference with land, made a nonresident of the county a party and sought reformation of his deed to the nonresident, and the nonresident by appearing had waived the objection to the jurisdiction, plaintiff could not complain that the court had no jurisdiction of the nonresident on defendant's cross-petition against the nonresident.

26. Adverse possession ¶16(1)—Inclosure not essential.

Adverse possession of land is evidenced by inclosure, but this is not the only evidence, and under Civ. Code 1910, § 4165, cultivation and any use or occupation of the land which is so notorious as to attract the attention of every adverse claimant, and so exclusive as to prevent actual occupation by another, constitutes adverse possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

27. Appeal and error ¶302(4)—Complaint of charge as not applicable to, based on, or authorized by pleadings and evidence, held too general.

A ground of the motion for a new trial complaining that the whole charge is erroneous as not applicable to, based on, or authorized by, the pleadings and evidence, is too general to present any question for determination by the Supreme Court, where the whole charge is not erroneous.

Beck, P. J., and Atkinson, J., dissenting.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Suit by J. C. May against J. T. Sorrell and others. Judgment for the defendant named. and plaintiff brings error. Affirmed.

J. C. May filed his petition against J. T. Sorrell, of Colquitt county; and made the following case: On October 30, 1883, he conveyed by deed to Bonus Turner 40 acres of land, described as follows: All that tract or parcel of land situate, lying, and being in the ninth district of said county, part of lot No. 389, containing 40 acres, more or less, being the north side of Bear creek, said creek being the line. The scrivener made a mistake in describing the land, the same being a mutual one between him and his grantee. The mistake consisted in conveying all the land north of Bear creek, instead of 40 acres, more or less, lying north of the dividing line between the upland and the swamp land of said creek; the intention being not to convey the swamp land. He did not discover this mistake until on or about April 28, 1915, when he immediately had Bonus Turner correct said mistake by making to him a deed to the swamp land, which recites that it was made to correct said mistake. J. C. Anthony has located his sawmill near this land, and has offered him \$2 per 1000 feet for all lumber that can be cut therefrom. He is anxious to sell to Anthony the timber on said swamp land, which is several miles from the railroad, and all the timber near this has been cut. If Anthony is not permitted to cut the same, it will be a loss to him, as said tract is not large enough to warrant the location of a sawmill there just for this timber. J. T. Sorrell has notified him and Anthony not to cut said timber, under threats of violence. To avoid serious trouble with Sorrell, he has refrained from so doing, although Sorrell does not own said land, has never been in possession of the same, but does claim to own the 40 acres that were conveyed to Turner under deed which was not recorded until the deed from Turner to correct said mistake, had been recorded. The deed from Turner to Sorrell was obtained by fraud, the latter representing to Turner, who could neither read nor write, that he wanted a contract from Turner to the 40 acres of land, and not a deed, to supply a link, and to describe said land as 40 acres, more or less, lying north of the dividing line between the upland and swamp land of Bear creek. Turner signed a paper, which he thought was a contract and not a deed, which was signed March 20, 1914, and recorded May 18, 1915, in the records of Colquitt county. Sorrell has never paid to Turner one penny for the same. Turner never intended to even contract to sell Sorrell the land as described in his deed to Sorrell. Petitioner's deed from Turner was made on April 28, 1915, and duly recorded on May 5, 1915. The deed from Turner to Sorrell was never intended to convey the swamp land. Turner was to make him a deed to the 40 acres on March 1, 1915, for \$300, which was never paid. Petitioner had no notice that Sorrell claimed

the swamp land, until he saw his deed of record on May 15, 1915. If Sorrell is not enjoined from molesting him, his agents, employees, or assigns, his damage will be irreparable. He prays that Sorrell be enjoined from interfering with said swamp land, and that the deed from Turner to Sorrell be so reformed as to convey the 40 acres lying in said lot north of the dividing line between the upland and the swamp land.

By amendment the plaintiff alleged that Turner was a resident of Brooks county, and was a necessary party defendant in this cause. In the early part of 1883 he executed to Turner a bond for title to 40 acres, more or less, of said lot, being all of the land lying north of Bear creek; the line being marked and established where the lowlands and uplands divide. On October 30, 1883, he made to Turner a deed to 40 acres of land, on the north side of Bear creek, in which deed said creek was given as the dividing line. This description was the result of a mutual mistake between him and Turner, caused by the scrivener who wrote the deed, in that the latter failed to describe the tract of land as directed, and agreed upon by him and Turner, and failed to make the south line of said tract the line dividing the upland and swamp land, which line before the making of said deed had been agreed upon, marked, and established between him and said Turner. Both parties to said deed desired the same to be reformed so as to speak the truth. He prayed that Turner be made a party defendant.

Turner, being in court and desiring that the case be speedily tried, waived the filing of said amendment, process, service, and further notice and service, and consented to be made a party instanter. This amendment was allowed, April 4, 1917. Turner on said date answered, adopting the facts in plaintiff's petition as amended, and prayed that the deed from plaintiff to him be reformed as prayed by the plaintiff, as the scrivener had made a mistake in describing the land.

J. T. Sorrell filed his answer, denying that there was any mistake in the deed from the plaintiff to Turner. He asserted title to the land in himself, that he bought from Turner in good faith, and had occupied the same openly, peaceably, and continuously for more than 20 years. He admitted that he told Anthony that he owned the timber and that he did not want it cut, but averred that he did not make any threats of violence to him or to any one else. He denied that his deed from Bonus Turner was obtained by fraud, and averred that he bought the land, paying full consideration therefor. He further alleged that at the instance of Turner he paid off certain mortgages on the land described in Turner's bond for title to him, amounting to \$250, which was the full value of said land. Each of said mortgages described said

land the same as it is described in the deed from May to Turner. Turner gave him a bond for title to said land, giving Bear creek as the south line of the land sold to him; the condition of said bond being that the defendant was to pay off said mortgages, which he did. With the consent of Turner he took possession of said land more than 20 years ago, under said mortgages and bond for title, exercising ownership all the time, openly, publicly, and continuously, in good faith. He boxed the timber thereon for turpentine purposes, and worked the same for 3 years. About ten years later he back-boxed and worked the same again for 3 years, without any objection by any one. He attached to his answer a copy of the bond for title. He cut part of the timber for sawmill purposes, without objection, and in perfect good faith. He further alleged, on information and belief, that May knew all the time that he had deeded this land to Turner, giving Bear creek as the south boundary. At the time he bought from Turner, the timber in the swamp was not worth much, and was hardly considered in the trade; but, owing to scarcity of timber now, the price is high, and such lands are valuable. He further charged that, if said timbered land had not become valuable in recent years, May would never have attempted to take his timber.

On April 8, 1920, Sorrell amended his answer, and alleged that on January 17, 1893, he purchased from Turner for \$240 that portion of land lot 389, in the ninth district of Colquitt county, situated in the northeast corner of said lot, in the form of a triangle, bounded on the north and east by the original line of said lot, and on the south by Bear creek, containing all the land in said lot on the north side of said creek, which land had been purchased by Turner from May on October 30, 1883. He paid the full and fair market value thereof. On said date Turner delivered to him an instrument in writing, which was intended by him and said Turner to be a deed or bond for title to said land. At the request of Turner they got S. L. Rentz, a notary public, to write a deed of conveyance. Turner gave the notary a description of the land, as follows:

"Forty acres of land, commencing at the northeast corner and running to Bear creek, the Bear creek being the line, to the original west line, being lot 389 in the ninth district of said county."

Said description is so vague and indefinite that the land cannot be located. Turner intended to convey, and he intended to purchase, the land as above described. The failure to correctly describe said land was a mutual mistake on their part. At the time he purchased there were a number of debts against said land, aggregating \$240, and said bond contained the stipulation that when he paid said debts Turner would make

him title to said land. Immediately upon the execution and delivery of said instrument to him by Turner on January 17, 1892, he immediately went into possession, cultivated all of the said lands that were open, and such other portions thereof as contained timber he worked for turpentine and sawmill purposes. His possession has been public, continuous, exclusive, uninterrupted, peaceful, did not originate in fraud, and has been occupied under a bona fide claim of right. May lived within a mile of said property, and had actual knowledge of the contract of purchase and sale between him and Turner, and of his exclusive possession of said land from said date. Upon the delivery of said instrument by Turner, defendant took it home, placed it in his trunk, and never saw or thought of it until the institution of this suit by May. He never knew or suspected that any defect existed in said instrument, until the decision of the Supreme Court was rendered in this case, holding the description too vague, indefinite, and uncertain. His education and business experience is so limited and he was so ignorant that he did not know that any mistake had been made affecting the description in said instrument. He prayed that said bond for title be so reformed as to properly describe said land. By further amendment of the answer it was alleged that he had paid Bonus Turner in full for said land, had been in possession ever since, had cleared a large part of said tract, had fenced 40 acres, had stumped and cleared that amount at an expense of \$400, and that, having fully paid for the same, he was entitled to a deed from Turner, and to have the contract of sale specifically performed by a decree of the court. He prayed for specific performance.

On May 8, 1920, May demurred to the amendment offered by Sorrell, on various grounds. This demurrer was overruled April 8, 1920, and no exception was taken to this ruling. At the April term, 1920, Sorrell offered a second amendment to his answer, to which the plaintiff demurred on the grounds that the amendment set forth no cause of action, and was multifarious and duplicitous; that the two defendants resided in different counties, Sorrell in Colquitt, and Turner in Lowndes; that Sorrell could not reform the contract between the two defendants, and in this way file a cross-action for the purpose of performing an instrument absolutely void; that the evidence showed that no such contract was ever entered into between the defendants; that Turner denies ever having sold by bond for title, by deed, or otherwise, the tract of land to Sorrell; and that the remedy of Sorrell against Turner is for specific performance in a court of equity. The court overruled this demurrer. Plaintiff filed exceptions pendente lite to this judgment; but no assignment of error was made upon

these exceptions, in either the main bill of exceptions or separately.

The case proceeded to trial, and resulted in a verdict for the defendant. The plaintiff made a motion for new trial, upon the formal grounds, and upon certain grounds embraced in an amendment to his motion. The court overruled his motion, and error was assigned upon this judgment.

James Humphreys and Dowling & Askew, all of Moultrie, and J. P. Knight and R. A. Hendricks, both of Nashville, for plaintiff in error.

W. F. Way, of Moultrie, for defendant in error.

HINES, J. (after stating the facts as above). [1, 2] 1. 2. The first and second headnotes do not require any elaboration. In view of the rulings therein made, the only thing left for the determination of the court is whether the court below erred in overruling the plaintiff's motion for new trial.

[3, 4] 3. Counsel for the plaintiff insist very earnestly that the judgment of the court below, overruling the motion for new trial, should be reversed on the general grounds. It is urged that this court, when the case was here before (May v. Sorrell, 149 Ga. 610, 101 S. E. 535), held that the bond for title under which Sorrell claims was void for lack of a sufficient description; that therefore the same could not be relied upon as color of title under which prescriptive title could be acquired by possession for 7 years; that for this reason the defendant would have to establish a title by prescription resulting from possession of this land for 20 years; and that he wholly failed to establish such title by prescription, as the land in question was in a swamp, wild and uncultivated. It is insisted that the defendant could only defend, under these circumstances, by showing such possession for 20 years as would ripen into a prescriptive title, and that, having failed to do so, a new trial should be granted in this case.

At the time Sorrell bought from Bonus Turner the paper title to all that part of lot 389 in the ninth district of Colquitt county, north of Bear creek, was in Bonus Turner, under a deed to him from the plaintiff. While the title was thus in Turner, Sorrell claims to have bought these lands, and that he paid Turner therefor in full. This was before the plaintiff undertook to have Turner correct the alleged mistake in the deed by which the plaintiff conveyed to Turner the premises in dispute. When Sorrell bought from Turner, and, as he alleges, paid Turner in full for the tract of land embraced in the deed from May to Turner, which deed embraces the premises in dispute, the title was in Turner. As both parties claim under a common grantor, it was not necessary for Sorrell to show title back of such common grantor. Sorrell set up the purchase of the

premises in dispute from Turner, with full payment of the purchase money. He prayed that Turner be required by the decree of the court to specifically perform the contract by which he sold the premises in dispute to him.

Full payment of the purchase money alone, accepted by the vendor, would be sufficient part performance to justify a decree requiring Turner to convey this land to Sorrell. Civil Code, § 4634. Furthermore, Sorrell, being the defendant, could successfully defend by showing the full payment of the purchase money. Payment in full of the purchase money would give him such title as would enable him to defend in this case against the attack made upon him by the plaintiff. Payment in full of the purchase money, in this state, gives to the purchaser a perfect equity, which is a good title even at law, and is sufficient to support or defeat an action of ejectment. *Pitts v. McWhorter*, 3 Ga. 5, 46 Am. Dec. 405; *Peterson v. Orr*, 12 Ga. 464, 58 Am. Dec. 484; *Dudley v. Bradshaw*, 29 Ga. 17, 25; *Temples v. Temples*, 70 Ga. 480, 483; *Glover v. Stamps*, 73 Ga. 209, 54 Am. Rep. 870; *Howell v. Ellsberry*, 79 Ga. 475, 481, 5 S. E. 96; *Dodge v. Spiers*, 85 Ga. 585, 11 S. E. 610.

[5] The fact that the deed from May to Turner describes the land as containing 40 acres, more or less, when the land within the boundaries of this deed amounts to 92 acres, will not defeat the claim of Sorrell to all the land within these boundaries, if he purchased the same from Turner and paid therefor. When land is conveyed by metes and bounds, whether there be more or less than the quantity named in the deed, the purchaser obtains the whole of it. *Benton v. Horsley*, 71 Ga. 619. So Turner obtained all the land within the boundaries given in the deed from May to him, and when Sorrell bought the tract from Turner, and paid him therefor, he obtained the whole of the tract, although it contained much more land than the quantity named in this deed. If the defendant could defeat an action of ejectment by showing a perfect equity, growing out of the payment of the purchase money in full, he can certainly, in a court of equity, rely upon such perfect equity to defeat an action to enjoin him from interfering with the plaintiff, who proposes to sell the timber growing on the premises in dispute. So we cannot agree with the contention of counsel for the plaintiff that a reversal is demanded upon the general grounds of the motion for new trial.

[6] 4. The first and third grounds of the amendment to the motion for new trial can be considered together. In the first ground it is alleged that the court erred in requiring J. C. May, on cross-examination, to testify that at the time he sold the land to Turner he did not know what the timber thereon was worth, as there was no demand for it, as it could only be used for splitting

falls and building houses; that in those days a man never went into the swamp to get timber; that such timber was then practically worthless, but swamp timber is now in demand and is worth considerable money. The objection to the admission of this testimony was that it did not illustrate any issue in the case, the only issue being whether Sorrell or May owns this land. The court admitted this testimony to illustrate the intention of the parties and the circumstances when May sold to Turner, and the latter sold to Sorrell. In the third ground the plaintiff moved to rule out this testimony upon the ground that it was irrelevant, and the court refused to rule it out, for the same reasons that he admitted it.

The defendant was seeking specific performance of his contract to purchase from Turner. Inadequacy of price may justify a court in refusing to decree specific performance. Civil Code, § 4637. It further throws light upon the question whether May sold Turner all the land north of Bear creek. Therefore the value of these swamp lands and the timber thereon, at the time May sold to Turner, and Turner to Sorrell, was relevant and important.

[7] 5. In the second ground of the amended motion it is complained that the court erred in refusing to permit E. W. McCranle to testify that the negroes, John and Bonus Turner, had done nothing to any one to cause them to receive such treatment as they did when they were cut, shot, and run off from their home "in order to get their property." In the fifth ground it is complained that the court erred in refusing to permit John Turner, a witness for the plaintiff, to testify that their presence in the community in which they lived was objectionable to the white people, and that parties came to their houses and, without any cause, cut, shot, and beat them and ran them off, so as to get their property. The plaintiff alleges that this testimony was admissible to shed light on the conduct of Sorrell, to disprove his claim of bona fides in acquiring this property, and to tend to show that he had no title to the same. It is claimed that this testimony was admissible to show that whatever paper title Sorrell had to the land in dispute was a forgery. Certainly the bad treatment of these negroes would not tend to establish forgery, even if Sorrell participated in these outrages; but there is no evidence in the record tending to show that such ill usage of these negroes was perpetrated by Sorrell. On the contrary, the evidence tends to acquit him of participating therein. This evidence was clearly irrelevant and inadmissible, and the court did not err in refusing to admit it.

[8] 6. In the fourth ground of the amendment to the plaintiff's motion for new trial it is alleged that the court erred in permitting Sorrell to testify that, 2 years after he went into possession, he leased the pine trees

for turpentine purposes to R. De Vane & Co., who cut, boxed, and worked them, and who chipped the boxes once a week during the entire turpentine season, for 2 years; that after De Vane & Co. worked the timber J. M. Ford back-boxed it some 8 or 10 years afterward, which was 10 years after he bought the land; that he had made a written lease to De Vane & Co., and a written or printed lease to J. M. Ford, and that he signed the leases in the presence of witnesses and an officer. Counsel for the plaintiff moved to exclude all the testimony with respect to working the timber for turpentine purposes under written leases, as the leases would be the highest and best evidence. The court ruled that he would let the jury consider the testimony with respect to the working of the timber, but would exclude the contents of the leases. Error is assigned on this ruling, on the ground that its effect was to allow the jury to consider the testimony of the defendant that he had made and signed written leases, and that the timber had been worked under them. How far the jury should be limited in their consideration of evidence is not raised by objection to its admission. *Moorefield v. Fld. Mut. L. Ins. Co.*, 135 Ga. 186, 69 S. E. 119.

[9-11] 7. The sixth, seventh, and eighth grounds of the amended motion can be considered together. In the sixth ground it is complained that the court erred in admitting in evidence the mortgage from Bonus and John Turner to J. T. Thrasher, dated September 4, 1886, properly witnessed, and recorded on September 14, 1886, which embraced certain real estate therein described, with a transfer of said mortgage to Sorrell, dated April 6, 1893. The admission of this mortgage and transfer was objected to on the ground that the description of the land embraced therein was too vague and indefinite to create a lien upon it, and further because Turner had testified that the mortgage had been paid prior to the time that Sorrell alleged that he bought the premises in dispute, there being no proof that the mortgage was due and owing at that time. The court ruled that there was a recital in the mortgage that Bonus Turner owed the amount of money therein specified. It is complained that this ruling in admitting said paper amounted to an expression by the court of opinion as to a material issue in the case; that is, that it showed that Turner owed, at the date of the trial, the amount of money recited in the mortgage.

Sorrell contended that he bought the premises in dispute from Turner, that he was to pay the incumbrances thereon, including this mortgage, and that he had paid the amount of this mortgage in accordance with the said agreement between himself and Turner. Under this contention it was immaterial whether the description of the property embraced in this mortgage was sufficient or not. If

Sorrell paid from the purchase money of this land the amount of this mortgage under said agreement, he was entitled to credit therefor, whether the mortgage was valid or invalid. The ruling to the effect that the mortgage recited that Turner owed the amount to secure which it was given did not amount to an expression of opinion by the court. The mortgage did contain this recital, and there was no dispute as to the existence of the recital. The fact that Turner testified at the trial that this mortgage had been paid before Sorrell purchased this land was not a good objection to the admission of these instruments. It is not a good objection to the admission of relevant testimony that one of the litigants controverts such testimony.

[12] In the seventh ground the plaintiff asserts that the court erred in admitting in evidence the note given by Bonus and John Turner to Thrasher, for the sum of \$88.50, dated September 4, 1886, and due October 1, 1887, being for the purchase money of a mule, with a transfer thereof to Sorrell. The objection to the admission of this testimony was that Turner testified that he owed nothing on said note at the time Sorrell claims to have purchased this land; that the note was barred by the statute of limitations, and could not be enforced against the rights of the plaintiff. This note was a part of the indebtedness of Turner which Sorrell claims that he was to pay under the agreement by which he bought this land from Turner. In view of this contention, the objections to its admission were without merit.

[13] In the eighth ground it is complained that the court erred in admitting, "over proper objection," a mortgage from John Turner to J. T. Sorrell, dated January 9, 1892, and duly recorded on February 1, 1892, to secure an indebtedness of \$65 on November 1, 1892, given on certain land therein described. The plaintiff objected to the admission of this instrument, on the ground that the description of the land embraced in this mortgage was insufficient to create a lien thereon, and for the further reason that John Turner is not a party to this suit, and Bonus Turner cannot be bound by the contract of John Turner. The court, in admitting this testimony, stated that there was testimony, he believed, that John Turner had an interest in the property, though the legal title was in Bonus Turner, and that Sorrell bought under an agreement by which he was to pay this indebtedness. It is complained that the court thus expressed an opinion, in the presence of the jury, upon a material part of the testimony in the case, and thus committed error prejudicial to the rights of the plaintiff. Under the contention of the defendant he was to pay this debt from the purchase money of the premises in dispute. The evidence in the case shows that John Turner paid to May half of the purchase

money of the land, embracing the premises in dispute, to which May made his deed to Bonus Turner, and that thus John Turner had an interest therein. There is no dispute in the evidence about this fact. The trial judge does not express an opinion when he states in the hearing of the jury a fact about which there is no dispute. *Marshall v. Morris*, 16 Ga. 368. For the above reasons, the court did not err in admitting any of the documents above referred to, and did not express any opinion upon the facts which would require the grant of a new trial.

[14, 15] 8. In the ninth ground it is complained that the court erred in permitting the defendant Sorrell to testify that he had made improvements on the cultivatable land since he had been in possession of it, putting up fences around it and stumping the same, which improvements cost some \$400. This testimony was objected to for the reason that there was no evidence to show that this defendant had such a paper title, or possession thereunder, for a period sufficient to ripen a prescriptive title, because the defendant did not allege that he claimed title by prescription, and had occupied this land for a period of 20 years, and because, if this contention were made, his title would extend no further than the inclosed boundaries of his possession, the undisputed evidence showing that the land in dispute is not cultivatable land, has never been fenced, and there has never been any actual possession of the land in dispute. The court ruled that he would allow the jury to say whether the plaintiff held title by possession. The objections to the admission of this testimony are not well taken. This testimony was clearly admissible upon the question of specific performance. As the defendant Sorrell claimed under a purchase of this land from Turner, who held the legal title thereto when he purchased, with full payment of the purchase money, it was not necessary for him to show such paper title and possession thereunder as would ripen into prescriptive title. The defendant in his answer does set up title by prescription arising from adverse possession of the lands in dispute for a period of 20 years. While the land in dispute was not cultivatable land, and had never been fenced, there is in the record evidence of such actual adverse possession as would authorize the finding in favor of this defendant upon his claim of prescriptive title by reason of 20 years' adverse possession. So the court did not err in admitting this testimony.

[16, 17] 9. In the tenth ground it is complained that the court erred in admitting in evidence the bond for title purporting to have been made by Bonus Turner to J. T. Sorrell, which was held by this court, when this case was here before, to be void for lack of sufficient description of the premises em-

braced therein. It is unnecessary to set out herein this bond in full. The objections urged to the admission of this document were: (1) That there was no proof of its execution; (2) that under the undisputed evidence there had been erasures and changes made in the description therein, the word "east" had been erased and the word "west" had been written into it, that it was originally written lot of land No. 389, and it has been changed to lot 389; (3) because said bond is void, because of lack of sufficient description of the property therein embraced, and could not be the basis of color of title; (4) because it was irrelevant. The court ruled that it was not admissible as color of title, but admitted it in connection with the other evidence in the case touching the contention of the defendant that he had purchased this property. The plaintiff claims that this ruling was harmful and prejudicial to his rights, especially in view of the decision of this court that this bond for title was a void instrument.

The ruling was correct, and this evidence was properly admitted. There was proof by the subscribing officer that he prepared this bond, that the same was executed by the maker, and that he attested its execution. This witness does testify that certain changes had been made in this instrument, not in his handwriting. These changes are those mentioned in this ground of the motion for new trial. It does not appear from the evidence by whom and when these changes were made. The defendant testifies these changes were not made by him, and that the bond was in the same condition it was when he received it. In his answer as amended, in the nature of a cross-action against the plaintiff and against his codefendant, Bonus Turner, the defendant Sorrell set forth this bond for title, and declared thereon as the basis of his claim of title, and as the basis of his cross-action for specific performance thereof by the maker. Being so declared on, and the execution of this contract not being denied under oath, proof of its execution and explanation of said alterations were not requisite to its introduction. Civil Code, §§ 4298, 5831. But, however this may be, there was sufficient proof of the execution of this bond, and of the fact that the alterations therein made were not made by the defendant Sorrell to admit the same in evidence. The fact that this court held, when this case was here before, that this bond for title was void for lack of sufficient description of the property therein embraced, did not render its admission illegal, in view of the amendment made by Sorrell, after said decision was made, in which he sought to have said bond so reformed as to describe the property sold by Turner to him. This bond was the foundation of his action for reformation and specific perform-

ance, and as such was properly admitted by the court.

10. In the eleventh ground the plaintiff insists that the verdict of the jury and the decree of the court are contrary to the law and the evidence in this case, and without either to support it, for the reason that the defendant Sorrell has no title or bond for title to the land in dispute, because the evidence shows that he has never been in the actual possession of the land in dispute, and has never exercised continuous, exclusive acts of ownership over the same, for a sufficient length of time to give him a prescriptive title; the evidence showing that the plaintiff went into possession of this land under a recorded deed on January 26, 1878, and has remained continuously and exclusively in the legal and peaceably acquired possession until May 29, 1916. What has been said in dealing with the first ground of the amendment to the motion for new trial disposes of this ground, and it is unnecessary to deal with it further.

11. In the twelfth ground it is alleged that the court erred in charging the jury that—

"Actual possession of land is evidenced by inclosure, cultivation, or any use and occupation thereof which is so notorious as to attract the attention of every adverse claimant, and so exclusive as to prevent actual occupation by another. The court instructs you that actual adverse possession of lands by itself for 20 years shall give good title by prescription against every one, except the state or person laboring under disabilities provided by law."

The error alleged is that the evidence is without conflict that the defendant Sorrell did not inclose the land in dispute; that his acts of ownership were such as to constitute only acts of trespass; that a period of as much as 6 months elapsed between the acts of possession upon the part of Sorrell; that, this defendant claiming prescriptive title by possession for a period of 20 years, nothing short of an actual inclosure of the land in dispute would ripen into a prescriptive title; and that there were neither pleadings nor evidence to authorize this charge. In this ground it is also urged that the court erred in charging the jury that—

"The court instructs you, with respect to the other contention set up by the defendant in this case, that the law provides that specific performance of a parol contract as to land, and the land in controversy, will be decreed if the defendants admit the contract, and with respect to this contention the plaintiff would be the defendant, because, in so far as it relates to Mr. J. T. Sorrell, the burden is upon him, and he insists that he acquired title in this way, or if it be so far executed by the party seeking relief, and at the instance or by the inducement of the other party, that if the contract be abandoned he cannot be restored to his former position. Full payment alone, accepted by the vendor, or partial payment accompanied by possession, or possession alone with valuable

improvements, if clearly proved in each case to be done with reference to the parol contract, will be sufficient part performance to justify a decree; and in this connection the court instructs you, as will appear from the pleadings in the case, the defendant Mr. T. J. Sorrell claims and contends that he bought this property from Bonus Turner, who is also a party to this suit."

The error alleged is: (1) That the court instructed the jury that, if the defendant admits the contract of purchase, this would be sufficient to decree title in the defendant, and that in this particular case J. T. Sorrell would be the plaintiff and J. C. May the defendant, there being no contention in the pleadings or the evidence that Sorrell purchased the land from May, or that any relation or contract was ever made or existed between them with respect to the title to this land; (2) that the evidence shows that Sorrell was not in possession of this land; (3) that Bonus Turner denied that any sale of the land was ever made to Sorrell, either verbally or in writing, and that he had ever been paid the purchase money; (4) that in this suit, Sorrell being a defendant and Bonus Turner being a defendant, Sorrell could not convert his answer into an equitable petition for specific performance against Bonus Turner, and have the title decreed into him out of Turner, which would defeat the title of the plaintiff; and (5) that Turner contends in his plea, and in his evidence, that Sorrell never purchased or acquired any deed or claim of title to the land in dispute, and that he did not convey or attempt to convey it to Sorrell.

[18, 19] We deal first with the errors alleged to exist in the first excerpt from the charge of the court. It is asserted that Sorrell did not inclose the land in dispute, and that his acts of ownership were such as to constitute only acts of trespass, which could not ripen into a prescriptive title. There was evidence from which the jury could find that Sorrell purchased the tract of land embracing the premises in dispute, on January 17, 1893; that he went into possession of the tract embracing the premises in dispute that year; that he cleared, fenced, and cultivated most of the uplands on this tract; that shortly after his purchase he leased all the pine trees on the tract suitable for turpentine purposes, to R. De Vane & Co.; that they turpented all the trees upon the entire tract which were fit for turpentine purposes; that they cut, boxed, and chipped them, dipped the turpentine, and hauled the same off, for a period of 3 years; that thereafter Sorrell leased the pine trees for turpentine purposes to J. M. Ford, who worked the same some 8 or 10 years after De Vane & Co. had worked them; that Mack Ford worked the lands 2 years for turpentine purposes; that Sorrell cut a lot of timber off of the premises in dispute for sawmill pur-

poses for the period of 2 years, and that May lived on the land let of which the premises in dispute formed a part, only a short distance from these premises; that he must have known of the above acts of possession by Sorrell; that he actually saw Sorrell cutting timber on the premises in dispute for sawmill purposes; that on one occasion, when he saw Sorrell cutting timber on the swamp lands, he said to Sorrell that he thought this was his timber, when Sorrell replied that it was his, after which he never heard of any claim of the premises in dispute on the part of May until this action was instituted. The cultivation of a turpentine farm upon a tract of land is such an occupancy as may be the basis of a prescriptive title to the land itself, and it is a question of fact, depending upon the character of possession, the extent of the visible signs of occupancy, and its continuance. *Flannery v. Hightower*, 97 Ga. 592, 25 S. E. 371. When we consider the above facts, and the further fact that the vendor of Sorrell, who held a deed from the plaintiff to a tract of land embracing the premises in dispute, which had been recorded, and under which such vendor had taken possession, which he held for a period of approximately 10 years, which possession Sorrell could tack to his own, we cannot say as a matter of law that the court erred in charging the jury upon the subject of prescriptive title ripening from 20 years' possession. But he did not need prescriptive title to defeat the plaintiff. He bought when the legal paper title was in Turner and thus acquired a good title.

[20] We deal next with the other portion of the charge, which is set out in this ground, and which deals with the subject of specific performance, and to which the plaintiff excerpts. In this excerpt from the charge the court instructed the jury:

"That specific performance of a parol contract as to land * * * will be decreed if the defendant admits the contract, and with respect to this contention the plaintiff would be the defendant, because, in so far as it relates to Mr. J. T. Sorrell, the burden is upon him, and he insists that he acquired title in this way, or if it be so far executed by the party seeking relief, and at the instance or by the inducement of the other party, that if the contract be abandoned he cannot be restored to his former position. Full payment alone, accepted by the vendor, or partial payment accompanied by possession, or possession alone with valuable improvements, if clearly proved in each case to be done with reference to the parol contract, will be sufficient part performance to justify a decree."

The error alleged is that the court instructed the jury that, in respect to the matter of specific performance, J. T. Sorrell would be the plaintiff and J. C. May would be the defendant, when there is no contention in the pleadings or the evidence that Sorrell purchased the land from May. While

this charge is not entirely accurate, the inaccuracy was not sufficient to have misled the jury. In the cross-action filed by the defendant for specific performance, May, the plaintiff, became a defendant with Bonus Turner, and Sorrell, the defendant, became in such cross-action the plaintiff.

[21] It is further insisted that this charge is erroneous because it instructed the jury that "if the defendant admits the contract" it will be sufficient to authorize specific performance, when the defendant Bonus Turner denied that he ever made any sale of the premises in dispute to Sorrell. There is enough in the testimony of Bonus Turner to authorize this charge; but, if not, we do not think that it requires the grant of a new trial. The court gave in charge to the jury the whole of section 4634 of the Code, which embraces the language, "if the defendant admits the contract." All the rest of this section was clearly applicable to the case. The jury could hardly have been misled by the court giving in charge the whole of this section.

[22] It is further urged that this portion of the charge is erroneous, because Sorrell and Turner were both defendants, and Sorrell could not convert his answer into an equitable petition for specific performance against Turner, and have title decreed into him from Turner, so as to defeat the title of the plaintiff. All the parties were before the court. On the application of the plaintiff the defendant Bonus Turner was made a party defendant for the purpose of reforming a deed from the plaintiff to him. After Turner was made a party, and after this court had decided that the bond of Turner to Sorrell was void for lack of sufficient description of the property therein embraced, Sorrell amended his answer, and by way of cross-petition asked to have this bond for title reformed, and asked for specific performance of the contract under which he alleged that he purchased this land from Turner. Equity seeks always to do complete justice; and hence, having the parties before the court rightfully, it will proceed to give full relief to all parties in reference to the subject-matter of the suit, provided the court has jurisdiction for that purpose. Civil Code, § 4522.

[23] 12. In the thirteenth ground the plaintiff complains that the court erred in charging the jury that, if they believed from the evidence that Bonus Turner owned the property in controversy, and if Sorrell bought the property from Turner and paid him for the same, but failed to get a deed to the same, and if Sorrell took possession thereof as contended by him, then, as between Turner and Sorrell, Sorrell would be entitled to have a decree for specific performance against Turner, and would, as between the two, be entitled to a verdict declaring title in him. The first error alleged is that Bonus Turner disclaimed that he ever purchased,

or intended to purchase, or otherwise acquired, the land, or was ever in possession of the same, and for this reason the charge was contrary to the evidence and the pleadings. There is no merit in this objection to the charge. The fact that Turner, at the trial, disclaimed purchasing this land from May, would not defeat the rights of Sorrell, who purchased from Turner when the paper title to this land, in the shape of the valid recorded deed from May to Turner, was in the latter.

[24, 25] It is next urged that this charge was erroneous, because the suit was brought by May against Sorrell, to which Turner was afterwards made a party, and that Sorrell could not so amend his defense as to convert it into an equitable petition for specific performance as against Turner; the suit being in Colquitt county, and Bonus Turner being a resident of Lowndes county. Here the plaintiff undertakes to raise the question of the jurisdiction of the court of the person of the defendant Bonus Turner. If the want of jurisdiction had been raised by Bonus Turner, this point would be a serious one (*Clayton v. Stetson*, 101 Ga. 634, 28 S. E. 983); but Turner did not raise any objection to the jurisdiction of Colquitt superior court of his person. On the contrary, he voluntarily came in and consented to be made a party, waiving process, service, and all further notice, in order that there might be a speedy trial. He filed an answer, without objecting to the jurisdiction of the court. He thus waived objection to the jurisdiction of the court. Civil Code, § 5654; *Ansley Co. v. O'Byrne*, 120 Ga. 618, 48 S. E. 228; *Lightfoot v. Brower*, 133 Ga. 766, 66 S. E. 1094. Certainly the plaintiff, who had Turner made a party defendant, cannot complain that the court had no jurisdiction of his person.

13. In the fourteenth ground the plaintiff complains of a repetition of the charge complained of in the thirteenth ground, and he makes the same objections to this charge, in effect, as those set up against the charge in the thirteenth ground. What has been said in dealing with the charge set out in the thirteenth ground is applicable to this ground.

[26] 14. In the fifteenth ground complaint is made that the court should have instructed the jury that the possession of Sorrell must have been in his own right, must not have originated in fraud, but was fairly and honestly claimed under a fair claim of right, and that the possession of Sorrell would not extend any further than to where he had the land actually inclosed by a fence for a period of 20 years. If the court had been requested in writing to give this charge to the jury, and had done so, it would have been erroneous. Adverse possession of land is evidenced by inclosure; but this is not the only evidence of adverse possession. Cultivation,

and any use or occupation of land which is so notorious as to attract the attention of every adverse claimant, and so exclusive as to prevent actual occupation by another, also constitutes adverse possession. Civil Code, § 4165.

15: In the sixteenth ground the plaintiff alleges that—

"The whole charge of the court is error, for the reason that it was not applicable to, based upon, or authorized by the pleadings and the evidence in the case."

This ground is too general to present any question for determination by this court; the whole charge not appearing to be erroneous. *Atlantic & Birmingham Railway Co. v. Sumner*, 134 Ga. 673, 68 S. E. 593.

Judgment affirmed.

All the Justices concur, except BECK, P. J., and ATKINSON, J., who dissent on the ground that the evidence was insufficient to show prescriptive title in the defendant on the basis of 20 years' actual adverse possession, and that the judge erred in charging the jury upon that subject, which charge is duly excepted to in the motion for new trial.

(28 Ga. App. 524)

**CITIZENS' FIRST NAT. BANK OF ALBANY
v. WILSON.**

**WILSON v. CITIZENS' FIRST NAT. BANK
OF ALBANY.**

(Nos. 13184, 13185.)

(Court of Appeals of Georgia, Division No. 2.
April 28, 1922.)

(Syllabus by the Court.)

Bills and notes \S 443(3) — Transfer without indorsement gives transferee only equitable title, and does not authorize suit in his name.

This was a suit on 18 promissory notes, bearing the same date and due at different times, made by the defendant Wilson and payable to the order of the Chal-Max Motor Company. They were not indorsed by the payee. By an amendment to the petition it was alleged that the notes were transferred to the plaintiff on an independent and separate piece of paper attached to them. The defendant made a motion to dismiss the suit, on the ground that there was nothing to show that the plaintiff held the legal title to the notes, and therefore it had no right to bring the suit in its own name, but the suit should have been brought in the name of the Chal-Max Motor Company for the use of the plaintiff. The court sustained the motion, and this is the error complained of. *Held*, there was no error in the dismissal of the suit; nothing appearing on the notes to show the title in the plaintiff, the Citizens' First National Bank, and the amendment offered being only sufficient to show an equitable interest of the plaintiff therein. Where a promissory note is made payable to "order," and is transferred without indorsement, the transferee does not acquire the legal

title, but acquires only an equitable title to the note. The notes sued on being payable to order, the mere delivery of them would not have the effect to pass the legal title, nor would the mere assignment thereof, evidenced by another and entirely distinct instrument in writing, have that effect. *Benson v. Abbott*, 95 Ga. 69, 22 S. E. 127; *Haug v. Riley*, 101 Ga. 373, 29 S. E. 44, 40 L. R. A. 244; 1 *Daniel on Negotiable Instruments* (8th Ed.) § 741; *Herring v. First National Bank*, 13 Ga. App. 492, 79 S. E. 359; *Lowry National Bank v. Maddox*, 4 Ga. App. 829, 61 S. E. 296.

Error from City Court of Albany; Clayton Jones, Judge.

Action by the Citizens' First National Bank of Albany, Ga., against G. I. Wilson. Judgment for defendant, and plaintiff brings error, and defendant brings a cross-bill of exceptions. Judgment affirmed, and cross-bill dismissed.

Milner & Farkas, of Albany, for plaintiff in error.

Lippitt & Burt, of Albany, for defendant in error.

HILL, J. Judgment on the main bill of exceptions affirmed; cross-bill dismissed.

JENKINS, P. J., and *STEPHENS, J.*, concur.

(28 Ga. App. 403)

SMITH v. COMMERCIAL CREDIT CO., INC.
(No. 12780.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1922. Rehearings Denied April 1, 1922, and May 6, 1922.)

(Syllabus by the Court.)

1. **Trover and conversion** \S 9(6) — Demand and refusal unnecessary in case of adverse claim.

Where a defendant in an action of trover admits in his plea or answer his possession of the property at the time of the action, under an adverse claim of title or right of possession, it is not necessary for the plaintiff to prove a demand and refusal or any other conversion of the property. Civ. Code 1910, § 4483; *Muse v. Wright*, 103 Ga. 783, 784, 30 S. E. 662; *Moore v. Ramsey*, 144 Ga. 118 (1), 86 S. E. 219; *Young v. Durham*, 15 Ga. App. 678 (5), 84 S. E. 165; *Pearson v. Jones*, 13 Ga. App. 448 (4 [a]), 89 S. E. 536; *Collins v. Hilton*, 27 Ga. App. 439, 108 S. E. 824 (2).

2. **Replevin** \S 105, 106 — When property not replevied, but sold by sheriff, plaintiff not entitled to verdict and judgment for property; plaintiff not precluded from claiming money verdict because he becomes purchaser at sheriff's sale.

Where property has been seized by a sheriff under bail process, and, after a failure by both parties in the trover proceeding to replevy, has been sold by the officer under sec-

tion 5153 of Civil Code 1910, as being perishable or expensive to keep, the successful plaintiff in the suit is not entitled to elect a verdict and judgment for the property under sections 5929 and 5930. The provisions of the first-mentioned statute are intended both to limit the plaintiff to a "money verdict for the amount of the proceeds of such sale, together with hire or interest from the date of conversion to the date of seizure," and to fix by such amount of proceeds the maximum recovery for the value of the property, which, under the general rule in trover actions, is "the highest proved value of the property at any time between the date of the conversion and the trial, or its value at the date of the conversion, with interest from that date." Civ. Code 1910, § 4514; *Mashburn v. Dannenberg Co.*, 117 Ga. 587 (15), 44 S. E. 97; *O'Neill Mfg. Co. v. Woodley*, 118 Ga. 114 (1), 116, 44 S. E. 980; *Tuller v. Carter*, 59 Ga. 395 (2); *Langdale v. Bowden*, 139 Ga. 324 (2), 77 S. E. 172; *Smith v. Duke*, 6 Ga. App. 75 (2), 64 S. E. 292.

(a) The fact that the plaintiff himself is the purchaser of the property at such a sale by the sheriff will not estop or preclude him from claiming the money verdict to which alone he is entitled under section 5153, for the reason that, as the purchaser at such judicial sale, he has acquired a new title upon payment of the amount of his bid, and thereafter such proceeds "in contemplation of law, stand in lieu of the property itself." *Glisson v. Heggie*, 105 Ga. 30, 34, 31 S. E. 118, 119; *Hudson v. Goff*, 77 Ga. 281 (1), 3 S. E. 152; *Mallary v. Moon*, 130 Ga. 591, 592, 61 S. E. 401.

3. Sales \S 479(4, 9)—Failure to return partial payments not defense to trover or condition precedent to money verdict; measure of recovery in trover by conditional seller failing to return partial payments stated.

Where a vendor under a contract of sale retains title to personalty until full payment is made of the purchase price, and, after the vendee has made partial payments, brings an action of trover to recover possession, the vendee is not entitled to set up as a defense a right of possession in himself because of the vendor's failure to return such payments; nor, where the vendor elects a money verdict, can the vendee demand a return of such sums as a condition precedent to the verdict and judgment; but in such a case, where the vendee has failed to set up any plea of set-off or recoupment for damages under section 4484 of Civil Code 1910, and has only pleaded such payments, he is merely entitled to a deduction thereof, and the vendor should recover only the excess in the value of the property and its hire over and above the total amount paid, with the condition that the recovery shall not exceed the unpaid balance of the principal debt and interest thereon. *Thomason v. Moore*, 139 Ga. 341 (3, 4), 77 S. E. 155; *Bradley v. Burkett*, 82 Ga. 255 (2), 257, 11 S. E. 492; *Guilford v. McKinley*, 61 Ga. 230, 232; *Hays v. Jordan*, 85 Ga. 742 (2), 750, 751, 11 S. E. 833, 9 L. R. A. 373; *Commercial Pub. Co. v. Campbell Co.*, 111 Ga. 388 (2), 889, 390, 36 S. E. 756; *Moultrie Repair Co. v. Hill*, 120 Ga. 730 (5), 732, 48 S. E. 143; *Ross v. McDuffie*, 91 Ga. 120 (3), 16 S. E. 648; *Fussell*

v. Heard, 119 Ga. 527 (1), 46 S. E. 621; *Benton v. Harley*, 21 Ga. App. 168 (2), 94 S. E. 46; *Young v. Durham*, 15 Ga. App. 678 (1), 84 S. E. 165; *Elder v. Woodruff Hardware Co.*, 9 Ga. App. 484, 71 S. E. 806; *Jones v. May*, 27 Ga. App. 152, 107 S. E. 897. Where the property after seizure has been sold by the sheriff under section 5153, Civil Code 1910, the vendor's recovery is further limited by the amount of such proceeds under the rule in the last preceding division of the syllabus. The recovery in the instant case did not exceed the amount of money verdict to which plaintiff was entitled under the rules stated.

4. Sales \S 479(4)—Conditional seller not entitled to recover value in trover without surrendering or accounting for purchase-money note.

A vendor who has taken a note for the purchase price of personalty and has reserved title in himself until full payment of the purchase money cannot, in an action of trover for the property after a default in payment, recover the value of the property from the vendee until the note has been delivered up to him or has been sufficiently accounted for so that the vendee will incur no further risk of liability thereon. *Tidwell v. Burkett*, 81 Ga. 84, 85, 6 S. E. 816; *Glisson v. Heggie*, 105 Ga. 30, 33, 31 S. E. 118; *Moultrie Repair Co. v. Hill*, 120 Ga. 730 (4), 48 S. E. 143; *Venable v. Young*, 137 Ga. 875 (3), 73 S. E. 633; *Ayash v. Ga. Show Case Co.*, 17 Ga. App. 467 (4), 87 S. E. 689. This right of the defendant was expressly insisted on by the terms of his plea and at the trial. It is not made to appear that this general and well-recognized rule would be inapplicable to this case because of any such peculiar and particular state of facts as existed and controlled the ruling in *Pannell v. McGarity*, 27 Ga. App. 71, 107 S. E. 352.

5. Appeal and error \S 1042(1)—Sales \S 479 (7)—In trover by conditional seller, plea of partial payments held good as seeking to limit recovery; error in striking plea harmless, where recovery did not exceed amount recoverable.

While the defendant's plea failed to set up any legal defense which would defeat the plaintiff's right to recover under the rules stated, it was good in so far as it alleged certain amounts as payments to the plaintiff and its assignor on the retention of title contracts, as it may be taken as thus limiting the amount of plaintiff's recovery to such portion of the fund arising under the judicial sale as represented the amount still remaining due and unpaid on such contracts, provided such amount shall not exceed the value of the property under the rule stated. Only for this reason, and for the reason that the plea showed the nature of the transaction and contracts to be such as would require a return of or accounting for the purchase-money notes as a condition precedent to a verdict for the plaintiff, the plea should not have been stricken in its entirety upon the plaintiff's general oral motion. Although it appears without dispute that the amount of the recovery was in accordance with the rules stated, and did not exceed the amount of proceeds of the judicial sale, the admitted value of the

property, or the amount remaining unpaid on the notes, and therefore that the error in striking the plea in its entirety would of itself have been harmless, the judgment of the trial court must be reversed for the reason stated in the preceding headnote.

Error from City Court of Macon; Will Gunn, Judge.

Action by the Commercial Credit Company, Incorporated, against I. P. Smith. Judgment for plaintiff, and defendant brings error. Reversed.

Gillon & Churchwell, of Macon, for plaintiff in error.

Walter De Fore and Jas. C. Estes, both of Macon, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 512)

PERRY et al. v. CAMILLA COTTON OIL & FERTILIZER CO. et al. (No. 12992.)

(Court of Appeals of Georgia, Division No. 2.
April 26, 1922.)

(Syllabus by the Court.)

1. Bills and notes \S 537(8)—Issue of payment for jury on conflicting evidence.

There being some conflict in the evidence on the material and controlling issue as to the payment of the note sued on, a question for determination by a jury was presented, and the direction of a verdict was error.

(Additional Syllabus by Editorial Staff.)

2. Bills and notes \S 527(1) — Payee's possession of note evidence of nonpayment.

That a promissory note is found in the possession of the payee furnishes a strong circumstance tending to show nonpayment.

3. Evidence \S 166—Witness may testify that there is no entry of payment of note in book.

Though, as a general rule, books are the best evidence of their contents, a witness who has examined books may testify that there is no entry therein of the payment of a note.

Error from City Court of Camilla; Ben T. Burson, Judge.

Action by F. A. Perry and others, receivers, against the Camilla Cotton Oil & Fertilizer Company and others. Judgment for defendants, and plaintiffs bring error. Reversed.

H. H. Merry and L. S. Moore, both of Thomasville, for plaintiffs in error.

E. M. Davis, of Camilla, for defendants in error.

HILL, J. [1] This is a suit by the receivers of the Sale City Bank on a promissory note against the principal maker of the note

and the indorsers thereon. A plea of payment was filed. At the conclusion of the evidence the presiding judge directed a verdict for the defendants, and this is assigned as error. It is insisted that there was evidence of a circumstantial character which would have supported a verdict for the plaintiff, in that it would have induced the jury to believe that the note had not been paid. The plaintiffs introduced the note, which made out a prima facie case. The defendants swore that the note had been paid by the giving of new notes. In addition to this the evidence for the plaintiffs showed that the receivers of the bank had made diligent search among the assets of the bank and had discovered the note sued on among them, but no evidence whatever of payment of the note itself; and they swore that they made an examination of the books of the bank to see whether there was any entry of such payment, and that no such entry was found.

[2] The fact that a promissory note is found in the possession of the payee furnishes a strong circumstance tending to show nonpayment. Men ordinarily take up their notes when they pay them, and this circumstance is one that the jury, on the trial of an issue as to payment, would be authorized to consider. The circumstance also that the bookkeeper of the bank failed to make any entry of payment of the note on the books of the bank was also a circumstance in favor of the plaintiffs.

[3] It is insisted by the defendants that the evidence as to the contents of the books was not admissible, there being no preliminary proof that would have authorized its introduction, and that the books themselves were the best evidence, and should have been produced. This is the general rule, well established, but a witness who had examined the books would be competent to testify that there was no entry of payment of the note therein. *Griffin v. Wise*, 115 Ga. 612, 41 S. E. 1003. The notes alleged to have been given in renewal of the old note were introduced in evidence, and were marked "Paid," and a witness testified that they were paid at maturity. The witness who testified as to the original note and as to the payment of these renewal notes was one of the defendants, having been an indorser of the original note. The theory of our law is that the jury, on questions of fact, are almost without restrictions, and can believe evidence of a circumstantial character or positive evidence as to the same fact. It is for them to consider all the evidence and determine the question, where there is any doubt about it whatever. It cannot be a question of law, for the direction of a verdict, unless there is no conflict in the evidence, either circumstantial or direct, and all the evidence demands a verdict for the one side or the other. Civil Code 1910, § 5926. The introduction of the note it-

self was sufficient to make out a prima facie case, and whether the circumstances in evidence were of sufficient weight to authorize the jury to discard the positive testimony of the defendants' witness was a question for determination by the jury alone. We think that the court should have left the question to the jury, under proper instructions, and that the direction of a verdict for the defendants was erroneous.

Judgment reversed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 518)

YATES v. OLIVENT. (No. 13019.)

(Court of Appeals of Georgia, Division No. 2.
April 26, 1922.)

(Syllabus by the Court.)

Appeal and error \Leftarrow 501(5)—No jurisdiction where only assignment of error is to interlocutory judgment directing nonsuit on set-off.

In order to give this court jurisdiction of the case, the bill of exceptions must contain a general or a specific exception, assigning error on the final judgment in the court below. Where the rendition of such a judgment is recited without such an assignment of error thereon, and the only assignment of error in the bill of exceptions is upon an interlocutory judgment, this court is without jurisdiction of the writ of error, and a motion to dismiss the writ must be sustained.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by H. A. Olivent, administrator, against W. D. Yates. Judgment for plaintiff, and defendant brings error. Writ of error dismissed.

Hartsfield & Conger, of Bainbridge, for plaintiff in error.

T. S. Hawes, of Bainbridge, for defendant in error.

HILL, J. When this case was called in this court a motion to dismiss was presented, on the grounds that: (1) There was no sufficient assignment of error on any ruling of the court; and (2) there was no assignment of error upon any final judgment.

The first objection, we think, is without merit. The bill of exceptions contains a sufficient assignment of error, but this assignment of error is limited and restricted to the interlocutory judgment made by the court.

The other objection—that there was no assignment of error upon any final judgment—seems to be well taken. The assignment of error in the bill of exceptions is in the following language:

"Upon motion of the plaintiff the court directed a nonsuit as to defendant's set-off, and directed a verdict for the amount sued for upon the ground that there was no implied promise to pay for said services, and to reimburse him for the amount of doctor's bills paid out on her account, on account of the fact that she, the deceased, was the aunt of the defendant, to which ruling and judgment of the court in granting a nonsuit on defendant's plea of set-off the defendant then and there excepted, and now excepts and assigns the same as error, as being contrary to law."

The specific assignment is restricted to the objection that the judgment of the court in granting a nonsuit on defendant's plea of set-off is erroneous. There was therefore a final judgment by the court directing a verdict for the amount of the suit, but there was no exception made to this final judgment. In the case of *Tinsley v. Gullett Gin Co.*, 21 Ga. App. 512, 94 S. E. 892, Presiding Judge Jenkins, in a very elaborate opinion, clearly stated the rule as to the point now under consideration. He said:

"Where exception is taken to a preliminary judgment sustaining a demurrer to the defendant's answer, it must not only appear from the bill of exceptions that a final judgment has been rendered in the case, but it is also required that error be assigned thereon. However, when a specific assignment of error is made upon such previous ruling, and exception is also taken to the final judgment, not for the reason that the latter is erroneous within itself, but merely for the purpose of reaching the error specifically complained of in the antecedent ruling, then a general exception to the final judgment will be deemed sufficient."

The learned judge cites decisions of both the Supreme Court and this court in support of this ruling. The bill of exceptions in the instant case, while showing that a final judgment was rendered, shows also that there was no assignment of error upon this final judgment, either general or specific, but the only assignment of error is limited to the judgment of nonsuit on the defendant's plea of set-off. It would have been entirely sufficient if counsel in making the exception had covered both the general judgment and the interlocutory judgment in one single assignment by a general statement. The judgment of nonsuit in the present case was the controlling ruling, but this did not dispense with an assignment of error also upon the final judgment, although the error in the final judgment may not have arisen solely in itself, but arose by reason of the antecedent error in the nonsuit. *Lyndon v. Ga. Ry. & Electric Co.*, 129 Ga. 353, 53 S. E. 1047; *McCranie v. Shipp*, 10 Ga. App. 544, 73 S. E. 701. The ruling against the defendant's plea of set-off was of course, not the final judgment in the case, either in law or in fact.

"Striking an imperfect plea to the jurisdic-

tion filed by the defendant, and rejecting an amendment thereto, is not a final judgment, and does not dispose of the case; nor would it have done so had the amendment been allowed and the motion to strike been overruled." *Baldwin v. Lowe*, 129 Ga. 711, 59 S. E. 772.

The ruling in the case of *Ellington v. Automobile Credit Sales Co.*, 145 Ga. 53, 88 S. E. 565, is very much in point:

"The Automobile Credit Sales Company commenced an action, by attachment for purchase money, against C. W. Ellington, J. S. Ellington, and V. L. Williams. The defendants filed an answer, which was amended. The plaintiff demurred to the answer as amended, and on the hearing the demurrer was sustained, and the plaintiff was allowed to proceed to verdict and judgment against the defendants. The defendants filed a direct bill of exceptions, in which error was assigned specifically on the judgment sustaining the demurrer to the answer; but there was no assignment of error upon the final judgment in the case. Held, that the writ of error must be dismissed."

And in the case of *Carpenter v. First National Bank of Sandersville*, 13 Ga. App. 497, 79 S. E. 360, the syllabus of the court is as follows:

"Suit was brought on a promissory note. The bill of exceptions recites that the court passed 'an order refusing an amendment to an original plea filed by the defendant, and, on demurrer, struck the plea and amended plea, and entered judgment for the plaintiff.' The only assignment of error in the bill of exceptions is in the following language: 'To the action of the court in refusing the amendment to the original answer the plaintiff in error excepted, and now excepts and assigns the same as error, on the ground that the same was contrary to law.' Held, that the writ of error in each case must be dismissed. To confer jurisdiction upon this court, it was essential that error be assigned upon the final judgment. The judgment refusing to allow the amendment to the defendant's plea was not a final judgment; nor would the judgment allowing the amendment have effected a final disposition of the case. A mere specification of a final judgment is not sufficient. There must be at least a general assignment of error on the final judgment; else this court is without jurisdiction to determine any interlocutory ruling made during the progress of the trial."

It follows from these decisions that the disposal of the plea of set-off by the ruling of the court was not a final disposition of the case, and that there was in fact subsequently a final judgment. There was no exception to this final judgment, either generally or specifically, and it follows that this court is without jurisdiction to consider and determine the correctness of the interlocutory ruling on the set-off, which is the only assignment of error, and the court is compelled, under these decisions, to sustain the motion to dismiss the bill of exceptions, on the ground

that there is no assignment of error as to the final judgment.

Writ of error dismissed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 521)

SOUTHERN RY. CO. v. CATHEY.
(No. 13186.)

(Court of Appeals of Georgia, Division No. 2.
April 26, 1922.)

(Syllabus by the Court.)

1. Petition held sufficient.

The allegations of the petition were sufficient to withstand the general demurrer.

(Additional Syllabus by Editorial Staff.)

2. Contracts \S 10(4)—Frauds, statute of \S 90(1)—That contract to cut and deliver ties unilateral or not in writing immaterial, when performed by plaintiff.

A contract to cut and deliver railroad ties on the right of way was not unenforceable, because unilateral, in that plaintiff did not bind himself to deliver any ties, or because not in writing, as required by Civ. Code 1910, \S 3223, subd. 3, where the ties had been cut and delivered by plaintiff.

3. Sales \S 178(1)—When railroad ties delivered pursuant to contract, this amounted to an acceptance.

Where railroad ties, which were to be cut and delivered on the railroad right of way, were so delivered in compliance with the instructions of the railroad, this amounted to a sufficient acceptance of the ties to support an action for their value.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by J. W. Cathey against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

O. I. Carey, and Hamilton & Hamilton, all of Rome, and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error.

Lamar Camp and L. A. Dean, both of Rome, for defendant in error.

HILL, J. This was a suit to recover for the value of a lot of cross-ties alleged to have been sold to the defendant. A demurrer to the petition was overruled, and the case was brought to this court for review.

The petition alleged, in substance, the following facts: Some time during the month of April, 1920, plaintiff contracted with Mr. Mr. Gordon Teat, section foreman of the defendant railway company at Six-Mile Station, in Floyd county, Ga., to deliver to said railway company 150 railroad cross-ties of hardwood, at the price of \$1.40 per tie. According to the instructions of said Teat, the

petitioner cut and placed on the right of way of the railway company the ties ordered. L. A. Oglesby, the inspector of the railway company, accepted the ties placed by the petitioner on the right of way and at the time of acceptance instructed petitioner to place as many more of like quality as petitioner could cut, and told him that the railway company would pay him at the rate of \$1.40 per tie. According to the instructions of this inspector the petitioner placed 203 more ties of the kind and quality first ordered and accepted by the railway company, which ties the said railway company now refuses to accept in accordance with the terms of its contract.

The demurrer was based on the following grounds: (1) It appears from the allegations of the petition that the cross-ties tendered under the contract alleged were never accepted by the defendant. (2) The contract sued on is void for uncertainty, no specified number of ties to be furnished being agreed on. (3) The contract sued on is unilateral, the plaintiff not having bound himself to deliver any ties. (4) The contract sued on was not in writing and the goods contracted for exceeded in value the sum of \$50.

[1,2] We think the court properly overruled the demurrer. The objections made by the demurrer, that the alleged contract was unilateral and not in writing, are fully answered by the allegations that there was such a performance of the contract by the plaintiff as would render it a fraud on the part of the defendant to refuse to pay for the ties. "Where there has been such a part performance of the contract as would render it a fraud of the party refusing to comply, if the court did not compel a performance," the contract is within the exception of the statute of frauds set forth in the Civil Code of 1910, § 3223, par. 8.

[3] As to the objection that there was no acceptance of the ties, this court holds that the delivery of the ties according to the terms of the contract, on the right of way, in compliance with the instructions of the defendant, amounted to an acceptance of the ties on the part of the railway company. In the case of *Mimms v. Betts Co.*, 9 Ga. App. 718, 72 S. E. 271, the court said:

"Even if it can be said, as it probably can, that in the beginning the contract was indefinite, or lacked mutuality by reason of the fact that the plaintiff did not undertake to furnish any specific number of teams, but was only to furnish such as he might be able to purchase, still the contract became enforceable and mutually binding when the number of teams which the plaintiff might be able to furnish was duly ascertained by his procurement of

five teams and by his putting them to work for the defendant under the contract, and by the defendant's accepting them as satisfying the terms of the contract."

It is true that the facts here alleged may not show a positive, direct acceptance of the cross-ties; but they do show that 203 cross-ties were cut by the plaintiff in compliance with the contract, and all of these cross-ties placed upon the right of way where the petitioner alleges he was instructed to place them. The plaintiff did all that he could in the performance of his contract, and the law should compel the defendant to do what it ought to do, in view of that fact, so as to not subject the plaintiff to loss by reason of his compliance with his contract in reliance upon the terms specifically stated by the defendant corporation. In the case of *Wholesale Mercantile Co. v. Jackson*, 2 Ga. App. 776, 59 S. E. 106, it was held:

"If goods of exactly the quantity and quality bargained for were delivered according to the terms of the contract, it became absolutely immaterial whether the agent who received them had or did not have the right to accept them. Acceptance followed necessarily on the impossibility of rejecting the goods contracted for, and to decline to take them would have been a fraud."

"And where the terms of the sale are agreed upon and the bargain struck, and everything that the seller has to do with the goods is completed, the contract of sale becomes absolute and the property rests in the buyer." *Good Roads Machinery Co. v. Neal*, 21 Ga. App. 161, 93 S. E. 1018.

Chief Justice Bleckley, in the case of *Fontaine v. Baxley*, 90 Ga. 416, 17 S. E. 1015, seems to have covered the points now being discussed in his usual forcible way:

"One of the objections urged to the third plea was the want of mutuality in the contract which that plea sets up and alleges. Grant that this objection would have been good if any question as to its binding force had arisen upon the contract before either party had partly performed it, yet after Fontaine had in pursuance of the agreement gone to New York and opened there the contemplated business, he had performed so far that it would be a fraud in the other party to repudiate the contract. This would satisfy the requisites both of mutuality and of the statute of frauds."

The cases cited by counsel for plaintiff in error in their brief are easily distinguishable on the facts from the cases here cited, which we think are controlling.

Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(28 Ga. App. 517)

BAGLEY v. LEDFORD. (No. 13016.)(Court of Appeals of Georgia, Division No. 2.
April 26, 1922.)*(Syllabus by the Court.)***New trial** \S 132(3)—Dismissal of motion for want of brief of evidence held not abuse of discretion.

A motion for a new trial was set down for hearing by the trial judge at a specified time. On the day set for the hearing no brief of the evidence was presented, and the hearing was continued to a fixed date in vacation. When the latter date arrived no brief of the evidence was presented to the court, and the only excuse for the failure of the movant to present the brief was that the reporter had not written out the evidence. The movant did not show such diligence as was required of him to secure the evidence from the reporter, and the court thereupon dismissed the motion for a new trial. *Held*, no abuse of the court's discretion is shown, and the judgment is affirmed. *Bowles v. Malone*, 189 Ga. 115, 78 S. E. 854; *Seaboard Air Line Ry. v. Memory*, 128 Ga. 191, 55 S. E. 15.

Error from Superior Court, Murray County; M. C. Tarver, Judge.

Action between H. D. Bagley and H. O. Ledford. Judgment for the latter, and the former brings error. *Affirmed*.

H. H. Anderson, of Chatsworth, for plaintiff in error.

O. N. King, of Chatsworth, for defendant in error.

HILL, J. Judgment affirmed.

JENKINS, P. J., and STEPHENS, J., concur.

(90 W. Va. 744)

LUSK v. CITY OF WILLIAMSON.
(No. 4561.)(Supreme Court of Appeals of West Virginia.
April 11, 1922.)*(Syllabus by the Court.)***Mandamus** \S 114—Is proper remedy to compel municipality to provide by taxation for payment of warrant for liquidated demand for damages for opening and improving street.

Mandamus is the proper remedy to compel a municipality to provide for by taxation and pay a liquidated demand for damages to private property resulting from the opening or improvement of a public street done pursuant to law and for which damages it has issued its warrant on the municipal treasury but has not provided the funds in the hands of the treasurer to meet and pay the same.

Error to Circuit Court, Mingo County.

Petition by R. A. Lusk for mandamus against the City of Williamson. Peremp-

tory writ refused, and relief denied, and the plaintiff brings error. Judgment reversed, and peremptory writ awarded.

Joe Hatfield, of Williamson, for plaintiff in error.

MILLER, J. The alternative writ issued out of the circuit court on December 2, 1921, upon the petition of plaintiff, commanded defendant to lay a sufficient tax upon the taxable property within the limits of said city at the next general tax levy, and as soon thereafter as possible to pay off and discharge the claim of plaintiff in the sum of five hundred dollars (\$500.00), with interest thereon from June 24, 1919, or appear before said court on December 14, 1921, and show cause why it should not do so.

The claim of plaintiff, as shown in his petition, verified by oath, consisted of a warrant in the sum of five hundred dollars with interest thereon, dated June 17, 1919, drawn by defendant on the First National Bank of Williamson, its treasurer, in favor of plaintiff, to cover the damages sustained by him to his property, as agreed in a settlement and compromise of his claim, by reason of the grading and paving of East Fourth Avenue, on which his said property is located, allowed by the Board of Commissioners on June 16, 1919, and to be charged to the General Fund.

Though appearing to have been duly served on the corporate authorities and returned to the court, there was no return to the alternative writ in the circuit court, nor any appearance of any kind made therein. The circuit court, on the return day of the writ, overruled the motion of the plaintiff for a peremptory writ and denied him any relief; and it is this judgment which this writ of error was brought to review and reverse.

The petitioner alleges that the reason given by the treasurer of the city for declining payment of the warrant was lack of funds in the treasury to meet the same, and no other reason is alleged or proven. So the sole question presented, and decided adversely to petitioner, is whether he was and is entitled to compel defendant by mandamus to provide for the payment of this liquidated demand against it for the damages to his property. We must accept as true the representation of the city treasurer that there were no funds in the general fund out of which payment of said warrant could be paid, and that the bank was not in default.

The commission created by the charter of said city is given thereby power over the subject of opening, closing, maintaining and keeping in repair the streets, alleys, etc., of the city, and necessarily the implied power to condemn land and settle for the damages to property taken or damaged in the execu-

tion of its powers, as it undertook to do in the present case. No funds being provided and placed in the hands of the treasurer to meet and pay the warrant issued to petitioner, the petitioner alleges the defendant was obliged to lay a levy on the taxable property of the city to provide for the payment of said warrant.

In an early case we decided that when the common council of a municipal corporation has given its creditor an order upon its treasurer for the payment of his claim and thereafter refuses to pay or provide for its payment, mandamus is the creditor's proper remedy, and that he is not required to first reduce his claim to judgment by some action at law. *Thomas v. Town of Mason*, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727. In *Wells v. Town of Mason*, 23 W. Va. 456, the right to mandamus to compel the payment of a claim reduced to judgment was affirmed also where the funds to pay the same had once been provided, but the funds devoted to other claims. *State ex rel. Bank v. City of Philippi*, 80 W. Va. 437, 92 S. E. 725. In *Water Co. v. Town of Welch*, 64 W. Va. 373, 62 S. E. 497, the right to mandamus to compel the town to impose taxes to pay various orders and drafts given for water and light furnished by the water company in accordance with the terms of its franchise contract was held inviolate and unaffected by a retroactive statute reducing the limit of taxation. No question as to the power of the city or limitation thereon as excusing the default of the defendant to pay or provide for the payment of petitioner's debt has been presented. So we think the plaintiff has a clear right to the peremptory writ, and we will so order.

(90 W. Va. 710)

JONES v. COOK. (No. 4315.)

(Supreme Court of Appeals of West Virginia.
April 11, 1922.)

(Syllabus by the Court.)

1. Master and servant §330(1)—Automobile driver's agency for owner presumed.

In an action for recovery of damages resulting from a collision with an automobile, proof that defendant was the owner of the automobile that caused the injury, and that the injury was the result of the negligence of the driver thereof, creates a presumption that the driver, when the collision occurred, was in the service of the owner and operating it on his account.

2. Master and servant §301(1)—Automobile owner's liability for stepdaughter's negligence depends on agency.

When property has been injured by the negligent operation of an automobile driven by the owner's stepdaughter, the owner's liability de-

pends upon whether the stepdaughter was his servant and engaged upon his business at the time.

3. Municipal corporations §705(12)—Automobile not a dangerous agency.

An automobile is not a "dangerous agency," so as to make its owner liable for injuries to travelers inflicted while being driven by another person, irrespective of the relationship of master and servant.

4. Master and servant §301(1)—Automobile owner held liable for stepdaughter's negligence.

Where a person allows his stepdaughter, who is a member of his family, to drive an automobile which he maintains for the comfort, convenience, pleasure, entertainment, and recreation of his family, whereby the stepdaughter negligently injures the property of a third party, the owner is liable; the stepdaughter, while so driving, acting in the furtherance of the owner's purpose.

(Additional Syllabus by Editorial Staff.)

5. Parent and child §13(1)—Father not liable for stepdaughter's wrong in driving automobile because of family relationship.

The owner of an automobile is not liable for the negligent wrong of his stepdaughter in driving it, merely because of the family relationship between them.

Poffenbarger, P., dissenting.

Error to Circuit Court, Wood County.

Action by C. N. Jones against James D. Cook. Directed verdict for the defendant, and the plaintiff brings error. Reversed and remanded.

T. A. Brown and C. N. Matheny, both of Parkersburg, for plaintiff in error.

R. E. Bills and C. M. Hanna, both of Parkersburg, for defendant in error.

MEREDITH, J. On October 24, 1919, Ivol Hickman, a stepdaughter of defendant, and who was then a member of his family and under 21 years of age, was driving defendant's automobile in returning from a football game in Parkersburg. She was the only member of defendant's family in the automobile, but had with her a number of her young friends. At the intersection of Covert and Sixteenth streets she permitted defendant's automobile to run into and practically demolish plaintiff's automobile. Plaintiff seeks recovery of damages. As the record now stands, plaintiff clearly showed that she was negligent and that plaintiff was not. Plaintiff made a clear case against her, but she is not made a defendant. It was also proved that the car she drove belonged to defendant. Defendant introduced no evidence, but at the conclusion of plaintiff's evidence, defendant moved the court to exclude it and to direct a verdict for defendant, and this was done.

[1] Plaintiff's injury, the driver's negli-

gence, and defendant's ownership of the automobile were proved. This made a *prima facie* case.

"When the plaintiff has suffered injury from the negligent management of a vehicle, such as a boat, car, or carriage, it is sufficient *prima facie* evidence that the negligence was imputable to the defendant, to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control at the time, and that the accident was occasioned by the fault of a stranger, an independent contractor, or other person." *Shearman & Redfield, Law of Negligence* (6th Ed.) § 158.

In the case of *Norris v. Kohler*, 41 N. Y. 42, it was held that, in an action for causing death in the streets of a city, charged to have been due to the negligence of the defendant's servants, evidence that the fatal injury was occasioned by a runaway span of horses and wagon, owned by the defendant, was sufficient to authorize a jury to find persons in charge of such horses and wagon to be his servants. In discussing this phase of the evidence, the court says:

"The property being proved to belong to the defendant, it is urged that a presumption arises that it was in use for his benefit, and on his own account. This argument, I think, is a sound one. The ownership of personal property draws to it the possession. The owner is entitled to have and to keep possession, and no other person can justly obtain possession until some act of authority from the owner is proved. Ownership implies possession, and possession is in subordination to title. No proof was given in the present case, separating the ownership from the possession, and the presumption of law is that the wagon and horses of the defendant were in use in his service and on his account."

In *Schaefer v. Osterbrink*, 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875, it was held that:

"In an action against a father and son jointly to recover for the negligence of the son, a minor, where it is charged that, at the time the plaintiff was injured, the son was acting as the servant of the father it is not error to charge that 'the presumption is that a minor child, living with his father, and using his team and conveyance in and about the business of such father, is acting in his behalf and upon his direction, until the contrary is made to appear by the evidence; this fact established, the burden to show that his son was not his servant is imposed upon the father'—where the court, in other parts of its charge, has submitted to the jury the question whether or not, at the time the negligence was committed, the son was in fact the servant of his father."

See, also, *Svenson v. Steamship Co.*, 57 N. Y. 108; *McCoun v. Railroad Co.*, 66 Barb. (N. Y.) 338; *Lovington v. Baucheus*, 34 Ill. App. 544; 6 Thompson, Commentaries on

Negligence, § 7639; 1 Cooley, Torts (3d Ed.) p. 181.

[2] Whether the driver of defendant's automobile, at the time of the accident, was in his employment was peculiarly within his knowledge, and her negligence in its use and his ownership of it being shown, the jury could very properly have found that the driver was his servant; the facts shown created a presumption that she was in his service and acting on his account, and the case should have been submitted to the jury.

But there arises a more serious question on the record. It can fairly be inferred from the evidence that defendant's automobile was a "big closed" Hudson "family car"; that it was acquired by him for the use and pleasure of his family, including his stepdaughter; that she was accustomed to drive it with his knowledge and consent, not only generally, but also with his permission on this particular occasion; and that on this drive she was using it for her own pleasure and that of her friends, one of the very purposes for which it was acquired and kept. Therefore, the question for decision is whether the defendant is liable for an accident occurring by reason of the proved negligence of his stepdaughter, while driving his automobile acquired for the purposes mentioned, by his permission, and for her pleasure.

1. To this question courts of high order make directly opposite answers. All agree, however, that defendant's liability depends upon whether the driver of the automobile was his servant and engaged upon defendant's business at the time the negligent act occurred. *Kayser v. Van Nest*, 125 Minn. 277, 146 N. W. 1091, 51 L. R. A. (N. S.) 970; *Hartley v. Miller*, 165 Mich. 115, 130 N. W. 336, 33 L. R. A. (N. S.) 81; *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59; *Griffin v. Russell*, 144 Ga. 275, 87 S. E. 10, L. R. A. 1916F, 216, Ann. Cas. 1917D, 904; *Van Blaricom v. Dodgson*, 220 N. Y. 111, 115 N. E. 443, L. R. A. 1917F, 863; *Doran v. Thomsen*, 76 N. J. Law, 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677; *Missell v. Hayes*, 86 N. J. Law, 348, 91 Atl. 322; *King v. Smythe*, 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918F, 293; *Arkin v. Page*, 287 Ill. 420, 123 N. E. 30, 5 A. L. R. 216.

[5] 2. The defendant could not be held liable for the negligent wrong of his stepdaughter merely because of the family relation between them. *Blair v. Broadwater*, 121 Va. 301, 93 S. E. 632, L. R. A. 1918A, 1011; *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Mirlick v. Suchy*, 74 Kan. 715, 87 Pac. 1141, 11 Ann. Cas. 366.

[3] 3. An automobile is not per se such a dangerous agency that its owner is liable for injuries on a highway inflicted, while being

driven by another, irrespective of the relationship of master and servant, or of principal and agent. On this proposition we believe there is little disagreement, though we have no doubt that the dangerous character of the automobile has had a very important bearing on the decisions.

[4] 4. It necessarily follows that, unless the driver of defendant's car at the time of the injury was in his service, the defendant is not liable. The authorities cannot be reconciled. In the leading case of *Doran v. Thomsen*, supra, a case very similar to the case at bar, the court held that the owner was not liable. In that case the daughter, who was the driver, was the only member of defendant's family in the automobile. In the later case of *Missell v. Hayes*, supra, a son of the defendant was driving the automobile, and with him at the time of the accident were the defendant's wife and daughter, and two guests. The court differentiates that case from the case of *Doran v. Thomsen*, in that in the *Missell* case there were members of defendant's family in the automobile other than the driver, and held that it was a question for the jury to determine whether the son, while driving the automobile, was the father's servant on the father's business, saying:

"It was within the scope of the father's business to furnish his wife and daughter, who were living with him as members of his immediate family, with outdoor recreation just the same as it was his business to furnish them with food and clothing, or to minister to their health in other ways"

—and affirmed a judgment in favor of the plaintiff. This view is sustained in the following cases: *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631; *Lemke v. Ady*, (Iowa, 1916) 159 N. W. 1011; *Collinson v. Cutter*, 186 Iowa, 276, 170 N. W. 420; *Uphoff v. McCormick*, 139 Minn. 392, 166 N. W. 788; *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224; *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 142, 41 L. R. A. (N. S.) 775.

We see no possible ground of difference concerning the owner's liability, whether there be but one member of the family or all members of the family in the automobile at the time of the negligent injury. If the father makes it his business or affair to furnish members of his family with an automobile for family use, and he maintains it for that purpose, just the same as it is his business to furnish them with food and clothing or to minister to their health in other ways, then he is in the furtherance of that business just as surely, when a single member of the family is driving it for his own pleasure and convenience, as if all the family were riding in it. Counsel for defendant say that defendant is not liable for the negligence of the stepdaughter in the operation of the automobile in the present case, because

it was none of his affair; but we hold that he made it his affair by maintaining the automobile for the very purpose for which she was using it at the time of the injury. He owned the machine and had the right to say where, how, and by whom it might be used, and impliedly, if not expressly, authorized the use to which it was put when the accident occurred. The doctrine of agency is not confined to merely commercial business transactions, but extends to cases where the father maintains an automobile for family use, with a general authority, expressed or implied, that it may be used for the comfort, convenience, pleasure, and entertainment or outdoor recreation of members of the owner's family. This view accords with the great weight of authority and is sustained by *Kayser v. Van Nest*; *Stowe v. Morris*; *McNeal v. McKain*; *Birch v. Abercrombie*; *Smith v. Jordan*; *Griffin v. Russell*; *Denison v. McNorton*—all cited supra. Also, *Crittenden v. Murphy*, 36 Cal. App. 803, 173 Pac. 595; *Tyree v. Tudor*, 181 N. C. 214, 106 S. E. 675; *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487; *Johnson v. Smith*, 143 Minn. 350, 173 N. W. 675; *Benton v. Regeser*, 20 Ariz. 273, 179 Pac. 966; *Boes v. Howell*, 24 N. M. 142, 173 Pac. 966, L. R. A. 1918F, 288.

This view was also applied in cases of horse-drawn vehicles, decided before the introduction of the automobile. *Schaefer v. Osterbrink*, 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875; *Lashbrook v. Patten*, 1 Duv. (Ky.) 318. It is not a new graft on the law of agency. It is merely applying old principles to new conditions. There are practical considerations involved to which courts cannot close their eyes. This doctrine puts the financial responsibility of the owner behind the automobile while it is being used by a member of the family (who is likely to be financially irresponsible), in furtherance of the business and purposes for which it is maintained. The Supreme Court of Tennessee, in the case of *King v. Smythe*, 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918F, 293, has tersely stated the doctrine and we quote with approval from the opinion in that case:

"If a father purchases an automobile for the pleasure and entertainment of his family, and, as Dr. Smythe did, gives his adult son, who is a member of his family, permission to use it for pleasure, except when needed by the father, it would seem perfectly clear that the son is in the furtherance of this purpose of the father while driving the car for his own pleasure. It is immaterial whether this purpose of the father be called his business or not. The law of agency is not confined to business transactions. It is true that an automobile is not a dangerous instrumentality so as to make the owner liable, as in the case of a wild animal loose on the streets; but, as a matter of practical justice to those who are injured, we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and when

moving rapidly upon the streets of a populous city, it is dangerous to life and limb and must be operated with care. If an instrumentality of this kind is placed in the hands of his family by a father, for the family's pleasure, comfort, and entertainment, the dictates of natural justice should require that the owner should be responsible for its negligent operation, because, only by doing so, as a general rule, can substantial justice be attained. A judgment for damages against an infant daughter or an infant son, or a son without support and without property, who is living as a member of the family, would be an empty form. The father, as owner of the automobile and as head of the family, can prescribe the conditions upon which it may be run upon the roads and streets, or he can forbid its use altogether. He must know the nature of the instrument and the probability that its negligent operation will produce injury and damage to others. We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent. If owners of automobiles are made to understand that they will be held liable for injury to person and property, occasioned by their negligent operation by infants or others who are financially irresponsible, they will doubtless exercise a greater degree of care in selecting those who are permitted to go upon the public streets with such dangerous instrumentalities. An automobile cannot be compared with golf sticks and other small articles bought for the pleasure of the family. They are not used on public highways, and are not of the same nature of automobiles."

For the foregoing reasons, we reverse the judgment, set aside the verdict, and grant the plaintiff a new trial.

POFFENBARGER, P. (dissenting). Although sustained by an apparent weight of authority, this decision, in my opinion, contravenes fundamental principles of the laws of agency and master and servant and the rule respondeat superior. In running an automobile for his or her own pleasure, a son, daughter, or other member of a family cannot legally be the servant or agent of another person, even though such other person be the head of the family and owner of the car. Action by one person for his own benefit or pleasure is legally incompatible with service or agency for another, in the performance of the act. Service necessarily implies the doing of something for another, not for the actor. It involves two persons, the master and the actor. Agency generally involves three, the actor, the person for whom he acts, and the person affected by the act authoritatively done. Both relations have their legal limitations. One acting for himself alone can be neither servant nor agent of another.

That the head of the family or some other member of it owns and keeps the car for the use of the family and permits all members thereof to operate it at their pleasure, or that he purchased and maintains it for such purpose and one member thereof occasionally or generally drives it with others riding in it, cannot change the principles of law. When he alone is driving it and riding in it, for his own pleasure or about his own business, he cannot be serving or acting for anybody but himself. If, while he drives it, the car carries other members of the family, he may be. How he obtained the use of some other person's car, or the motive of such other person, in its purchase, ownership, or maintenance, is entirely too remote to affect the question of agency or service. These circumstances and the close relationship of the parties add to and emphasize the probative force and effect of evidence of service or agency, but they are not of themselves such evidence. The same observation is true of the relation of master and servant. If the driver is the chauffeur of the owner or other employee in charge of his car, there may be a rebuttable presumption that he was using it in his master's business, but nothing more. On proof that he was not, the relation may re-enforce evidence that he was, but beyond that, it signifies nothing. Such is the uniform holding in cases in which close relationship of parties is invoked, as evidence of fraud.

In *Goff v. Clarksburg Dairy Co.*, 86 W. Va. 237, 103 S. E. 58, liability was not predicated on the mere relation of the parties to each other. It was put upon the ground of evidence of use of the car, at the time, within the scope of the servant's employment as defined by an informal contract and the mode of its execution. In agency, one person must be doing something for another, not merely for himself. *Mechem, Agency*, § 2; *Clark & Skyles, Agency*, § 1; *Bouv. Law Dict.* title "Agent." The same principle governs in master and servant. If the owner of the car has a purpose in allowing a member of his family to use it for his own purposes, the purpose of the former is necessarily merged in that of the latter. It is merely subordinate when the two purposes coincide. One must be dominant and, when the car is running, the dominant one is that of the driver. The car serves his purpose merely with the consent of the owner, just as much as if it had been loaned or hired to any stranger. In view of these fundamental principles of law, several of the cases referred to in the majority opinion would deny right of recovery upon the facts disclosed here, and, in my opinion, they rest upon solid legal ground.

New laws should be made by the Legislatures, not the courts

(90 W. Va. 693)

ALFRED v. SNYDER. (No. 4406.)(Supreme Court of Appeals of West Virginia.
April 11, 1922.)*(Syllabus by the Court.)*

1. Work and labor \S 7(1)—Presumption that services rendered for member of family are gratuitous generally limited to members living together.

Where services are rendered between members of the same family, there is a presumption that they are rendered gratuitously, but generally such presumption applies only to persons who are living together as members of the same family, and not to persons, though related, who do not so live together.

2. Work and labor \S 28(3), 30(2)—In nephew's action against uncle for services rendered, defended as having been gratuitous, evidence held to support a verdict for plaintiff.

At the age of 12 years, plaintiff, who lived with his parents, began working on his uncle's farm about a quarter of a mile away. He continued such work for the most part until he was 42 years old, performing substantial and beneficial services, for the last 7 years having practically the entire management of his uncle's 600 acres of land, including the raising and harvesting of crops, and care of about 50 head of live stock; during part of this period he received from the farm small quantities of potatoes, pasture for a cow and colt, and some timber. He made his home with his parents until he was married, at the age of 22, and then he and his wife continued living with them for about 6 years, when he moved with his family into and maintained a home of his own during the remainder of his period of service, at various places, varying from one to three miles from his uncle's farm. For the last several years of service, he spent a considerable portion, but not all, of his nights at his uncle's home, on account of his uncle's feeble condition, there being no one else to care for him at night except that for part of the time a nurse was employed. In an action by plaintiff against the uncle for services rendered, the defendant claimed that during the 30 years of service, plaintiff was a member of his family, and that the services were rendered gratuitously; such issue was properly submitted to the jury, and there being sufficient evidence to support the verdict, it will not be set aside.

Error to Circuit Court, Lewis County.

Action by Harry S. Alfred against J. P. Snyder. Verdict and judgment for the plaintiff, and the defendant brings error. Affirmed.

Brannon, Stathers & Stathers, of Weston, for plaintiff in error.

Charles P. Swint, of Weston, for defendant in error.

MEREDITH, J. Upon notice and verified account, plaintiff, on March 10, 1921, moved the circuit court of Lewis county for judgment for \$14,800. Of this amount \$13,725 is for services rendered by plaintiff for defendant, as an employee upon his farm during the years 1891 to February, 1921, inclusive; \$300 for money paid for defendant; and \$775 for services rendered by plaintiff's minor son for the years 1916 to 1920, inclusive. Defendant pleaded nonassumpsit, the statute of limitations, and also filed offsets amounting to \$15,000, in which he seeks recovery for "use, rent, and occupation of farm" for the years 1892 to February, 1921, inclusive, \$14,750, and for "use of silo machine cutter," \$250. The charges of each party are made at so much per year, covering services on the one hand, and use, rent, and occupation of the farm, on the other. The jury returned a verdict for plaintiff for \$6,908.39, which the court refused to set aside. Judgment was entered on the verdict, and defendant seeks reversal here on writ of error.

The defendant made various assignments of error; all but one have been practically abandoned. The only one relied on is that the verdict is contrary to the law and the evidence.

[1, 2] Plaintiff is defendant's nephew; his mother, now deceased, was defendant's sister. At the time of trial, plaintiff was 42 and defendant 82 years of age. In 1891 defendant and his brother, Hezekiah Snyder, were the owners of a 600-acre farm located about three miles from Weston, upon which they resided. The two were never married.

Hezekiah died in October, 1914. The defendant, upon his brother's death, became sole owner of the farm, probably by will, though how is not affirmatively shown. Defendant has continued to reside there ever since. In 1891 plaintiff lived with his parents on a farm about a quarter of a mile from the defendant's residence. He was then about 12 years old. That year he entered upon the service for which he claims compensation in this action. The exact nature of the arrangement under which plaintiff entered this service is not clear. Plaintiff testifies that the two uncles hired him and that he expected compensation, but that the amount was not fixed. Defendant says:

"He came there while a small boy * * * just like other boys, running around, fishing about the place, and continued to run around, was one of the family almost, in fact I had no family and liked to have a little fellow around"

—but substantially denies that there was any understanding between them then that plaintiff was to be paid for his services. Whether there was any understanding between them then, or if there was, what it may have been, is not so material. The record shows that, for a period of about 12 years, from 1891 to 1902, the date of plain-

tiff's marriage, he lived with his parents and worked for defendant and his brother, Hezekiah, on the farm, doing at first the light work usually done by boys, and as he grew older and stronger he made a "full hand," performing all kinds of hard farm work. For some six years after plaintiff's marriage, he and his wife lived with his father, and he continued to work for his uncles on their farm. In 1904 he formed a partnership in the lumber and planing mill business, but he seems to have spent a considerable part of his time working on the farm, hiring some one to perform his share of the work in the firm. This firm continued till about 1912, when it failed. Plaintiff's account from 1901 to 1904 calls for \$250 per year; from 1905 to 1907, for \$300 per year; and from 1908 to 1912, for \$350 per year. As these items were under the court's instructions barred by the statute of limitations, they were not carried into verdict and judgment, but they clearly indicate the value which plaintiff placed on his services for that period. About 1908 plaintiff moved with his wife and children to Weston and shortly thereafter to a place near Polk Creek Bridge and nearer the defendant's residence, then to near Gee Lick Road.

At this time he walked a distance of a mile or two daily to work on defendant's farm. It is well established that his duties included the raising of feed and grain, building of fences, repairing buildings and machinery, ploughing and the usual farm work, and defendant admits these were performed in a satisfactory manner. Plaintiff did not at any time move his family to the Snyder farm, nor did he stay there prior to the death of his uncle Hezekiah, except occasionally to eat a meal, and possibly now and then to spend a night there. In no sense could it be said that, during the period from 1891 to 1914, he made the Snyder home his home. Plaintiff had a home of his own at his father's from 1891 to about 1908, when he moved to Weston, and has kept and maintained a home for his family, consisting of his wife and five children, since that time at the places already stated, and in walking distances to the defendant's farm.

It appears that his Uncle Hezekiah was a very vigorous man practically up to the date of his death at the age of 82 years, and was a hard worker, the defendant not being so vigorous, and that, after Hezekiah died, the defendant was not able to do much work on the farm and the plaintiff spent nearly all his time looking after defendant's interests. With the aid of hired hands he built three siles, yearly planted about 18 acres of corn and filled them, raised corn, wheat, oats, harvested the hay crop, cared for some 50 head of live stock, principally cattle, and rendered himself useful in all the ways familiar to those who live on farms or who know

what those ways are. On account of the feeble condition of the defendant, plaintiff took practical management of the farm work, though the defendant was the "boss." He sold stock from time to time but always accounted to the defendant therefor. During this period he frequently stayed at night at defendant's home, and especially so while defendant was sick. The housework was done chiefly by two daughters of defendant's half-brother, Peter Snyder, who made frequent trips to the house. Defendant for some months had a nurse. The two nieces and nurse were paid for their services, though the amount paid the nieces was very little. But the real burden of looking after defendant was borne by plaintiff. He managed the farm, looked after the buildings, fencing, machinery, crops, and live stock. During his 30 years of service he added very materially to defendant's wealth. The defendant attempted to show that the plaintiff had the use of the farm products and thus maintained his family; that in that way he had been fully compensated for his work; that he had pasture for his cow and a colt part of the time and had the use of a farm tractor for two seasons, which plaintiff used in operating a threshing machine, and used some timber from the farm in building a house. But we think the plaintiff has shown that what little he got from the farm was credited to the defendant in his account; while it does not appear on the itemized account, it was taken into consideration in making it up. Besides, it is shown that the farm products obtained by plaintiff consisted of a few bushels of potatoes for some years, a little grain, and the timber used was not a material amount and was fully paid for. The services performed by plaintiff were of too substantial a nature for us to believe that either party considered them paid for in the manner claimed by the defendant.

The defendant claims that plaintiff was a member of his family. He swears he always considered him "as one of the family almost." He may have been "almost" a member of his family, but not sufficiently so for his purposes in this case. In attempting to show that plaintiff never expected pay for his services, the defendant offered evidence to the effect that plaintiff became a bankrupt about 1912 and did not list in his assets any account against the defendant; but if plaintiff were a member of defendant's family, it is rather strange that he and his wife and children were never invited to live on the 600 acres, and especially so at that trying period. It appears that his bankruptcy was due to his partnership in the timber business, but it is quite possible that his constant and faithful service to the defendant, without receiving compensation therefor as he ought to have done, may have very materially contributed to his misfortune. Plaintiff moved

a number of times, first into rented property and then into a house he built for himself, but never upon defendant's farm. True, plaintiff stayed with defendant at his farm for a considerable period during the last five years of service, working for him in the day time and caring for him at night, but this was all for the benefit of the defendant. The defendant was too feeble to attend to his farm, in fact, too frail to take care of himself. He is an old man, he was alone, and plaintiff thought it unsafe for defendant to remain alone at night. We cannot say, as a matter of law, that plaintiff at any time during his period of 30 years of service for defendant was a member of his family. There is no showing of that personal touch or that spirit of affection which impels members of one family to work for the pleasure and benefit of all.

True, plaintiff rendered no bill for his services during his period of service, but he kept an account of his services, and when he finally asked defendant for payment, defendant asked him to render him a bill. Before doing so, however, he offered him \$1,000, which defendant claims was in the nature of a gratuity. At that time plaintiff was about to buy a farm in Ohio and needed money for his purchase. The request defendant made for an account of plaintiff's demand and his admissions that he expected to compensate him over and above what he proposed giving his other relations, and his testifying that plaintiff had been a good "servant," all tend to show that the defendant expected in some way to pay him for his services.

Another circumstance repels the inference of family relationship. In this suit defendant filed offsets against the plaintiff for \$15,000. Offsets imply a contract. The defendant said in effect that he did not owe the plaintiff, but even if he did owe him any part of plaintiff's demand, yet the plaintiff owed him \$15,000 for use, rent, and occupation of his farm and the use of a silo machine cutter and which sum he had promised to pay. By filing his offsets, he in effect sued the plaintiff therefor upon an alleged contract.

"Where a party defends against a claim for services, on the score of relationship, and that the services were compensated by paternal care, etc., he should not, by his pleading, claim a set-off for board, etc.; such charges imply that there was a contract between the parties." *Schwarz v. Schwarz*, 26 Ill. 81.

We think that, considering the nature of plaintiff's demand and defendant's offsets, the defendant practically admitted that there was a contract between them. Whether there was an express promise to pay plaintiff is not important; an implied promise was just as effectual and binding. The plaintiff performed valuable services; the

defendant knowingly accepted them and greatly benefited thereby, and the law implies on the part of the defendant a promise that he would pay a reasonable compensation therefor. The jury was so instructed and it so found.

When defendant was rendered the account by plaintiff, he said, in substance, that the items for the earlier years of service were all right, at least he had no substantial objection to them. They started at \$25 per year and gradually increased to \$400 per year up to the year 1914, when plaintiff charged for the years 1914 to 1919 inclusive at the rate of \$1,200 per year, and for 1920, \$1,400 per year, and for the months of January and February, 1921, at \$125 per month. We think the charges for the last seven years have been the cause of this litigation. The defendant is an old man. He doubtless recalled the many years when farm hands worked from sunup to sundown, and often far into the night for 50 cents per day; and when plaintiff's account was presented him we do not wonder that he pronounced it "preposterous." We can almost hear him say it. It aroused his indignation, and he pronounced it a fraud and averred he did not owe the plaintiff anything. But other farmers, the evidence shows, during this same period, paid equal or even higher wages. Doubtless they complained, too, but they paid nevertheless. What employer of labor has not complained in the last several years? But living expenses have been high, and laborers could not afford to work at former rates; nor could the defendant reasonably expect plaintiff to do so. The evidence justifies the plaintiff in the amount claimed, and the amount of the verdict is fully supported by the evidence of competent businessmen and farmers, familiar with farm work and farm wages, and we are satisfied it is morally just. The defendant, by pleading the statute of limitations, has deprived the plaintiff of more than half of his claim—his services for more than 25 years—and we would not do him further injustice by reversing the judgment and setting aside the verdict, unless the law so commands.

It is strenuously insisted by defendant's counsel that plaintiff was a member of defendant's family; that this is shown by the blood relation existing between them and by the circumstances detailed, and that if plaintiff was, in fact, a member of defendant's family, then it is presumed that the services performed by him were gratuitous, and that the evidence offered by the plaintiff is insufficient to overcome that presumption. In determining questions of this character, kinship by blood often plays an important part; but one may be a member of a family without being connected by blood or marriage to any members of it. Again, one may be ever

so closely related by blood to the members of a family, yet in the legal sense in which it is involved in this case, not be a member of the family. And there must be something more than mere living together, as a mere lodger or boarder in the family would not by that fact alone be a member of it. Can we say that plaintiff was a member of defendant's family while he continued to live in his father's family and did not make his home with the defendant? Or was he a member of defendant's family while he lived in a separate house with his wife and five children? Until he was married, plaintiff was certainly a member of his father's family; and after he moved into a house of his own he was certainly a member of his own family. It is rather incongruous to say he was a member of defendant's family in a separate house and at a distant place, and at the same time also a member of his father's family or his own.

We cannot say, as a matter of law, from this record, that plaintiff ever lived with defendant, at any time, as a member of his family. This question was submitted to the jury and defendant cannot complain. It has been held that:

"The presumption that services are intended to be gratuitous applies only to services which are rendered between persons who are living together as members of the same family. The presumption does not exist as between persons who are related but who are not living together." 3 Page, Law of Contracts, § 1454, citing *McConnell v. McConnell*, 75 N. H. 385, 74 Atl. 875; *Winkler v. Killian*, 141 N. C. 575, 54 S. E. 540, 115 Am. St. Rep. 694; *Brown v. Cummings*, 27 R. I. 369, 62 Atl. 378; *Williams v. Williams*, 114 Wis. 79, 80 N. W. 835; *Winter v. Greiling*, 114 Wis. 378, 90 N. W. 425.

There might be special circumstances under which this rule would not apply, but, as a general proposition of law, we think it is sound. It would have been unnatural under the circumstances shown in this case for plaintiff to devote thirty of the best years of his life to a wealthy bachelor uncle without any expectation or understanding on his part that he would be compensated; and it would have been just as unnatural for the uncle to accept such valued services without any obligation on his part to pay for them. The jury was fully justified in holding that the services rendered were not gratuitous and that defendant impliedly, if not expressly, promised to pay for them. The parties were represented by able counsel and every phase of the case was fairly submitted to the jury, under proper instructions from the trial court.

The law and evidence both justify the verdict, and we therefore affirm the judgment.

(90 W. Va. 806)

STATE v. CUNNINGHAM. (No. 4472.)

(Supreme Court of Appeals of West Virginia.
April 18, 1922.)

(Syllabus by the Court.)

1. Statutes §228—While a proviso may be an exception, it may also be an additional paragraph or clause performing a more extensive function.

Although primarily the office of a proviso in a statute is exception from its operation, of something that would otherwise be included therein, it is often an additional paragraph or clause performing a much more extensive and important function.

2. Statutes §228—A penal statute proviso restraining the terms of the penal clause requires consideration of both clauses for construction.

A proviso in a penal statute, which, to have full force and effect in its operation, must necessarily qualify and restrain the meaning of the terms of the main or penal clause, goes beyond the mere function of exception in the ordinary sense of the term, and the meaning of the terms of the main or penal clause is to be determined by consideration of both clauses.

3. Statutes §228—Penal clause of statute must be construed strictly and proviso given liberal construction.

In such case, the statute as a whole must be construed favorably to the accused, by application of the rule of strict construction to the penal clause, and the rule of liberal construction to the proviso.

4. False pretenses §22—Worthless check statute does not make defendant guilty where he paid check protested for insufficient funds within 20 days.

Properly interpreted, section 84 of chapter 145 of the Code (sec. 5237), known as the Worthless Check Act, does not make one who has obtained credit, money, goods, or other property of value, by issuance and delivery of a check or draft, in exchange therefor, without funds or sufficient funds on deposit in the drawee bank to pay the same, guilty of any offense, if he has paid the same within 20 days from his receipt of actual notice, verbal or written, of the protest of such check or draft.

5. False pretenses §4—Protest of draft or check for nonpayment and notice thereof is necessary under worthless check statute.

Nor can there be guilt of any offense under said statute, in the absence of protest of such check or draft for nonpayment, within a reasonable time after receipt thereof, and actual notice of such protest.

6. False pretenses §22—Accord and satisfaction made within 20 days held "payment" within the proviso of worthless check statute.

An accord and satisfaction respecting a check issued and delivered under the circumstances and for the purpose mentioned, in said statute, extinguishing liability thereon, made within 20 days from the receipt of notice to the drawer of nonpayment thereof, amounts to

payment within the meaning of the proviso in said statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Payment.]

7. False pretenses \S 48—Rejection of evidence to prove accord and satisfaction under worthless check act held error.

On the trial of one indicted under said statute, it is error to reject evidence tending to prove an accord and satisfaction so made.

8. Criminal law \S 1186(3)—Where the court of appeals finds that accused can, by no possibility, be convicted for the offense charged, he will be discharged without day.

If, on a writ of error to a judgment in a criminal case, the appellate court finds that, by no possibility, can the accused be convicted on the indictment by which he is charged with the alleged offense, the judgment will be reversed, the verdict set aside, and a judgment entered that he go thereof without day.

Error to Circuit Court, Harrison County.

G. L. Cunningham was convicted under the Worthless Check Act, and sentenced to the penitentiary, and he brings error. Reversed, and defendant discharged.

Frank M. Powell, of Clarksburg, for plaintiff in error.

E. T. England, Atty. Gen., and R. A. Blessing, Asst. Atty. Gen., for the State.

POFFENBARGER, P. The plaintiff in error complains of a judgment imposing upon him imprisonment in the penitentiary of this state, for a period of 2 years, and founded upon a verdict of guilty of an offense under section 84 of chapter 145 of the Code (sec. 5237), known as the Worthless Check Act.

As payment for an automobile sold and delivered to him, he contemporaneously drew and delivered to the vendor, J. C. Criss, his check on the Empire National Bank of Clarksburg, for \$1,150, and had not sufficient money in that bank, at the time, to pay it, if any at all. A day or two later, the check was presented and payment declined for lack of funds due the drawer, but it was not protested. Immediately or shortly after the unsuccessful effort to obtain payment, the payee found the drawer and, under some sort of an understanding between them, the automobile was left in a garage from which the vendor soon afterwards obtained possession of it, without having surrendered the check. At that time, the vendee had been arrested on a warrant issued on complaint of the vendor and incarcerated in the jail, or was so arrested and imprisoned very soon afterward, on a warrant previously issued. The former testified the car had been returned and accepted in full adjustment of the controversy; and the latter that it had not been. An offer to prove, by several witnesses, an

admission of the vendor that it had been taken back in full settlement was rejected by the court.

Admitted lack of protest of the check was relied upon, as the principal ground of defense, it being contended that, on account of the proviso in the statute, forbidding prosecution, if payment shall be made within 20 days from the date on which drawer "receives actual notice, verbal or written, of the protest" of the check, there is no punishable offense, in the absence of protest of the check and notice thereof. A motion to direct a verdict for the defendant, based on the lack of protest, was overruled. An instruction, given at the instance of the state and omitting all reference to protest and notice thereof, and another expressly excusing or eliminating protest as an element in the offense, were given over objections. An instruction, requested by the defendant and containing the elements of protest and notice was rejected, and another similar one, refused as offered, was modified so as to limit the notice to total lack of funds or of insufficiency of funds, and given, as modified, over an objection. To all of these rulings against him, as well as to the exclusion of evidence offered to prove the car had been taken back by way of adjustment of the matters in difference between the parties, the defendant excepted.

[1, 2] Determination of the constituent elements of the offense created by the statute involves consideration of the proviso as well as its other parts. The analysis of the statute found in the opinion in *State v. Price*, 83 W. Va. 71, 97 S. E. 582, 5 A. L. R. 1247, makes this proposition apparent, and it accords with uniform authority. *Bish. St. Crimes*, § 65; *Kent. Com.* 463, note. The general purpose of a proviso is to except the clause covered by it from provisions of the statute or to qualify another portion of the statute. But it is often used as a conjunction to an independent paragraph. *Ga. R. & B. Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377. A proviso, introduced by the word "but," was so interpreted in *State v. Harden*, 62 W. Va. 313, 337, 53 S. E. 715, 60 S. E. 394. The doctrine has been affirmed on numerous occasions. *Ches. & O. Ry. Co. v. Pack*, 6 W. Va. 397, 403; *Stanley v. Colt*, 72 U. S. (5 Wall.) 119, 18 L. Ed. 502; *Ches. & P. Tel. Co. v. Manning*, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144.

[4] The proviso here involved is not a mere exception. It is an additional clause expressing the intent and spirit of the whole section as well as effecting an exception from the operation of the preceding terms. Though it does not specifically say one who has paid a check or draft issued or delivered without funds to pay it and used in the manner and for the purpose mentioned, within

20 days after notice of protest, shall not be guilty of the offense, or that, in such case, no offense shall be deemed to have been committed, under the statute, that is what it means. Moreover, it contemplates no offense in the absence of presentation and protest of the paper and notice of the protest. Read as a whole, it assumes presentation and protest for nonpayment, wherefore it fairly contemplates such procedure, and, under the rules of construction, applicable to penal statutes, these steps must be held to be elements or factors in the operation and administration of the statute. The Legislature did not intend to make every issuance of a check or draft in exchange for money or property, without funds or credits sufficient to pay it, a criminal act. There is no offense, unless the money or property obtained was parted with in reliance upon the false representation made by the check or draft. The offender must obtain it by issuance or delivery of the check or draft. If the vendor or lender relies upon the financial ability of the other party and not upon the representation of funds in bank, the transaction involves no criminal offense. Inadvertent overdrafts and relations of confidence and trust between men in their dealings with one another, inducing reliance upon character rather than specific representations and agreements, were well known to the lawmakers, and they likely did not intend to open the door to prosecution except in cases of actual fraud of a particular kind. Hence, it may have been deemed advisable to require the payee to present the paper for payment, with reasonable diligence, and have dishonor thereof, in case of nonpayment, formally recorded and notice thereof given, in order to make it clear that the representation was relied upon and that the drawer so understood it at the time of the exchange. Protest and notice may have been required, as a means of making it clear in every case, that payment was actually and properly demanded and refused. In so grave a matter as a charge of crime, growing out of an apparently honest business transaction, it ought to be based upon certain and definite elements. Whether the hypotheses as to legislative intent, just stated, are sound or not, there is a presumption of good reasons for this provision in the act, which must prevail.

[3] The liberal construction here given to the proviso, in restraint of the operation of the terms of the main or penal clause of the statute, is well founded in authority. In its entirety, the statute is construed favorably to the accused, the penal part, strictly, and the exception or restraining clause, liberally. *Bish. St. Crimes*, §§ 226-229; *Sneed v. Com.*,

6 Dana (Ky.) 338; *Dull v. People*, 4 Denio (N. Y.) 91; *Rex v. Heming*, 2 East, P. C. 1116; 1 Hawk. P. C. p. 686, § 5; 1 Hale, P. C. 694; *Porter's Case*, Cro. Car. 461. The term "divorced" in a proviso was held to be applicable to one spouse judicially separated from the other by a decree of divorce from bed and board. The author of a threatening letter, known by reason of his handwriting, is not guilty under a statute, making it an offense to send a threatening letter "without any name subscribed thereto, or signed with a fictitious name."

From the conclusion here stated, it follows, of course, that the court below erred in all of its rulings upon instructions and the motion to direct a verdict.

[6, 7] As payment of the check in money, within 20 days, absolves from punishment, the return of the property, if accepted as payment in full, would necessarily have the same legal effect, under the liberal construction we are required to give the proviso. In this connection, it is to be observed, too, that the term "money" is not used. The terms are literally satisfied by payment of the check. Property accepted in payment would work payment within the technical meaning of the word. The defendant testified he had returned the car with the understanding that he would not be prosecuted and offered to prove by three witnesses, admissions of the vendor, that he had accepted it with that understanding. From this, the jury could have inferred that it was accepted as payment of the check. Hence, the rejected evidence of the admission should have been permitted to go in.

[5, 8] Under the interpretation of the statute, required by these settled rules, the elements of protest within reasonable time and notice thereof are essential; and, as the check in question admittedly was not protested and cannot be, within a reasonable time after issuance thereof, there can be no conviction upon the indictment on which the accused was arraigned and tried. When, on a writ of error, it becomes apparent to the appellate court that the plaintiff cannot, by any possibility, prevail on a new trial, it will not remand the case, but will enter a final judgment for the defendant. *Ruffner Bros. v. Dutchess Ins. Co.*, 59 W. Va. 432, 53 S. E. 943, 115 Am. St. Rep. 924, 8 Ann. Cas. 866; *Miller v. Ralston*, 1 Serg. & R. (Pa.) 309; *Griffith v. Eshelman*, 4 Watts (Pa.) 51.

For the reasons stated, the judgment will be reversed, the verdict set aside, and a judgment entered that the defendant go thereof without day.

(90 W. Va. 774)

ALLEN v. SIMMONS. (No. 4453.)(Supreme Court of Appeals of West Virginia.
April 18, 1922.)*(Syllabus by the Court.)*

1. Sales \S 175—Seller is excused from tendering delivery, where buyer notifies that he will not accept.

Where the buyer of merchandise under an executory contract notifies the seller that he will not receive the same if shipped to him, the seller is excused from tendering delivery.

2. Sales \S 332, 384(7)—Where buyer asks seller to cancel or resell, and is notified that resale must be at loss, seller, after reasonable time, may resell; on buyer's default seller may recover difference between contract price and proceeds of resale, with expenses.

Where one enters into an executory contract for the purchase of personal property, and subsequently asks the seller to cancel the contract, or, if he cannot do this, to resell the property for him, and the seller declines to cancel the contract, but does undertake to resell the property, and subsequently advises the buyer that it cannot be resold except at a loss, and demands that the buyer make some disposition of it, to which demand the buyer makes no response, the seller is justified, within a reasonable time, in reselling said property at the market price for the buyer's account, and is entitled to recover, in an action upon the contract, the difference between the purchase price and the amount received by him for the property, together with any expenses which he may have incurred in storing the property, or in making such resale.

3. Appeal and error \S 1175(1)—Appellate court will not enter judgment, notwithstanding the verdict on issues joined.

A judgment non obstante veredicto must be based upon the merits of the case as disclosed by the pleadings, and not in any sense upon the evidence produced upon the trial.

(Additional Syllabus by Editorial Staff.)

4. Set-off and counterclaim \S 32—Matter of recoupment must grow out of contract in litigation.

A matter of recoupment must grow out of the contract involved in the litigation.

Error to Circuit Court, Brooke County.

Suit by Oliver Allen against J. M. Simmons. Judgment for defendant, and plaintiff brings error. Reversed, and remanded for new trial.

Erskine, Palmer & Curl, of Wheeling, for plaintiff in error.

R. L. Ramsey and W. S. Wilkin, both of Wellsburg, for defendant in error.

RITZ, J. This was a suit to recover damages for the breach of a contract for the sale of certain feed by the plaintiff to the defendant. A trial of the case in the court below resulted in a judgment in favor

of the defendant, which the plaintiff seeks to reverse by this writ of error.

The plaintiff is a grain and feed broker, having his place of business at Coraopolis, Pa. The defendant was engaged in the retail mercantile business at Follansbee, W. Va., at the time of the transactions involved in this litigation. On the 14th of March, 1918, plaintiff's traveling salesman took an order from the defendant for 10 tons of Dixie hen feed at \$77 a ton, and 25 tons of Dixie horse and mule feed at \$66 a ton, to be shipped May 1st, and on April 12th the same traveling salesman took from the defendant another order for 1 car of Dixie horse and mule feed at \$59.50 per ton, to be shipped in June. It seems to be conceded that this meant 30 tons, inasmuch as this was the minimum amount which could be shipped as a carload. These orders were subject to confirmation before becoming binding contracts. The plaintiff testifies that he confirmed the orders upon their receipt, and immediately purchased from the manufacturer in East St. Louis the feed to fill the same. This feed is \S patent production, and could only be secured from the one manufacturer. On April 29, 1918, the defendant wrote to the plaintiff that he was going out of business, and requested the plaintiff, if convenient, to cancel the orders which he had theretofore given for feed; and further stating that, if that was not satisfactory, to let him know and he would make some other disposition and give further instructions. On May 3d the plaintiff replied to this letter, advising that he had no place where he could place the shipment for feed ordered by the defendant, but advised that he would have his traveling salesman see if he could make some disposition of it, advising, however, that feed was hard to resell as the market was somewhat easier and purchasers were very timid. He also requested the defendant to see if he could not make some disposition, suggesting that he might get his successor to handle the two cars. The plaintiff did attempt, as is shown, to make some disposition of these cars, as requested by the defendant, but was unable to do so, and, on June 11th, wrote to the defendant insisting on him taking the shipments, or making some disposition of them. In reply to this letter the defendant, on June 13th, wrote to the plaintiff that he had theretofore given notice that he was going out of business and canceled his orders, and directed the plaintiff not to consign any shipments to him, for he was not in a position to take care of them. On June 18th the plaintiff again wrote to the defendant insisting that he give directions for the disposition of the two cars of feed, advising that the plaintiff had no place where he could dispose of them, and that he had them on hand, inasmuch as he had to protect the orders. The letter concluded by insisting on

the defendant taking the feed or making some disposition of it. To this letter the defendant made no reply, and, after waiting until July 1st, the plaintiff got the manufacturer to take back the feed at the then market price, which was considerably less than the price at which it had been sold to the defendant. This suit was then brought to recover the difference between the price at which the plaintiff sold the feed and the contract price, as well as some charges for storage and other services.

[4] Upon the trial of this action the defendant attempted to set up, by way of recoupment, damages which he claims accrued to him by reason of an inferior quality of feed furnished to him by the plaintiff prior to the time these orders were given. The court declined to allow this to be done, and the defendant makes some complaint of this action of the court in his brief. Clearly the court was right in this, as damages, in order to be proper matter of recoupment, must grow out of the contract involved in the litigation.

It is a little difficult to understand how the jury arrived at the verdict returned in this case. The defendant made no real defense to the cause of action asserted against him. He seeks to justify the judgment now upon the theory that the orders were given subject to confirmation by the plaintiff, and that there is no proper evidence that they were ever confirmed, that there is no proof of any proper measure of damages, and that the plaintiff gave to the defendant no notice of his intention to resell the feed before doing so, for any or all of which reasons he insists the judgment in his favor should be sustained.

[1] Of course, it is quite well established that, where an order is given, as was the case here, subject to confirmation by the seller, it does not become a binding contract until the same has been confirmed, and, if this contention of the defendant found any support in the evidence, it might be well taken. The plaintiff, however, testifies that he confirmed the orders, and the defendant's letter of April 29th is a tacit admission that this is so. In that letter he does not insist upon any right to withdraw the orders for lack of confirmation, but simply requests that they be canceled, if convenient to the plaintiff, clearly recognizing that they constitute a valid and binding contract. Further than this, as a witness in his own behalf, he does not deny the plaintiff's statement that the orders were confirmed.

He also argues that there was no proper proof upon which the jury could find any damages in favor of the plaintiff; that, inasmuch as the first car was to have been shipped May 1st, and the other car in June, the measure of damages would be the difference between the contract price and the purchase price at the time and place of delivery,

and, inasmuch as it is not shown that the plaintiff ever tendered delivery at any time or place, or attempted to prove what the market price was at any other time than July 1, 1918, he was not entitled to any recovery. It must be borne in mind that the defendant's letter, above referred to, asking the plaintiff to cancel the orders, started negotiations between the parties in an attempt to place these cars of feed somewhere else, and relieve the defendant of the obligation to take them, and this was a sufficient reason for not tendering delivery of the car which was to be shipped May 1st. Plaintiff was endeavoring to resell both cars to some one else, so that defendant might be relieved of the contract, and the defendant, if he was acting in good faith, was doing likewise. On June 11th, the plaintiff having failed to make such a disposition of the cars, insisted upon the defendant taking them, or making some disposition of them, and, in reply to this letter, on June 13th, the defendant for the first time declared that he would not accept the shipments. It is true, upon receiving this unequivocal declaration of the defendant, plaintiff might have immediately sued for his damages, but he determined to give the defendant another opportunity to dispose of the cars of feed if he could do so. With this view he wrote him on June 18th insisting on him taking the shipments, and the defendant says that he made no reply to this letter, having come to the conclusion that he would allow the plaintiff to make such disposition as he desired of the feed. Defendant's counsel in argument insist that the plaintiff is not entitled to recover damages because he testifies that the defendant never canceled the contract; that he did not treat the letters of April 29th and June 13th as a cancellation of the contract. This argument seems to be based upon the theory that the plaintiff is not entitled to recover unless the contract was canceled. This is not the theory of the plaintiff's action at all. The plaintiff is quite right in his testimony in insisting that there could be no cancellation of the contract after it had been made, except by the mutual consent of the parties, or for some fraud or mistake. His action is based upon the damages sustained by him because the defendant refused to perform the contract.

[2] There is no merit in the defendant's contention that the plaintiff cannot recover because he did not notify the defendant that he was going to resell the feed. It may be stated, under the facts in this case, that the correspondence between the parties was authority to the plaintiff to make resale of this feed at the best price obtainable, and it appears from the evidence that he had made earnest efforts to that end, and did sell it at the market price on July 1st. The plaintiff did not treat the contract as finally broken on the part of the defendant until a reasonable time after he had forwarded his let-

ter of June 18th, insisting upon the defendant accepting the shipments or making some disposition of them. After waiting a reasonable length of time thereafter and receiving no reply from the defendant, he treated the contract as broken and brought suit for his damages. Under the circumstances, the plaintiff was not bound to accept the defendant's letter of June 13th as final, nor was he bound to make immediate sale of the feed in order to hold the defendant for any damages he might sustain.

The plaintiff insists that his peremptory instruction to find in his favor the amount claimed in his bill of particulars should have been given. There is no doubt but that the court should have instructed the jury to find for the plaintiff, but we cannot say, under the evidence, that the amount stated in the peremptory instruction is justified from the evidence. The items claimed in the bill of particulars amounting to \$504.50, being the difference between the contract price of the feed and the market price, the plaintiff was undoubtedly entitled to a verdict for. The other items, consisting of mill overhead charges and profit, carrying charges and commissions, we do not find that the plaintiff was entitled to recover from the evidence. What is meant by mill overhead charges and profit does not appear, nor is it shown what is meant by carrying charges. Of course, the plaintiff would not be entitled to recover any profit from the defendant in addition to the contract price, for the reason that the price at which the feed was sold to the defendant included the plaintiff's profit. If the carrying charges are for storage of the feed while the parties were trying to dispose of it, then it would be a proper item of damages. As to whether or not the item of mill overhead charges is or is not a proper item would depend on what goes to make it up. There being nothing in the evidence to inform us in regard to it, the jury would not be justified in returning a verdict therefor. As the case was presented to the jury without explanation of the items above referred to, the court should have peremptorily directed the jury to find for the plaintiff the sum of \$504.50.

[3] The plaintiff insists that we render judgment here in his favor for the amount which he is entitled to recover, inasmuch as there is no defense made by the defendant. This court will not render a judgment in opposition to a jury's verdict, unless the case is such that the pleadings demand it. Where a determination of the questions involve a consideration of the evidence in a case in which an issue has been joined, this court will not render a judgment non obstante veredicto. *Zinn v. Cabot*, 88 W. Va. 118, 106 S. E. 427, and authorities there cited.

Our conclusion is to reverse the judgment, set aside the verdict of the jury, and remand the cause for a new trial.

(90 W. Va. 787)

SCHUTTE v. SCHUTTE. (No. 4438.)

(Supreme Court of Appeals of West Virginia.
April 18, 1922.)

(Syllabus by the Court.)

1. Divorce \S 27(3) — To justify decree for cruelty generally requires evidence of personal violence.

To justify a decree of divorce on the ground of cruel and inhuman treatment generally requires evidence of personal violence or other acts tending to break down the health and happiness of the offended spouse.

2. Divorce \S 27(7)—Disavowals of love and expressions of hatred do not constitute cruelty.

Disavowals of love, expressions of hatred and the like, while the marital relation continues, do not constitute cruel and inhuman treatment of husband by wife.

3. Divorce \S 129(1)—Burden rests on party alleging adultery to prove case by strong, convincing evidence.

In suits for divorce based on alleged adultery of defendant, the burden rests upon plaintiff to make out his or her case by clear, strong and convincing evidence, sufficient to convince the judicial mind affirmatively. Evidence to raise a suspicion only will not justify a decree of separation.

4. Divorce \S 129(16), 130—Evidence held not to sustain charges of adultery and cruelty.

The charges and counter charges of adultery and of cruel and inhuman treatment in this case held not sustained by such sufficient and convincing proof as to justify reversal of the decree below denying to each of the parties a decree of divorce.

Appeal from Circuit Court, Harrison County.

Action by George Schutte against Henrietta Schutte for divorce, in which defendant brought a cross-bill. From a judgment denying both parties relief, the plaintiff appeals. Affirmed.

Law & McCue and H. J. James, all of Clarksburg, for appellant.

Carter & Sheets and Glenn F. Williams, all of Clarksburg, for appellee.

MILLER, J. By bill and cross-bill answer each of the parties is seeking a divorce from the other; the plaintiff on the grounds, (1) of alleged cruel and inhuman treatment of the defendant toward him, (2) of adultery alleged against defendant; while the grounds upon which defendant predicates her prayer for affirmative relief against the plaintiff are, (1) desertion, (2) cruel and inhuman treatment, (3) the counter charge of adultery by him. Each of the parties in their respective pleadings names a particular person with whom the other is alleged to have committed adultery.

The defendant denies in her answer all charges of cruel and inhuman treatment, and all acts of adultery charged against her. Plaintiff filed no answer to the cross-bill of defendant. The case was tried by the court upon the pleadings and the documentary and oral evidence of the witnesses adduced by both parties, resulting in the decree complained of by both, denying to them the relief prayed for, or any relief, and dismissing the bill and cross-bill with costs to the defendant against the plaintiff.

[1] The only specific act of cruel and inhuman treatment alleged and sought to be proven by plaintiff consisted of a warrant of arrest procured by defendant January 15, 1920, upon a charge of lunacy against him, which upon investigation and consideration by the lunacy commission of Harrison County was sustained; and that subsequently, upon a writ of habeas corpus sued out by him against defendant Henry M. Schutte, custodian, discharge from custody was denied him by the circuit court, but which judgment was reversed here upon writ of error on September 20, 1920, and the plaintiff discharged and restored to his liberty. 86 W. Va. 701, 104 S. E. 108. The only other acts of bad treatment consisted of supposed alleged expressions of disrespect for plaintiff, lack of love for him and love for another, developing into acts of notorious conduct pointing to acts of adultery on the part of defendant with the correspondent, which are alleged to have become unbearable by plaintiff.

The charge of adultery is predicated on various acts of misconduct of defendant with one Samms within three years prior to the institution of the suit. No specific acts are set out or pleaded in the bill.

Defendant in her answer denies the cruel and inhuman treatment, either in connection with said lunacy charge or in any other manner. The facts relating to the accusation of lunacy sufficiently appear perhaps from the record and opinion in the proceeding already referred to. The record and the evidence adduced before the court in the present case clearly show that the former proceedings were begun only after consultation by both plaintiff and defendant with eminent and qualified physicians, and conduct on plaintiff's part tending to show aberration of mind or an abnormal mental condition, and the fear of defendant, expressed at least, that she was liable to sustain some bodily harm at his hands. While we were of opinion on the hearing of the habeas corpus proceedings that the mental condition of petitioner was not shown to be such as ought to deprive him of his liberty and of his property taken into custody, and that he ought to be discharged, yet under the circumstances there disclosed and here proven, we can not say that they convicted defendant of cruel and inhuman treatment sufficient to furnish

grounds for a decree of divorce. The record shows she did not bring these proceedings hastily, but only after observing plaintiff's strange and unusual conduct, his threats of violence, and after consultation with competent and reputable physicians. It was the opinion of the circuit court, and it is our opinion that cruel and inhuman treatment is not made out by the record of the lunacy proceedings. Nor do we think the accusations of disrespect as charged have substantial foundation in the evidence. The defendant denies them, and we can not say the decree below, predicated on the want of evidence to sustain them, is wrong. To justify a divorce on the ground of cruel and inhuman treatment generally requires evidence of personal violence or other acts tending to break down the health and happiness of the offended spouse. Section 6, chapter 64, Code (sec. 3641).

[2] We have distinctly held that disavowals of love, expressions of hatred and the like, while the marital relation continues, does not constitute cruel and inhuman treatment of the husband by the wife. *Huff v. Huff*, 73 W. Va. 330, 80 S. E. 846, 51 L. R. A. (N. S.) 282; *Wills v. Wills*, 74 W. Va. 709, 82 S. E. 1092, L. R. A. 1915B, 770. By the Code the false charges of prostitution by the husband against his wife amounts to cruelty on his part.

[3] On the only other accusation, that of adultery with said Samms, we are not justified, we think, in reversing the decree below on this ground. Outside of the numerous instances testified to by witnesses, where defendant and Samms were seen riding together in an automobile of the one or the other on the public roads or streets in and about the city of Clarksburg, only three or four instances are given where they are charged with having been seen together in rather secluded places and along the public highways, but where, it is contended, the opportunity to commit adultery was furnished. In one instance three witnesses testify to having seen them together in the Masonic Cemetery near Clarksburg in the act of hugging and kissing each other, showing lascivious conduct and a disposition to commit adultery if opportunity was furnished. It is not pretended by these witnesses that they saw anything more on this occasion than acts of lasciviousness; they do not pretend they saw the parties in the act of adultery, nor that any opportunity was there present for such criminal conversation. Another matter of evidence relied on, testified to by a motorman on the electric railway, is that he saw defendant and Samms enter a field on an afternoon and go in the direction of a woods, and that on his return trip he saw two persons, not definitely identified as the same persons, with heads and shoulders above a fallen tree at the edge of the woods, but outside of this he saw nothing improper in their conduct. A third

fact testified to by two other witnesses for plaintiff is that they saw Samms and defendant at the Green Lawn Cemetery near Adamston, one of whom says he saw them go through a fence towards a small woods. They were not seen going into the woods by either witness, but going in that direction. This was supposed to have been in the summer of 1919, the latter part of June. The three witnesses who swear to seeing the parties in the other cemetery place the time in the latter part of May of the same year. Another witness testified that he saw Samms, in June, 1919, get out of his car in front of the Schutte residence and go directly into the house, and sometime afterwards on re-passing saw him come out of a side door, and sit on the front porch. He does not pretend to have seen Mrs. Schutte on this occasion. Samms and Mrs. Schutte both emphatically deny that they were ever at any time or at the times and places designated by the witnesses together in either of the cemeteries or in the field referred to by the motorman. They also deny that he was ever at her home, at the times indicated by the witnesses, or at any time except when Samms was there with his wife, who had heard of some of the charges made against him and Mrs. Schutte, which they claim was the result of false reports circulated by the plaintiff's witness Skinner, and which Skinner says he afterwards admitted in the presence of Mrs. Samms were false, but which, in his testimony in the present case, he lied about to Mrs. Samms; counsel for plaintiff say, "like a gentleman." Samms and Mrs. Schutte were members of the same church, both in good standing and reputation; he president of the men's Bible class; she president of the women's Bible class. They were also near neighbors, and members of the two families frequently rode together from Adamston where they resided to Clarksburg and return, as other neighbors living in the same neighborhood did, and frequently when the death of neighbors occurred, they volunteered the use of their respective automobiles to carry relatives and friends of the deceased to and from the cemetery, but at no time were they ever there alone; and Mrs. Schutte swears that as soon as she learned of the criticisms against her, she ceased to ride with Samms and be with her. Mrs. Schutte is corroborated, to some extent at least, by female witnesses who roomed at her house while plaintiff was absent in the South in 1919, that Samms was not at her house during that time except in company with Mrs. Samms. One of these says she saw Samms' car parked in front of Mrs. Schutte's residence, on one occasion, when he was calling on a customer at a store on the opposite side of the street.

Of course, if the facts are as sworn to by plaintiff's witnesses relating to the presence of Mrs. Schutte and Samms in the cemeter-

ies, and in the woods on the opposite side of the field as sworn to by the motorman, they were guilty of very unbecoming conduct. But no witness swears to any act of adultery on their part. The court below evidently concluded that the fact of adultery was not established. Is the evidence such as to justify us in reversing the decree? We do not think it is. The burden is upon the plaintiff in this class of cases, as in all others, to make out a clear case of adultery when that is the ground relied on. The proof in this case is little if any stronger, we think, than was the evidence of adultery in *Huff v. Huff*, supra, which we held insufficient to justify a decree on that ground. It was not of that clear and strong character sufficient to convince the judicial mind affirmatively. It may be sufficient to raise a suspicion as to defendant's chastity, but that is not enough to justify a decree, according to our cases. The facts in the Virginia case of *Musick v. Musick*, 88 Va. 12, 13 S. E. 302, which were held sufficient to justify a decree on the ground of adultery will be found much more convincing than the facts proven in this case. In the case of *Throckmorton v. Throckmorton*, 86 Va. 768, 11 S. E. 289, the court laid down the rule that—

"to establish the charge of adultery the evidence must be full and satisfactory—the judicial mind must be convinced affirmatively. The proof should be strict, satisfactory and conclusive."

Courts of equity are reluctant to convict husband or wife of unfaithfulness who for many years have lived together happily and maintained good reputations in the community, and they should not do so except upon the clearest and most convincing proof; and we are not prepared in this case to reverse the decree below denying plaintiff relief on the ground of adultery charged.

[4] But should the lower court have awarded defendant a divorce a vinculo or a mensa et thoro against plaintiff? Having failed to make out a clear case of adultery against her, the statute, if his charges amounted to that of prostitution, would give her a divorce on the ground of cruel and inhuman treatment. But the charge is not that of prostitution, but of adultery. To be a prostitute means for a woman to give herself up to indiscriminate lewdness, to become a base hireling. Adultery is a crime of less gravity at common law and under the statute. *Ex parte Richards*, 53 W. Va. 555, 45 S. E. 341. And so the statute does not in terms, nor likely by implication, include adultery in the word "prostitution," a question, however, not necessary nor intended to be decided. Plaintiff may have felt justified in making the charge in his bill, in view of the many reports testified to by the witnesses. There is considerable evidence, however, tending to show that plaintiff with chalk wrote on the side of a building in a public place words commending

himself, but accusing his wife of being a "whore." He admits seeing those words but says he immediately rubbed them out with his handkerchief. A young lady witness for defendant says she saw the writing, and undertook to identify the handwriting as his, after seeing his letters to his wife and observing the misspelling of the same word or words. However he flatly disclaims responsibility for the sign, and says he undertook to blot it out as soon as he discovered it. One or two witnesses swear to plaintiff's threats in connection with this publication to ruin the reputation of his wife, to shield his own unbecoming conduct towards a lady roomer in his house, with which he is charged. On the first impression a majority of us were inclined to say that defendant was entitled to a decree of divorce against plaintiff on the ground of cruel and inhuman treatment. But as he so flatly denies the charge, and in view of the uncertainty, we have concluded the decree below denying her a divorce ought also to be affirmed.

(90 W. Va. 760)

BIDDLE CONCRETE CO. v. McOLVIN et al.
SAME v. JACOBS REALTY CO. et al.
(two cases).

(Nos. 4435, 4437.)

(Supreme Court of Appeals of West Virginia.
April 18, 1922.)

(Syllabus by the Court.)

1. Vendor and purchaser ⇨54—Vendor retaining title until final payment holds in trust for purchaser.

Where the owner of a vacant lot enters into a written agreement with another, whereby the owner sells and the other buys such lot, the owner to execute a deed therefor upon full payment being made, the purchaser becomes the equitable owner, and the vendor holds the legal title to the land in trust for the purchaser and as security for the payment of the purchase price.

2. Vendor and purchaser ⇨54—Vendor holds title in trust for purchaser, where latter enters into possession and makes valuable improvements under oral contract.

Such is also the case where there is a verbal contract of sale and purchase, and the vendee enters into possession and makes such valuable improvements as will entitle him to specific performance.

3. Mechanics' liens ⇨59—Purchaser is deemed "owner" within meaning of mechanic's lien statute.

In either of such cases, the vendee is deemed to be the owner of the land within the meaning of the Mechanic's Lien Law, chapter 6, Acts 1917 (Code Supp. 1918, c. 75, §§ 1-27 [secs. 3842, 3851a-3857]), and one who furnishes materials for the construction of a building on the land, under a contract with the owner or his authorized agent, is entitled to a lien on such owner's interest in the land and

building, for the materials so furnished, upon compliance with the statutory requirements as to filing his claim of lien for record.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Owner.]

4. Mechanics' liens ⇨118, 132(1)—Party furnishing materials under contract with owner need not give owner notice, but must file lien within statutory period.

Where one furnishes materials that are used in the construction of a building, under a contract with the owner or his authorized agent, to perfect his lien for material, he is not required to give notice to the owner of his claim of lien, but he must record his notice of lien within the statutory period of 90 days from the date he ceases to furnish materials to the owner under the contract.

Appeal from Circuit Court, Harrison County.

Action by the Biddle Concrete Company against Edward P. McOlvin and others, and two actions by the Biddle Concrete Company against the Jacobs Realty Company and others. Judgments for plaintiff, and defendants appeal. Affirmed.

Carter & Sheets, of Clarksburg, for appellants.

Robert R. Wilson, of Clarksburg, for appellee Biddle Concrete Co.

Robinson & Robinson, of Clarksburg, for appellee Bumgardner.

Cornelius C. Davis, of Clarksburg, for appellee Cole.

Felix O. Sutton, of Clarksburg, for appellee West End Plumbing Co.

MEREDITH, J. These three cases involve the validity of certain mechanics' liens, on three separate lots and the buildings thereon. They were heard together in the court below and also here. As the same point of law is raised in each case, a single opinion will suffice for all.

McOlvin Case.

In this case, Martin Petrel, in February, 1919, bought from C. T. Stealey, lot No. 98 in the Hartland addition to Clarksburg, the deed to be made upon payment of the purchase money. About March 1st Petrel took possession and began constructing a dwelling house thereon. He bought most of his materials from Glen Elk Lumber Company and the plaintiff. After the house was well under construction, he sold the property to McOlvin. The exact terms of sale are not shown; a deed was made by Stealey to McOlvin, dated May 31st, which he recorded July 29th. McOlvin paid Stealey the purchase money for the lot. His tenant took possession of the house about July 1st. The house was then substantially completed, though some of plaintiff's material for which it claims a lien was furnished as late as July

24th. Petrel paid no part of the purchase money on the lot and made no formal assignment of his contract to McOlvin, but verbally directed Stealey to make the deed to McOlvin. McOlvin appeals from a decree allowing plaintiff's lien for materials furnished for the construction of the house, on the theory that Petrel was a "contractor" for the construction of the house and not the "owner" of the lot on which the house stands. As already stated, the terms of McOlvin's purchase are not clear, but that is his fault. He borrowed \$2,600 from a loan company, secured by deed of trust upon the property, and part of this, if not all, was used in paying claims for labor and materials. He claims he then had no knowledge of plaintiff's demand. Of course, that makes no difference. He was bound to know. Petrel swears that he was merely a contractor, though for his share he was paid by McOlvin some \$350 or \$400; that he did not own the lot, never paid anything on it. He says he contracted to build the house for McOlvin; he may have contracted with McOlvin to finish the house for him, but he certainly did not make any contract with him until some time in May, and then the house was well on the way to completion. When he started the work, he did not know that McOlvin would buy it, nor is there any evidence that he expected to sell it to him. He started building it for purposes of sale generally, and not to sell to any definite person.

[1, 2] Plaintiff's notice of lien was recorded October 15th, and within 90 days from the date of furnishing the last materials. Not knowing the exact relations between Stealey, Petrel and McOlvin, it filed its notice of lien against all of them. If McOlvin were the purchaser of the lot from Stealey, in the first instance and Petrel merely a contractor to construct the house for McOlvin, then, under the mechanic's lien statute, the plaintiff should have served a notice of its claim of lien upon McOlvin, as owner of the property, within 60 days from the date of its furnishing the last item of materials, and in that event, its claim in this suit would be invalid, because no notice was served on McOlvin. But as already stated, McOlvin was not the original purchaser from Stealey. Stealey sold the lot to Petrel by written contract. Petrel was to pay the purchase money, but by his sale to McOlvin he got him to step into his shoes. McOlvin, under such circumstances, could not accept the benefits without assuming the burdens. By the contract of purchase with Stealey, Petrel became the equitable owner of the lot. Defendant complains that the written contract is not in the record. No matter whether the contract was written or verbal, Petrel took possession and made such valuable improvements that he would have been entitled to specific performance under the contract, even if it had not been in writing. Besides, there was no

controversy about that. Stealey made the deed according to the contract, except at Petrel's request, he made it to McOlvin instead of to the original purchaser. Petrel was the equitable owner of the lot, and his interest therein became liable for any mechanics' or materialmen's liens, for which Petrel was responsible to the same extent as if he had the legal title to the lot, under a deed from Stealey, with a vendor's lien reserved in the deed securing Stealey's purchase money. The case cited by counsel for McOlvin, *Charleston Lumber & Manufacturing Co. v. Brockmyer*, 18 W. Va. 586, instead of denying this rule, directly affirms it. If Stealey had conveyed the lot to McOlvin, reserving a lien to secure his purchase money, he would have had the first lien, but the mechanic's lien claims against Petrel for work and material, would nevertheless have been valid claims against the property, to be paid out of it, after the satisfaction of Stealey's vendor's liens. The holder of the equitable title to land is an owner of the land within the meaning of our mechanic's lien statute. *Charleston Lumber & Manufacturing Co. v. Brockmyer*, 18 W. Va. 586. See, also, *Jacksonville Nat'l Bank v. Williams*, 38 Fla. 305, 20 South. 931; *Interstate Bldg., etc., Ass'n v. Ayers*, 71 Ill. App. 529; *Monroe v. West*, 12 Iowa, 119, 79 Am. Dec. 524; *King v. Smith*, 42 Minn. 286, 44 N. W. 65; *Fullmer v. Poust*, 155 Pa. 275, 26 Atl. 543, 35 Am. St. Rep. 881; 18 R. C. L. 885; 27 Cyc. 29; *Boisot, Mechanics' Liens*, § 301. And where one furnishes materials which are used in the construction of a building, under a contract with the owner or his authorized agent, he need not serve notice on the owner of his claim of lien; all he needs to do is to record his notice of lien within 90 days from the date of the last item furnished. The owner does not need such notice as by contracting for the materials, either directly himself or through an authorized agent, he already knows of claimant's right to his lien, and our statute does not require the service of any notice upon him. But where the owner has entered into a contract with a third party, who has agreed to do the work or furnish the materials, or both, and this third party, the contractor, has purchased materials or employed labor for the work, then the claimant furnishing the materials to, or performing the labor for, the contractor, must serve notice of his claim of lien upon the owner in order to hold the owner's property liable for his claim, and also record his notice of lien. Such notice must be served within 60 days and recorded within 90 days from the date of the last item of material furnished or of labor performed.

[3] Petrel being the equitable owner of the lot, plaintiff was not required to serve upon him any notice of its claim of lien; nor did it need to do so as to McOlvin. It

owed him no duty. He bought the property subject to the valid lien claims then filed or which might thereafter be filed for record against Petrel's equitable interest. It necessarily follows that plaintiff's claim for materials furnished Petrel, and which went into the construction of the dwelling placed on the lot, to which he had an equitable title, is a valid lien, and the decree so holding will be affirmed. We have not discussed the question whether plaintiff actually furnished the materials, as we think there can be no doubt about that.

Jacobs Realty Company Case—No. 1.

Some time in March, 1919, Fred Petrel contracted with Etta Pearl Spears for the purchase of lot No. 185 in the Hartland addition. The terms of purchase do not appear. About that time he took possession and started building a house thereon. A deed was made to him for the lot, dated June 17, 1919, recorded September 18th. On August 23d he conveyed the lot to J. R. Jackson, by deed, recorded September 18th. Jackson, on September 9th, conveyed to appellants, Jacobs Realty Company, ^{92/117}, and Southern Pine Lumber Company the remaining ^{25/117} of the lot, by deed, which was recorded September 22d.

Before the deed was made to Petrel, the plaintiff sold and delivered certain material for the construction of the dwelling on this lot, and its deliveries, beginning May 5th, continued up to August 1st. On October 15th, it recorded its notice of lien against M. Petrel, F. Petrel, J. R. Jackson, Jacobs Realty Company, and Southern Pine Lumber Company. The present owners, the appellants, deny that Fred Petrel was the owner, but say he was the principal contractor in the construction of the dwelling house, though there is no evidence of that fact. He bought the lot, started the building and then received a deed for it before the work was finished. The only difference between this case and the McOlvin Case is that the original purchaser in the McOlvin Case did not ultimately take legal title to the lot; in this case he did; hence this case is governed by the same principles as the McOlvin Case. Plaintiff perfected its lien within the 90 days required, and the decree enforcing its lien as well as the other liens is affirmed.

Jacobs Realty Company Case—No. 2.

[4] It appears that Fred Petrel contracted with Florence Rider Dupay for the purchase of lot No. 179, Hartland addition, though the deed for the lot was made to his father, P. M. Petrel, dated June 17, 1919, recorded September 18th. August 20th, P. M. Petrel conveyed it to J. R. Jackson, a son-in-law, and he recorded his deed September 18th.

Jackson, on September 9th, by deed conveyed ^{92/117} of the lot to Jacobs Realty Company, and ^{25/117} to Southern Pine Lumber Company, which deed was recorded September 22d. Fred Petrel paid nothing on the lot and swears he had no interest in it; that he was employed by his father to build the house on a commission of 5 per cent. It appears that Fred Petrel ordered most of the material, but some may have been ordered by his father, P. M. Petrel, and possibly some by his brother, Martin Petrel. We think it is clear that, for whatever was ordered by the two sons for this dwelling, P. M. Petrel was responsible. Fred told the plaintiff, about the time the last materials were ordered, to charge the account to his father and the two sons, and this was done, the plaintiff understanding that they were partners. However, we think that P. M. Petrel, he being the owner of the lot, is bound by the acts of his son Fred on the score of agency. Where materials are furnished for the construction of a building, under a contract with the owner or his authorized agent, the owner's property is subject to a lien for the materials. Upon what terms P. M. Petrel acquired Fred's equitable interest in the lot does not appear. Nor does it appear whether Fred had a written contract for the purchase of the lot. We simply have his bare statement that he contracted for it. He may have contracted for his father.

Plaintiff, on October 15th, filed its notice of lien against Florence Rider Dupay, P. M. Petrel, Fred Petrel, Martin Petrel, J. R. Jackson, and the present owners, the appellants. It began furnishing materials May 15th and ceased August 2d. Its notice is in the usual form and affects the interests, whatever they might be, of all who were named in it. The fact that some named in the notice did not have any interest in the property does not affect its validity as to those who did. 27 Cyc. p. 165. The notice of lien was filed within the period required by the statute. That Fred Petrel was employed by his father to build the house on a percentage or cost plus basis did not make him an independent contractor. He was his father's agent, and his father was bound by what he did, so notice to the father of plaintiff's claim of lien was not required. Filing it for record within the required statutory period was sufficient. The claims of plaintiff and the other lienors are fully proved; the liens were properly perfected and the decree adjudicating such claims to be liens on this property will also be affirmed.

We therefore affirm the decrees in each case.

(90 W. Va. 781)

**CARSON v. JACKSON LAND & MINING CO.
et al. (No. 4494.)**(Supreme Court of Appeals of West Virginia.
April 18, 1922.)*(Syllabus by the Court.)*

1. Easements ¶17(4)—Parties buying lots held to acquire easements to streets, alleys, and bridge shown on plat.

Where the owner of a tract of land lays the same off into lots, streets, and alleys, and constructs a bridge connecting one of the streets so laid off with a street of an incorporated city lying on the opposite side of a practically impassable obstruction, and makes a plat upon which the lots, streets, alleys and bridge are shown, and records said plat in the office of the clerk of the county court, and sells the lots indicated thereon with reference thereto, the purchasers of such lots, as an incident to their purchases, acquire an easement in such streets and alleys, and the bridge shown upon said plat, whether the same are ever formally accepted by any public authority or not.

2. Easements ¶53—Duty to maintain rests upon owner of easement in absence of contractual or prescriptive obligation on servient owner.

The duty to maintain an easement in such condition that it may be enjoyed is upon those entitled to its use, in the absence of some contractual or prescriptive obligation upon the owner of the servient estate to so maintain it.

3. Easements ¶53—Servient owners not bound to keep up bridge and not liable for injuries thereon.

Where the owners of a tract of land lay the same off into lots, streets, and alleys, and connect one of the streets thus laid off with an incorporated city lying across a practically impassable hindrance or obstacle, and make and record in the office of the clerk of the county court a plat showing such streets and alleys, and the bridge thus constructed, and make sale of the lots thus laid off, there is no duty upon the parties so laying off said lots and selling the same to maintain said bridge in a reasonably safe condition for the use of the purchasers of the lots.

Error to Circuit Court, Harrison County.

Action by George R. Carson against the Jackson Land & Mining Company and others. Demurrer to declaration sustained, and plaintiff, not desiring to amend, judgment of nil capiat was rendered, and plaintiff brings error. Affirmed.

G. H. Duthie and Law & McCue, of Clarksburg, for plaintiff in error.

Millard F. Snider and Steptoe & Johnson, all of Clarksburg, for defendants in error.

RITZ, J. This suit was instituted for the purpose of recovering damages for the death of plaintiff's intestate, from a fall through a bridge, which it is claimed the defendants

were under the duty to keep in good order and repair. The court below sustained a demurrer to the declaration as amended, and the plaintiff, not desiring to further amend, a judgment of nil capiat was rendered, to review which this writ of error is prosecuted.

The declaration as amended alleges that, in the year 1911, the defendants were the owners of a tract or parcel of land situate near the city of Clarksburg, and on the north side of the Baltimore & Ohio Railroad Company's tracks and right of way; that at or about that time they caused the same to be laid off into town lots, streets, and alleys, and made a plat thereof, designating the same as the Jackson, Snider & Maxwell addition to Clarksburg, and caused said plat to be recorded in the office of the county clerk of Harrison county, designated as "Montpelier Plat No. 1"; that since said time the defendants have offered for sale, and have sold to persons desiring to purchase the same, many of the lots or parcels of land shown upon said plat; that about the same time the defendants built a bridge designated on the said plat as Montpelier bridge, constructed of iron, stone, etc., over and across the tracks of the Baltimore & Ohio Railroad Company, and about 25 feet above the level of said tracks; that said bridge was constructed for the accommodation of vehicles, as well as pedestrians desiring to use the same, and extends from the lots platted and laid off as aforesaid across the said railroad, and connects the same with Pike street in the city of Clarksburg; that the said bridge was constructed by the defendants as a means of approach from the said city of Clarksburg to the said Montpelier addition, and for the purpose of making access to said lots more convenient, and for the purpose of making said lots more attractive to prospective purchasers, and was open to, and ever since has been used by, all persons owning a lot or lots in said addition, or any persons transacting any business in said addition, and that the same is the only convenient and accessible way to said lots from the city of Clarksburg; that the said bridge was open to general use by the public, and that the public used the same by the invitation and consent of the defendants; that in September, 1917, the plaintiff purchased from the defendant land company a certain lot situate in said addition, with the buildings thereon and appurtenances thereunto belonging, upon which lot he lived with his family at the time of the injury complained of, and that he, together with all members of his family, with the knowledge, invitation, and consent of the defendants, used the said bridge across the said railroad tracks in going to and from the city of Clarksburg and other places; that at the time of the happening of the accident to the plaintiff's decedent the said bridge had not been accepted by the

county court of Harrison county, or by the common council of the city of Clarksburg as and for a public bridge; that it became and was the duty of the defendant, under the circumstances, to keep the said bridge in reasonably good and safe condition for travel thereon and thereover by the plaintiff and members of his family; that the defendants did not perform their obligation in this regard, but allowed the said bridge to become out of repair and in an unsafe condition for travel, by means whereof, in June, 1920, the plaintiff's intestate, a boy four years of age, accompanied by his sister, when walking across said bridge in the exercise of due care, fell with great force and violence through the floor thereof to the tracks of the railway company underneath, and sustained injuries from which he died.

[1] The defendants insist that the declaration does not state a cause of action against them for two reasons: First, because the laying off of the tract of land into lots, streets, and alleys, and making a plat thereof, together with the bridge in question, and selling lots in relation thereto, constituted an irrevocable dedication by the defendants of the streets, alleys, and bridge shown upon said plat to the purpose thereon indicated, whether the same had ever been accepted formally by any public authority or not; that, when they sold the lots in said addition, they in effect conveyed to each purchaser, not only the lot covered by his deed, but also an irrevocable easement in the bridge, streets, and alleys, and that they were under no obligation to maintain this easement in such condition that it could be used safely; and, second, that the Legislature, by extending the corporate limits of the city of Clarksburg in the year 1917, so as to include this Montpelier addition, thereby accepted, on behalf of the public authorities, the streets and alleys, as well as the bridge shown upon said plat, and the duty to maintain the same in good order and repair from that time devolved upon the city of Clarksburg.

[2, 3] It cannot be doubted but that, when the defendants laid off this tract of land and made the plat thereof, and recorded the same in the county clerk's office, and sold lots in regard thereto, the purchasers of such lots acquired an easement in the streets, alleys, and public ways shown upon said plat, whether the same were accepted by any public authority or not, and they could not be deprived of this easement or right by the proprietors of the subdivision without their consent. *Cook v. Totten*, 49 W. Va. 177, 38 S. E. 491, 87 Am. St. Rep. 792; *Edwards v. Moundsville Land Co.*, 56 W. Va. 43, 48 S. E. 754; *Griffin v. Richardson*, 83 W. Va. 442, 98 S. E. 523. It is likewise very well established that the owner of an estate over which there exists an easement is under no obligation to maintain the easement in a condition

fit for use. The duty to maintain it so that it may be enjoyed rests upon those entitled to its enjoyment, in the absence of some contractual or prescriptive relation imposing this duty upon the owner of the servient estate. *Griffin v. Richardson*, supra; 9 R. O. L., title "Easements," § 51, and authorities there cited; *Nichols v. Peck*, 70 Conn. 439, 39 Atl. 803, 40 L. R. A. 81, 66 Am. St. Rep. 122; *City of Bellevue v. Daly*, 14 Idaho, 545, 94 Pac. 1036, 15 L. R. A. (N. S.) 992; *Hammond v. Hammond*, 258 Pa. 51, 101 Atl. 855, L. R. A. 1918A, 590; *Lamb v. Lamb*, 177 N. C. 150, 98 S. E. 307; *Dudgeon v. Bronson*, 159 Ind. 562, 64 N. E. 910, 65 N. E. 752, 95 Am. St. Rep. 315, and note at page 328; *Walker v. Pierce*, 38 Vt. 94; *Brill v. Brill*, 108 N. Y. 511, 15 N. E. 538; *Kirkland v. Pitman*, 122 Ga. 256, 50 S. E. 117. This citation of authorities might be extended by the addition of many other adjudicated cases, but the foregoing sufficiently illustrate the principle, from which there seems to be no dissent, that the owner of an easement over the lands of another is under the obligation to keep such easement in proper condition to be enjoyed, in the absence of an agreement devolving this duty on the owner of the servient estate.

It is insisted here, however, that the relation of the parties to this bridge is very different from their relation to the streets in the subdivision, and their rights and obligations in regard thereto are not the same as the relative rights and duties of the parties in relation to the easement over the streets. It is insisted that the bridge is not a part of the system of streets and alleys in which the purchasers of lots acquired an easement, but is an instrumentality owned by the defendants which they invite the lot owners to use, and their liability is determined by the law governing the duty of one to keep his premises in a safe condition, or else pay damages to a person whom he invites to come thereon who may be injured because of their unsafe condition. It is a little difficult to understand how the duty of the parties in regard to the bridge can be any different from their relative duties in regard to the streets and alleys in the subdivision. The averment of the declaration is that this bridge was laid down upon the plat, and that it connected one of the streets of the subdivision with one of the streets of the city of Clarksburg, and formed the only practicable way of passing from the one to the other. The fact that the easement provided for travel was not upon the surface of the ground can make it no less a street. The action of the defendants in constructing this bridge and laying it down upon the plat as a part of one of the streets of their subdivision, as between themselves and the purchasers of said lots, irrevocably dedicated it to the use of such purchasers, and, when the lots were sold, each purchaser, as an incident to the

grant of the lot, acquired an easement not only in the streets and alleys as they existed upon the surface of the ground, but also in this bridge, as it then existed. The plaintiff's intestate was not upon this bridge as an invitee of the defendants. He was on there in the exercise of his rights under the easement granted as incident to the conveyance of the lot to the plaintiff. When the plaintiff purchased the house and lot in this subdivision, he acquired the right to use this bridge, not as an invitee of the defendants, but as the owner of an easement in it, and when he or his family used the bridge he was using his own property, and was not using the property of the defendants at all. When the defendants laid off these lots and constructed this bridge as a part of one of the streets, they, in effect, said to the purchasers of lots:

"We have provided streets and alleys in this subdivision as laid down upon this plat, and as indicated upon the ground. We have likewise provided, as a means of access from this subdivision to the business sections of the city of Clarksburg, the bridge laid down upon the map, and also actually constructed upon the ground. We dedicate these streets and this bridge to the use of purchasers of our lots."

Thereafter the purchasers of said lots owned an estate in the streets and alleys, and in the bridge superior to that of any one else, and their right to use the streets and alleys, and the bridge constitutes an easement which is dominant to any estate remaining in the defendants, if, indeed, there remains any such estate. The case of *Oney v. West Buena Vista Land Co.*, 104 Va. 580, 52 S. E. 843, 2 L. R. A. (N. S.) 832, 113 Am. St. Rep. 1068, involved the rights of parties in a bridge, under circumstances very similar to those existing here. In that case the land company had laid off a tract of land into lots and constructed a bridge across the river, connecting one of the streets of their subdivision with one of the streets of Buena

Vista, and one of the questions involved in the case was: Upon whom devolved the duty to maintain this bridge? The court in that case, in a well-reasoned opinion, held that, after the land company built the bridge and dedicated it upon its plat to the purchasers of the lots, its duty was at an end; that the lot owners then became the owners of the dominant estate in the bridge, and the duty devolved upon them to keep it in repair. Another case which throws some light upon the question involved here is that of *Cole v. Pierce* (N. H.) 106 Atl. 605. In that case there were two mills on a canal fed by water from a dam in a stream, which were conveyed, the lower mill to the plaintiff, and the upper mill together with the dam to the defendant. The deed to the plaintiff gave him the right to draw water from the stream by means of the dam. The plaintiff insisted that it was the duty of the defendant to maintain the dam so that the water to which he was entitled might be derived therefrom, but the court held that the defendant was under no duty in that regard so far as the plaintiff was concerned.

It results, from what we have said, that the owners of the lots in this Montpelier subdivision own an easement in this bridge, as well as the streets used in connection with it, and that there was no duty upon the defendants, after the dedication of this bridge to that purpose, to maintain the same so that the lot owners might enjoy their easement. Having come to this conclusion, it is unnecessary for us to consider whether or not the Legislature accepted this bridge and the streets laid off in the Montpelier addition, by the adoption of a new charter for the city of Clarksburg, under the terms of which this addition, as well as the bridge, were included with the corporate limits of said city.

Our conclusion is that the declaration does not state a cause of action against the defendants, and the judgment complained of is affirmed.

(183 N. C. 800)

STATE v. PUGH. (No. 472.)

(Supreme Court of North Carolina. May 10, 1922.)

1. Criminal law \S 309 — Witnesses \S 333 — Character of witness presumed good but is subject to attack.

The character of a witness is subject to attack by cross-examination or by testimony of other witnesses, but his character is presumed to be good until the contrary is shown.

2. Criminal law \S 865(1) — Instructions as to their duty in sending jury back for further deliberation held not ground for reversal.

Instructions in sending jury back for further deliberation after jury had reported without rendering a verdict because of disagreement, that it was the duty of the jury to reach a decision if it could do so without doing violence to the conscience of the jurors, that the case was one of importance to the state and to the defendant, and that some jury was required to pass upon it, held not ground for reversal.

3. Criminal law \S 856(8) — Remarks of court in discharging a former jury held not ground for reversal; "opinion."

Action of court in discharging a jury after verdict in other case, with statement that, "You evidently have important business matters at home that are attracting your attention, judging by the verdict which you have just returned, and in view of that fact the court will excuse you for the term," held not ground for reversal in case subsequently tried before another jury; such statement not constituting an expression of opinion on the facts in violation of C. S. \S 564.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Opinion.]

4. Jury \S 76 — Court has discretion to discharge jury from further service after rendition of verdict.

The court in its discretion may discharge a jury from further service after rendition of verdict.

5. Criminal law \S 1144(15) — Court in discharging jury from further service after rendition of verdict presumed to have acted properly.

The court, in discharging jury from further service after rendition of a verdict, will be presumed to have acted properly and to have made no improper remarks.

6. Criminal law \S 1134(9) — Exception to action of court in previous trial not considered.

Exception complaining of action of court in discharging a jury which had rendered a verdict in other case from further service will not be considered in subsequently commenced prosecution, since it does not relate to anything that occurred during the trial in such subsequent case.

Appeal from Superior Court, Randolph County; Brock, Judge.

Maryland Pugh was convicted of an at-

tempt to burn an unoccupied dwelling, and he appeals. No error.

C. N. Cox and Brittain, Brittain & Brittain, all of Ashboro, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. The only errors assigned are for matters occurring after the case had been submitted to the jury. There were no exceptions to the evidence or charge.

[1] After the jury had been in deliberation for some time, they came into court for further instructions and asked the judge this question: "Is a witness' character considered good until proven bad in court?" to which the court replied, "The witness' character is presumed to be good until the contrary is shown." This reply is undoubtedly correct. A witness' character is subject to attack as soon as he goes on the stand. If the opposite party wishes to attack it, he may do so by witnesses or by the manner of his cross-examination. If this is not done and there is nothing in the witness' own testimony which impeaches him, it may well be taken that his character is to be considered good.

In 40 Cyc. 2552 et seq., the authorities are summed up from the different states and hold that—

"A witness is presumed to speak the truth, but such presumption is, of course, subject to be overcome by any other matters tending to indicate that the witness is not worthy of credit and ceases where it appears that the witness has testified falsely as to a material matter."

Also:

"As a general rule, evidence is not admissible to sustain the credibility of a witness who has not been impeached, and, where a witness has not been impeached, it is not permissible to support his testimony by other evidence which, although corroborative in its nature, bears on the credibility of the witness rather than on the issues in the cause."

Further it is held that—

"Evidence is not admissible to show the good character or reputation for truth and veracity of a witness whose character has not been attacked, and, where a witness has not been impeached, it is not permissible to support his testimony by showing that he had made statements out of court in conformity to his testimony, or that his testimony is consistent to that given by him in a previous proceeding, or that he had never made any statements contradictory to his testimony. But it is, of course, permissible to corroborate an unimpeached witness as to any fact in issue in the case."

The ground of all these decisions is that the character of a witness is to be deemed good unless it is impeached. It may be impeached either by direct testimony as to his character or by the manner of his examina-

tion, and in such cases the court will admit testimony in support of his good character, but it would be a useless consumption of time to put in testimony as to the good character of a witness which has not been impeached in any way.

In *State v. Knotts*, 168 N. C. 190, 83 S. E. 972, the court held that it was not error to refuse an instruction that the law presumed defendants were men of good character. While a defendant is presumed innocent of the particular charge for which he is being tried, there is no presumption as to his good character, and the mere fact that he is indicted and on trial is an attack upon his character when offered as a witness, as well as the fact that he is an interested witness.

[2] The jury having again returned to the courtroom without having reached a verdict, and having informed the court that it stood eleven to one, the court then said to them:

"The court does not know which way the eleven stand, or who you are, or how the one stands, or who he is, and it does not concern the court to know. But the court instructs you that each of the jurors must be satisfied beyond a reasonable doubt before they can convict the defendant; it is the duty of the jury, if you can do so without doing violence to your conscience, to reach a decision. The case is one of importance to the state and to the defendant, and some jury must pass upon it."

This is unexceptionable. The court also suggested that it was the duty of the juror, if he could make up his mind to a moral certainty, to do so, and told the jury to go back and see if they could get together. The court, during the course of its remarks to the jury, stated to the jury that it was their duty to consider the evidence, and not to decline to agree on account of stubbornness; that to decline to agree, if one could do so without doing violence to his conscience, was not necessarily a "mark of great intelligence or high citizenship." In this we can see nothing prejudicial of which the defendant can complain.

The defendant and his counsel were in court at the time the foregoing remarks were made to the jury, and they made no objection and did not make any exception at the time.

[3-5] After the verdict was rendered, the defendant entered an exception on the following ground:

"On Tuesday morning previous when a former jury was trying a different case, *State v. Sizemore*, and returned a verdict of not guilty, the court stated to that jury, there being present some who subsequently served as jurors in this case, as follows: 'Gentlemen, you evidently have important business matters at home that are attracting your attention, judging by the verdict which you have just returned, and, in view of that fact, the court will excuse you for the term.'"

This was in the discretion of the trial

judge, and he had the power and it was his duty in a proper case to discharge a jury from service. His remarks are not shown to have been improper, and the presumption of law is that the judge acted properly. Certainly it was no expression of opinion by him on the facts in issue in this case, under our statute which forbids a judge to give an opinion. It is no violation of the Act of 1796, now C. S. § 564, which provides:

"No judge, in giving a charge to a petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury."

The judge in discharging the former jury, or in making any remarks during the term in the discharge of his duty to impress the public with the duty of jurors in their conduct, is presumed to have acted correctly, and his remarks in so doing can in no possible view be taken as a violation of this statute, which forbids the judge to express an opinion "whether a fact is fully or sufficiently proven" in this trial.

This matter has been recently reviewed in *State v. Baldwin*, 178 N. C. 687, 100 S. E. 348, 10 A. L. R. 1112, where, on the conviction of a party of having in possession spirituous liquors, the judge in sentencing the prisoner expressed condemnation of the transaction, and subsequently at the same term the brother of that defendant was tried for connection with the same offense, and the same objection was made as in this case, and the court said that the judge's remarks could not be considered as an expression of an opinion on the trial of this defendant any more than the verdict of guilty against his brother on whom he was passing sentence had been, and added:

"At common law, and in England to this day, the judge is not forbidden to express an opinion upon the facts of any case, but it was deemed that the judge, who is an integral part of the trial, could be of aid to the jury in expressing an opinion upon the reasonable inferences to be drawn from the evidence, though of course he could not direct a verdict when there was conflicting evidence. The same rule still obtains in all the federal courts, and the courts of nearly every state of the Union. It is, therefore, not an inherent right of a defendant that the judge should be restricted from expressing any opinion during the trial."

It is further said that our statute of 1796, now C. S. § 564, forbids a judge only "in giving a charge to the petit jury from giving an opinion whether a fact is fully or sufficiently proven." Being in derogation of the common law and of the practice and procedure in the English and federal courts, and of the procedure generally elsewhere, we cannot extend it beyond its terms"—citing many cases to the same effect. The subject is so fully discussed in that case that repetition is unnecessary.

[6] Furthermore, the exception was not to anything that occurred during the trial and presents no question for consideration in this case. There is nothing which would authorize us to say that there was such misconduct of the judge at that term as would vitiate this, or any other trial at that term.

The judge is presumed to have acted properly in his discharge of the jury in the former case, which was a matter committed to his discretion, and certainly it is not to be reviewed in this case. If it had vitiated this trial, it would have vitiated every other trial at this term.

No error.

(183 N. C. 444)

BASS v. SOUTHERN R. CO. et al. (No. 449.)

(Supreme Court of North Carolina. May 8, 1922.)

1. Master and servant §288(6)—Assumption of risk within federal act held for jury.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for injuries to a brakeman, where there was evidence that he was injured while stepping from one car to another by reason of a sudden, violent, unusual, and unforeseen jerk of the train, a nonsuit was properly denied.

2. Master and servant §204(1)—Assumption of risk defense under federal act.

Under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), an employee assumes the risk incident to the proper and careful operation of a railroad, but does not assume the risk of the company's or a fellow servant's negligence.

3. Negligence §141(12)—Charge on comparative negligence under federal act held proper.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for injuries, the charge, authorizing diminution of damages on account of plaintiff's contributory negligence, held proper.

Appeal from Superior Court, Mecklenburg County; Finley, Judge.

Action by W. M. Bass against the Southern Railroad Company and others. From a judgment for plaintiff, both parties appeal. No error.

This action was brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), the plaintiff having been injured while working as a brakeman for the defendant in interstate commerce. The charge on the subject of damages was as follows:

"There is one phase of this case which I forgot to call to your attention. This is, if you answer the second issue, 'Yes'—that is the issue as to contributory negligence, that plaintiff is guilty of contributory negligence—then you take that in consideration in making up your verdict as to the amount of damages. If you answer, 'No,' that he was not guilty of con-

tributory negligence, of course that disposes of that issue and all matters resulting from it, but if you answer it 'Yes,' that plaintiff was guilty of contributory negligence, then you consider that in the question of damages; in other words, the amount of damages that you ascertain that plaintiff would be entitled to recover should be diminished by the amount of negligence that you find the plaintiff contributed towards this sum total of damage; in other words, the net amount of damage should be ascertained, and the plaintiff charged up with the proportionate amount, or with a certain amount of this entire damage in proportion to the amount that he has contributed to the result. The amount of damage that plaintiff would recover would be the amount of negligence that the defendant has been guilty of proportioned to the total amount of negligence, including that the plaintiff has been guilty of and the amount the plaintiff has been guilty of deducted from the total amount, leaving the net amount for you to ascertain as your verdict on the question of damages."

Jno. C. Wallace, of Winston-Salem, and Jno. M. Robinson, of Charlotte, for plaintiff.

F. M. Shannonhouse and W. S. Beam, both of Charlotte, for defendants.

CLARK, C. J. The plaintiff, a brakeman of 14 years' experience in the line of his duty was proceeding from the cab of a freight train towards the engine while the train was in motion. While stepping from a box car to a flat car there was, according to his evidence, such a violent, sudden, and unusual jerk in the train that "it jerked the flat car from under my foot, and it jerked so hard it jerked me loose from the car. It jerked my hold loose, and I slipped and went through." The plaintiff's arm was cut off, and he sustained other serious injuries. The train consisted of an engine and 14 cars. These cars had been picked up, and put in the train at Statesville without any inspection being made either of the cars or the drawheads. This appears from the defendant's own witness.

The defendant assigned as error that the court refused to nonsuit the plaintiff. This was rested upon the proposition that under the federal Employers' Liability Act the plaintiff assumed the risk. It is not necessary to cite the numerous cases illuminating the law applicable, for it has been very clearly enunciated in *Reed v. Director General*, in an opinion filed February 27, 1922, 257 U. S. —, 42 Sup. Ct. 191, 66 L. Ed. —, which holds that—

"The doctrine of the assumption of risk, though not wholly abolished by the federal Employers' Liability Act has no application where the negligence of a fellow servant, which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury."

In that case Mr. Justice McReynolds says:

"Seaboard Airline R. Co. v. Horton, 233 U. S. 492—often followed—ruled that the federal Employers' Liability Act did not wholly abolish the defense of assumption of risk as recognized and applied at common law. But the opinion distinctly states that the first section 'has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff.'" And *Mondou v. Railroad*, 223 U. S. 49, 32 Sup. Ct. 175 (56 L. Ed. 327, 38 L. R. A. [N. S.] 44), "declared that 'the rule that the negligence of one employee, resulting in injury to another, was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee'"

—and added that in *Railroad v. Ward*, 252 U. S. 18, 40 Sup. Ct. 275, 64 L. Ed. 430, the court had said:

"The federal Employers' Liability Act places the coemployee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk" (citing *Railroad v. Carr*, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; *Railroad v. De Atley*, 241 U. S. 313, 36 Sup. Ct. 564, 60 L. Ed. 1016).

Justice McReynolds further said:

"In actions under the federal act the doctrine of assumption of risk certainly has no application when the negligence of a fellow servant, which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad, while engaging in Interstate Commerce, shall be liable to the personal representative of any employee killed while employed therein, when death results from the negligence of any of the officers, agents, or employees of such carriers."

[1] To the same purport are numerous decisions in this court. Among them *Jones v. Railroad*, 176 N. C. 260, 97 S. E. 48; *Weldon v. Railroad*, 177 N. C. 179, 98 S. E. 375; and *Lamb v. Railway*, 179 N. C. 619, 103 S. E. 440. All these cases were tried under the federal statute. Upon the evidence in this case, tending to show that there was a violent and unusual jerk of the train not foreseen by the plaintiff, which caused the injury, we think the case was properly submitted to the jury.

[2] The doctrine of assumption of risk under the federal Employers' Liability Act is that the employee assumes only the risk incident to the proper and careful operation of the railroad. It does not exempt the employer from liability for injuries or death, whether caused by the negligence of the corporation or by the negligence of a fellow servant. The defendant contended that the employer is liable only for injuries caused by the negligence of the company itself as by failure to furnish safety appliances and

otherwise; and also that the question of assumption of risk was a question for the court upon the plaintiff's evidence, and moved for a nonsuit, which was properly denied.

[3] The plaintiff excepted that the court did not charge the jury correctly as to the measure of damages, but we think that the charge in this respect was correct under the ruling approved in *Railroad v. Tilghman*, 237 U. S. 499, 35 Sup. Ct. 653, 59 L. Ed. 1069, and *Railroad v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172.

No error.

(183 N. C. 497)

SMITH et al. v. BEAVER et al. (No. 475.)

(Supreme Court of North Carolina. May 10, 1922.)

Acknowledgment \S 42—Justice held not authorized to change certificate of probate of deed signed by wife.

A justice of the peace, having made his certificate of probate of deed signed by husband and wife, without the examination of wife as to the facts, as required by C. S. \S 2515, and without knowledge of such statute, could not, long after the probate was taken, and certificate filed, and the deed registered, and after the parties had died, make a new certificate, stating the facts he should have found by such statute, since, even if empowered to amend certificate, he should not do so without affording the wife an opportunity to be heard, under section 3321.

Appeal from Superior Court, Rowan County; McElroy, Judge.

Action by Mrs. Gertie Smith and others against Archie Beaver and others. Judgment for plaintiffs, and defendants appeal. No error.

This was a civil action commenced by the plaintiff before the clerk of the superior court, and transferred to the civil issue docket and tried before McElroy, Judge, and a jury, at November term, 1921, of Rowan county superior court.

(1) The plaintiffs brought the action for the partition of the lands in question, which they inherited from their mother, Mary Jane Beaver, as they alleged, the land having been before then conveyed by Simeon J. Beaver, who owned it, and wife, Mary J. Beaver, to said Mary J. Beaver, on March 4, 1893, registered March 15, 1893. The defendant Archie Beaver answered, and set up sole seisin to the lands, claiming under a deed executed November 2, 1917, by Simeon C. Beaver and wife, Mary J. Beaver, to Simeon C. Beaver and wife, Mary Jane Beaver, recorded in Book 147, at page 293, and under a will of S. C. Beaver, dated November 27, 1919, devising the land to the said Archie Beaver.

(2) S. C. Beaver died in February, 1921, and his wife, Mary J. Beaver, died in July, 1920. This suit was commenced on June 20, 1921, and summons was served June 21, 1921. After the summons was served, and long after the death of both S. C. Beaver and wife, Mary J. Beaver, the justice of the peace who took the probate to the deed of November 2, 1917, executed a new probate, in accordance with the provisions of section 2515 of the Consolidated Statutes. The court refused to admit in evidence the deed with the new certificate. The only point involved in this case is the legal effect of the deed of November 2, 1917. If this deed is void, the plaintiffs were entitled to recover.

Judge McElroy held as a matter of law that the deed was void, as the probate was not taken in accordance with the provisions of section 2515 of the Consolidated Statutes.

The evidence, as to the probate of the deed was substantially as follows: The following is the probate first taken by the justice on November 2, 1917:

"North Carolina, Rowan County:

"Be it remembered that on this 2d day of November, 1917, before the undersigned W. L. Kimball, a justice of the peace of said county, personally appeared Simeon C. Beaver and wife, Mary J. Beaver, the grantors named in the foregoing deed, and acknowledged the due execution thereof by them as their act and deed, and thereupon the said Mary J. Beaver, wife of Simeon C. Beaver, being by me privately examined, separate and apart from her said husband, touching her free consent to the execution of said deed, on such separate examination declared she executed the same freely, of her own will and accord and without any force, fear or undue influence on the part of her said husband, or any other person, and does still voluntarily assent thereto. Therefore let the said deed, together with this certificate, be registered.

"Witness my hand and private seal, date above written. W. L. Kimball, Justice of the Peace. [Seal.]

"North Carolina, Rowan County:

"The foregoing certificate of W. L. Kimball, a justice of the peace of Rowan county, is adjudged to be in due form and according to law. Therefore let the said deed, with the certificates, be registered.

"Jno. B. Manly, Deputy C. S. C.

"Registered November 10, 1917, at 2 p. m., in Book 147, at page 293."

To the introduction of the foregoing deed, the plaintiff objects. Objection sustained, defendants except.

W. L. Kimball testified for defendants:

"I am a justice of the peace of Rowan county, and have been a justice for about 18 or 20 years. On November 2, 1917, I drew a deed from Simeon C. Beaver and wife, Mary J. Beaver, to themselves. They were both present and gave directions as to how they wanted the deed drawn.

"Q. I want you to state to the jury what directions they gave you as to the drawing of this

deed. (Plaintiffs object; objection overruled.) A. Mrs. Beaver wanted to make the land to her husband, and in the event one or the other would die, the land would go to the one that would survive. That was the object. That was the way they wanted, and the intention they wanted. This deed that is shown to me is in my own handwriting and is the one I drew up. I took the acknowledgment of Mrs. and Mr. Beaver, and took her private examination on November 2, 1917.

"Q. When you took her private examination on November 2, 1917, I want you to tell the jury what facts, if any, what conclusions, if any, you found on that day, and why you did not embody your findings and conclusions in the certificate of that date?" (Plaintiffs object; objection sustained; defendants except.)

"Questions by the Court: Q. At the time you took this acknowledgment, did you attempt to do anything else except to take the ordinary private examination of the wife? A. I did ask more questions than I usually do.

"Q. At that time, you didn't mean to set out anything different from the ordinary private examination? A. There was a good deal of discussion and talk.

"Q. You didn't attempt to find the facts and adjudge the matters as required by this section of this Revisal? A. No, sir.

"Q. You didn't know that section was in existence? A. No, sir."

The following evidence was excluded:

"Q. (defendants' counsel). Tell what conclusions you formed in your own mind when this deed was executed by Simeon C. Beaver and wife to themselves? A. I came to the conclusion that it certainly could not injure her. It never had been her land. It originally belonged to him, and, as they both stated, he turned it over to her as protection, and she now turned it back, and in the event of his death, it would go to her. She could not possibly be injured in any way. I found this at that time. (To the foregoing, the plaintiffs object. Objection sustained. Defendants except.)

"Q. Did you come to that conclusion? A. I came to the conclusion that it could not possibly be injurious to her at that time. (To the foregoing question and answer, plaintiffs object. Objection sustained. Evidence excluded, defendant excepts.)

"Q. After you found out that you had omitted your conclusions from the certificate and that the law required your conclusions to be embodied in your certificate, did you then file a new certificate to that deed? A. I did. (To the foregoing question and answer the plaintiffs object. Objection sustained. Evidence excluded. The defendants except.)

"Q. Is this certificate attached to the deed which I hand you, that is, the certificate that you signed on June 29, 1921? A. Yes, sir. (This was after the death of both parties, and the new certificate was drawn up on June 29, 1921.)

"Q. Does this certificate, dated June 29, 1921, embrace and set out your conclusions you came to on the 2d of November, 1917? A. Yes. (Plaintiffs object; sustained; defendants except.)

"Q. At the time you drew the deed on No-

vember 2, 1917, mentioned in the pleadings, did you know that the law required your conclusions to be set out? A. No, sir.

"Q. If you had known that there was such a law, would you have embodied it in your certificate? (Plaintiffs object; sustained; defendant excepts.)"

The defendant proposed to show that, if the justice had known that the law required his conclusions to be put in his certificate, he would have put them in, and that his findings and conclusions were omitted through ignorance or inadvertence.

The defendant next offered in evidence the deed dated November 2, 1917, heretofore introduced in evidence, together with the certificate of probate signed by W. L. Kimball, justice of the peace, on June 20, 1921, and registered in Book 167, page 99, which new certificate is in words and figures as follows (omitting acknowledgment and privy examination, which are in the usual form):

"I further certify that on said November 2, 1917, I carefully examined into the facts causing the execution of said deed, and found that the original deed was in the name of Simeon C. Beaver, and that he became financially involved, and in order to save his lands executed a deed to his wife, Mary J. Beaver, and that she held the title to said lands in trust and upon the understanding and agreement to reconvey the same to him when called upon, and that she really had no interest in said real estate. I further find as a fact at said time that the said Mary J. Beaver desired to execute a title to her said husband for said lands, and it was the purpose to so fix the title that the survivor should have the land at the death of the other. I also certify that I found as a fact on November 2, 1917, that said conveyance of said deed from Simeon C. Beaver and wife, Mary J. Beaver, was not unreasonable or injurious to her, the said Mary J. Beaver, and that no undue advantage was taken of her. All of the foregoing facts were found by me, and the acknowledgment made by Mary J. Beaver on November 2, 1917, the date of the execution of the said deed, and the date that the probate was made, and that these facts were omitted by me through ignorance of the law, mistake and inadvertence.

"Witness my hand and private seal, this 29th day of June, 1921. W. L. Kimball, Justice of the Peace. [Seal.]"

This certificate is to be read in connection with and as a part of the deed heretofore offered in evidence.

"North Carolina, Rowan County:

The foregoing certificate of W. L. Kimball, a justice of the peace of Rowan county, is adjudged to be in due form and according to law. Therefore, let the said deed, with this certificate, be registered.

"J. F. McCubbins, Clerk Superior Court.

"Registered in Book 167, at page 99, on July, 4, 1921, at 10 a. m."

To the introduction of the foregoing deed, with last certificate of probate, the plaintiffs object, sustained, defendants except.

Cross-examination: "I found out that my certificate of probate was improper when this case came up. I dictated my last certificate. Q. Could you dictate to the stenographer the certificate? A. Yes. On the private examination of the said M. J. Beaver she says that she executed the same freely, of her own will and accord, without any influence. I find that she voluntarily said that she executed the deed voluntarily, without any fear of her husband or any one, and that she still voluntarily assents thereto, and that she further said that she wanted Mr. Beaver to have the land; that it was his land; had been his land, and he had given it to her because he had got in a little trouble; intended to make it back as soon as the time came to do it; the time had now come, and she wanted him to have it; in case of his death she wanted it so that the one who would survive would get the land. As to the findings of fact that it was not injurious, this is an unusual certificate, you know. I could not do that. It is not on our blanks. Defendants' counsel prepared the certificate. That is, he typewrote it, but I read it over. I am willing to swear to anything that is on it. It is my certificate, if he did write it."

R. A. Smith testified for defendants:

"I was a magistrate and drew a deed from Simeon C. Beaver and his wife, Mary J. Beaver. I do not remember who was present, but I know that he was present and she also. Q. (by defendant). You may state what they told you about this deed, the way they wanted it fixed, and what was the understanding, if any, between Simeon C. Beaver and Mary J. Beaver. (To the foregoing question, plaintiffs object; sustained; defendants excepts.)"

The defendant proposed to show by this witness the following facts:

"I was called to his home to fix some papers for him. He wanted a deed made for the property; that it was Simeon C. Beaver's property, and they wanted it made to his wife. I asked why, and he said, 'Well, he got into some trouble some way, and he wished to make the deed to her.' I drew the papers the best I knew how, and the papers were recorded. My recollection was that he wanted a deed made to her in order to keep from paying a certain sum, or something like that; there was some trouble that he was looking for, and he wanted to make this deed to his wife that way. Q. Was anything said about how long she was to hold it for him? A. I would not be positive whether there was or not. Four or five years after this deed was made, she asked me if they could sell and make a good title, and I told them that they could, so far as I knew. I do not remember the number of acres."

The judge charged the jury as follows:

"In this case of Smith v. Beaver, the defendant Archie Beaver relies entirely on the deed dated November 2, 1917, which S. C. Beaver and his wife attempted to execute to S. C. Beaver and wife. The court instructs you, gentlemen, as a matter of law, that the deed is void, and that S. C. Beaver, under whom the defendant Archie Beaver claims, took nothing by it. Now, that being the view of the law

taken by the court, it is unnecessary to go further into the facts, as he relies entirely on that deed, and if the deed is void, he had no title whatever to this particular tract of land. The will of S. C. Beaver, so far as this tract of land is concerned, did not pass the title to it, he did not own it, and he could not will it. As I understand it, there is another tract of land about which there is no controversy, devised by Beaver to this same defendant Archie Beaver; but, as the deed was void, any attempt that S. C. Beaver made to devise the land by the will in so far as this particular tract of land is concerned, conveyed nothing.

"Now this court submits for your consideration the following issue, gentlemen: Are the plaintiffs the owners in fee simple of an undivided three-fourths interest in the lands described in the complaint, as therein alleged?"

"The court instructs you, gentlemen, that if you believe the evidence taken in its light most favorable to the defendant Archie Beaver, you will answer that issue, 'Yes.' If you do not believe the evidence, you will answer it, 'No.'"

To the foregoing charge and to the court directing the jury that if they believed the evidence, they should answer the issue, "Yes," and to the failure to give instructions requested, the defendants excepted. The jury answered the issue, "Yes." Judgment for plaintiff, and exception by defendant, who appealed.

B. D. McCubbins and R. Lee Wright, both of Salisbury, for appellants.

Rendleman & Rendleman, of Salisbury, for appellees.

WALKER, J. (after stating the facts as above). Whatever may be the true rule, in cases of this kind, concerning the power of the justice to alter his certificate as to the probate of a deed and privy examination of a married woman, who was a party to it, he cannot do so long after the probate was taken and the certificate had been made and filed (on November 2, 1917), and the deed duly registered on that date. When the justice admitted, in answer to questions from the judge, as was done in this case, that "he did not attempt to find the facts and adjudge the matters as required by section of the Revisal, and that he did not even know, at the time (November 2, 1917), that the section was in existence," and it appears that both of the parties to the deed, husband and wife, were dead at the time, the justice made an entirely new certificate, in which he attempts to find material facts not stated in his first certificate, and essential to have been found and inserted in it at the time it was made.

In the case of *Butler v. Butler*, 169 N. C. 584, 86 S. E. 507, Ann. Cas. 1918E, 638, this court, in considering a somewhat similar case, said, through Justice Allen (169 N. C. at p. 588, 86 S. E. 510, Ann. Cas. 1918E, 638);

"There is much conflict of authority as to the power of a judicial officer to amend his certificate of probate after the instrument he is probating has passed from his hands, but it seems that the weight of authority is against the exercise of the power (1 Devlin on Deeds, § 539 et seq.), and all agree that it is a power fraught with many dangers. The higher judicial tribunals are not permitted to correct their records without notice to the parties and without an opportunity to be heard, and if the position of the defendant can be maintained, a justice of the peace, who has no fixed place for the performance of his official duties, may at any time, and when parties cannot be heard, change his certificate of probate and materially affect the titles to property."

The exercise of the power of amendment by a justice in a case of this kind was fully discussed in the several opinions filed in *Butler v. Butler*, supra, and we need not extend that discussion but very little in this opinion. The case of *Jordan v. Corey*, 2 Ind. 385, 52 Am. Dec. 516, where the court held that the justice could amend his certificate, is said in 1 Am. & Eng. Enc. of Law (2d Ed.) at pages 552 and 553 and notes, to have been disapproved by the other courts, as being wholly unsupported by reason or by precedent elsewhere, and the Supreme court of Missouri, which at one time adopted the same doctrine in *Wannall v. Kem*, 51 Mo. 150, afterwards disapproved and overruled the case in *Gilbraith v. Gallivan*, 78 Mo. 456, and it was also criticized, and the court refused to follow it, in *Griffith v. Ventress*, 91 Ala. 366, 8 South. 312, 11 L. R. A. 193, 24 Am. St. Rep. 918, where the subject is fully and exhaustively treated and many authorities cited, showing how the question is viewed by the courts generally of this country. The Supreme Court of the United States had this question before it in *Elliott v. Lessee of Pelsol*, 1 Pet. 328, 7 L. Ed. 164, where it was said:

"Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed, at any time after the record was made? We are of opinion he had not. We are of opinion he acted ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act in pais, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed was functus officio as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent, and unalterable; and the remaining powers and duty of the clerk were only to keep, and preserve the record safely. If a clerk may, after a deed, together with the acknowledgment or probate thereof, have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we can see no just reason why he may not also subtract from it. The doctrine that a clerk may, at any time, without limitation alter the

record of the acknowledgment of a deed, made in his office, would be, in practice, of very dangerous consequence to the land titles of the county, and cannot receive the sanction of this court."

There are numerous cases to the same effect. But we will not base our decision of this case upon a lack of power residing in the probate officer to amend his certificate after it has been fully executed, filed, and acted upon by a registration of the deed, or instrument, for we are of the opinion that if such a power exists, it should not extend to a case like the one we are now considering, as before any such power should be exerted, the party (for instance the feme covert), whose interests may be, and likely will be, materially and vitally affected by it, should have had notice of what was intended to be done a reasonable time before it was done, and a fair opportunity to be heard in opposition to it, and to defend and safeguard her rights, and such an amendment should not be permitted after the death of the feme, who is by the statute required to be privately examined separate and apart from her husband and who would be the only witness, except the justice, to the fact, as to whether her examination by him was conducted according to the statute (Revisal, § 2107; Consol. St. § 2515), otherwise those claiming under her would be completely at the mercy of the probate officer, and this limitation upon his power is more imperatively required because by the statute his findings are made conclusive. That parties are entitled to notice and a hearing before substantial and material alterations can in any event be made would seem to require no authority, as Justice Allen said in the Butler Case, *supra*, and we repeat it here, because of its great importance even "the higher judicial tribunals are not permitted to correct their records without notice to the parties and without an opportunity to be heard," and, further, he said:

"And if the position of the defendant can be maintained, a justice of the peace, who has no fixed place for the performance of his official duties, may at any time, and when parties cannot be heard, change his certificate of probate and materially affect the titles to property."

This matter had been considered in the courts of other jurisdictions. In *Enterprise Transit Co. v. Sheedy*, 103 Pa. 492, 49 Am. Rep. 130, the headnote reads:

"A notary public having made and delivered a defective certificate of acknowledgment of a deed cannot amend it in the absence of the grantor."

And the court said in its opinion:

"This attempt to impart life to a void instrument has the merit of novelty. When Mrs. Sheedy affixed her name to the written instrument and acknowledged it, the acknowledgment

was confessedly so defective as not to bind her or pass her title to the land. It was then delivered, and eleven days thereafter recorded. More than five months after the acknowledgment was actually taken, and the certificate thereof signed by the notary public indorsed thereon, he wrote and signed a second certificate of acknowledgment. The parties to the instrument did not again come before him, but he certifies what occurred months before. To this last certificate he adds facts not contained in his former certificate, with a view and for the purpose of making valid the writing of a married woman, which was then invalid. Effect cannot be given to this latter action of the notary public."

And in *Merritt v. Yates*, 71 Ill. 638, 22 Am. Rep. 128, where a similar question was presented, the court said:

"It is also contended that the subsequent certificate, written by the justice of the peace on the deed some years after the first was made, cured the defective certificate, although the deed was not reacknowledged. We have been referred to no precedent for such action, and we would confidently expect that none could be found. Anciently, such acknowledgments could only be taken in open court, and entered on the records of the court in proceedings tedious, expensive and incumbered with much form. It was at that time regarded of too much moment to be left to the loose and uncertain action of unskillful persons, and the title to property held by married women was guarded with such care as only to permit it to be divested by the judgment of a court of record. Justices of the peace, and the other enumerated officers, have, however, under our laws, been intrusted with the power to take and certify such acknowledgments, and when in conformity with the statute, the act is clothed with the same force and effect that was anciently produced by the judgment of a court of record.

"It is said, that courts of record permit amendments to their records—sheriffs to amend their returns, and compel officers by mandamus to perform legal duties. There is no rule more rigidly enforced, than that the opposite party must have notice in all cases of amendments of records in matters of substance, and the amendment here is of the very essence of the conveyance itself. And it is true, that the court, in a proper case, and on notice to the opposite party, will permit the sheriff to amend his return. *O'Conner v. Wilson*, 57 Ill. 228. But we are aware of no statute or common-law practice which authorizes, or in any manner sanctions, the right of justices of the peace to amend their records after they have once been made. To allow a justice to make alterations and changes in his record, at will, and according to his whim, would be fraught with evil and wrong that would be oppressive. Such a power has not been intrusted to the higher courts, and cannot be exercised by these inferior jurisdictions."

The court further observed that it may be the failure of the officer to properly take and certify the probate, if such was true, may seriously affect the rights of parties, "but that is no ground for violating rules

that have governed the purchase and sale of real estate from the organization of our state," and that the defendant must be left to any other remedy he may have in law or equity, if he has any. It was finally held that the deed, the certificate to which was altered, was improperly read in evidence, and for that reason the judgment was reversed. We have a provision in our law (Code, § 1266, Revisal, § 1008, Consol. St. § 3321) for correcting errors in registration of instruments, but it requires notice and a hearing before any material correction is made therein.

In a case like ours, where the amendment of the certificate is fraught with such grave consequences, the well-settled rule as to notice and hearing should not be departed from. For these reasons, we have reached the conclusion that the evidence as to the new certificate, and also the other evidence relating to it and the alteration of the first certificate, was properly excluded by Judge McElroy at the trial of the case.

We again direct particular attention to the fact before closing that the justice admitted, when examined by the judge, that he made no attempt to find the facts and adjudge the matters as required by section 2107 of the Revisal (Consol. St. § 2515), and was not even aware of its existence, and his evidence substantially amounts to no more than this, that if he had known of the law, he would have found the facts and his conclusions thereon, and stated them in the original certificate. As said by Justice Allen, in *Butler v. Butler*, supra, 169 N. C. at pages 588 and 589, 86 S. E. 510, Ann. Cas. 1918E, 638:

"The remainder of the certificate of that date [1912] is in regular form, and gives evidence of the acts of an official of some experience, and if he then knew that it was necessary to adjudicate that the conveyance was not unreasonable, and not injurious to the wife, and he did so adjudicate at that time, he would have included it in his certificate."

The fact that this was not done is strong proof that he is mistaking his findings of 1921 for those which he should have made in 1917, but which he evidently did not make, as the law required, and insert in his certificate. If he did find the facts, why did he do so, if he did not know it was necessary to consider the matter? The evidence, viewed as a whole, is entirely of too unsatisfactory a character to induce a court to act upon it, and reform as solemn an instrument as the acknowledgment and private examination of a married woman.

A full and exhaustive consideration of the general power of a justice, or probate officer, to materially alter his certificate once given, and upon which the deed has been registered, will be found in *Griffith v. Ven-*

tress, 91 Ala. 918, 8 South. 312, 11 L. R. A. 193, 24 Am. Rep., p. 918.

As defendant relied entirely on the validity of the deed in question, and it being invalid as to Mrs. Beaver, he acquired no title to it under the deed, and consequently none under Mr. Beaver's will, the title remaining in Mrs. Beaver, because the deed, not having been executed and probated properly was void as to her. *Kearney v. Vann*, 154 N. C. 311, 70 S. E. 747, Ann. Cas. 1912A, 1189; *Wallin v. Rice*, 170 N. C. 417, 87 S. E. 239; *Butler v. Butler*, 169 N. C. 584, 86 S. E. 507, Ann. Cas. 1918E, 638; *Foster v. Williams*, 182 N. C. 632, 109 S. E. 834.

It must be understood that we confine our decision strictly to the grounds stated in it, and it should not be construed as covering the general and broader question as to whether the certificate of a justice, as probate officer, can be materially amended after it has been completed and passed from his possession and the deed has been registered upon it. We decide the case on other grounds.

There was no error in the rulings and judgment of the court and it will be so certified.

No error.

(183 N. C. 485)

FISHER v. JOHN L. ROPER LUMBER CO.
(No. 173.)

(Supreme Court of North Carolina. May 10, 1922.)

1. Master and servant §3(1)—Adjustment of claim for injuries consideration for contract of employment for life.

The adjustment of an employee's bona fide claim for injuries, whether well grounded or not, was a sufficient consideration for the employer's agreement to give him employment for life at a living wage, especially where the agreement was carried out for 12 years and until the claim for the injury was barred by limitations.

2. Principal and agent §102(1)—Agreement to give crippled employee life employment not within ordinary powers of mere foreman.

A contract to give a crippled employee employment for life is so out of the usual that authority to make it would not come under the ordinary powers of a mere foreman or boss or even of an agent of mere general powers.

3. Principal and agent §166(2)—Principal charged with knowledge of terms of employment complied with for 12 years.

Where the principal owner of a manufacturing plant and the general superintendent both had personal knowledge of an employee's injury, the amputation of his arm, and that he was taken back at the same wages notwithstanding the loss of his arm, and he continued on the pay roll at full wages for 12 years, they were charged with knowledge of a foreman's agreement to give him life employment in settlement of his claim for injuries.

4. Master and servant — 3(1)—Agreement to employ for life at living wage held not too indefinite.

An agreement by an employer in settlement of an employee's claim for injuries to employ him for life at a living wage was not too indefinite to support a recovery for its breach, where there was evidence as to the employee's capacity to earn wages, his physical condition, the number in his family, the cost of necessities for an ordinary livelihood, the mortuary tables, etc.

5. Limitation of actions — 46(7)—Right of action on employment contract did not accrue until breach.

An injured employee's right of action on a contract to give him life employment at a living wage in settlement of his claim for injuries did not accrue, within the statute of limitations, until a breach occurred by refusal to pay him a living wage.

Appeal from Superior Court, Craven County; Lyon, Judge.

Action by Frank Fisher against the John L. Roper Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The action is to recover for a breach of contract for support, and there were facts in evidence, on part of plaintiff, tending to show: That in 1908 plaintiff, a young married man, then strong and vigorous, was in the employment of defendant company in one of its lumber mills, and in the course of his employment received serious and permanent injuries; two of his ribs being broken and one of his arms, this last of such a character that it had to be amputated, etc., and otherwise facts in evidence permitting the inference of actionable negligence on the part of the company and its agent. That, when plaintiff had returned from the hospital some weeks after the occurrence and was preparing to bring suit for the wrong done him, he was called into an office of the company by Mr. W. G. Roberts, defendant's foreman in charge and control of the employees and their work in the mill, and was told by him that the company always took care of their men injured in that way, that there was no use to see a lawyer, and if plaintiff would not sue the company would employ him in such work as he could do about the mill in his crippled condition, and for the balance of his life give him a living wage sufficient for support of himself and family. That plaintiff agreed to the proposition, and in pursuance of the agreement continued in the service of the company, receiving fair and adequate wages for his work till 1920, when, owing to the rise in cost of living, the sum paid him would not keep himself decently clothed or his family from want. Thereupon plaintiff interviewed Mr. John Sutton, then superintendent of de-

fendant company, and told him that the wages paid would not support him and his family. That they were in a suffering condition. That witness was working both week days and Sundays and was unable to keep himself clothed, and that he had no shoes, and that unless the company gave him an increase he would have to seek work elsewhere; reminded him that the company had agreed to give witness a living wage and had cut what they had been giving. That the company had for a long time continued to pay witness the same after the injury as before he was crippled, but, owing to the increased prices, this, as stated, was insufficient to keep him and his family from suffering and want. That defendant not giving any increase in wages, witness quit of necessity and sought and obtained employment for a time with the East Carolina Lumber Company and worked with them for three or four months, was then taken down sick with influenza, and before he recovered that company had gone out of business. That plaintiff had always been ready and willing to comply with his agreement, but is now all broken up and out of employment. That at time of agreement plaintiff's family consisted of one infant child, and they now have three children. That Mr. Roberts, who made the agreement with plaintiff, was operating the mill at the time, Mr. Speight came later as superintendent. That Mr. Roberts was foreman, and witness did not know whether he was superintendent or not. There were also facts in evidence on part of plaintiff tending to show that Mr. Roper, the principal owner of the plant, and Mr. Speight, the superintendent, were aware of plaintiff's injury at the time it was received and of his being at the hospital, that his arm was amputated, and of his being taken back into service at the same wages he formerly received.

Defendant denied any and all liability by reason of the alleged negligence and pleaded the statutes of limitation in bar of recovery on that ground. Defendant also denied liability on the alleged contract, claiming that it had never been made, and, if it had, Roberts was without power to bind the company by any such agreement, and offered evidence in support of its position both as to the alleged negligence and as to nonliability on the contract. Defendant further insisted that the agreement, if made, was without valid consideration, and further that same was too indefinite to afford a basis for recovery. On issues submitted, the jury rendered the following verdict:

(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? A. Yes.

(2) Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? A. No.

(3) Did the plaintiff and defendant contract as alleged in the complaint? A. Yes.

(4) Has plaintiff been at all times ready, able, and willing to perform his contract, as alleged? A. Yes.

(5) Did defendant wrongfully break said contract? A. Yes.

(6) Did the plaintiff, by his own conduct, waive said contract? A. No.

(7) Is the plaintiff's cause of action barred by the statute of limitations? A. No.

(8) What damages, if any, is plaintiff entitled to recover? A. \$2,500.

Judgment on verdict for plaintiff, and defendant excepted and appealed, assigning errors.

Moore & Dunn, of New Bern, for appellant.

D. L. Ward and Ward & Ward, all of New Bern, for appellee.

HOKE, J. Under the charge of his honor, the verdict has established that there was a breach of the agreement on part of defendant in forcing him to leave their employment by wrongful refusal to give him a living wage, and, judgment having been entered for the damages awarded, the defendant objects to the validity of the trial.

[1] 1. That there was no consideration for the alleged contract, the facts showing that plaintiff never had a legal claim against the company. This, too, has been resolved by the jury against the defendant, and, while there are several exceptions noted to the proceedings in determination of these issues we do not consider it necessary to refer to them in detail, except to say that there were facts in evidence permitting the inference of liability, and, if it were otherwise, the evidence as accepted by the jury all tended to show that the contract, if made, was by way of compromise and adjustment of a bona fide claim on the part of plaintiff against the company. Such an adjustment will afford sufficient consideration for the agreement, whether the claim was well grounded or not. *Dunbar v. Dunbar*, 180 Mass. 170, 62 N. E. 248, 94 Am. St. Rep. 623; *Dickerson v. Dickerson*, 19 Ga. App. 269, 91 S. E. 346; 6 R. C. L. p. 662, tit. Contracts, § 71; 5 R. C. L. p. 890, tit. Compromise, § 13. See, generally, on sufficiency of consideration, *Brown v. Taylor*, 174 N. C. 423, 93 S. E. 982, L. R. A. 1918B, 293; *Spencer v. Bynum*, 169 N. C. 119, 85 S. E. 216; *Institute v. Mebane*, 165 N. C. 644, 81 S. E. 1020. In the Massachusetts case it was held that a compromise cannot be avoided for want of consideration where made in settlement of a demand arising under a previous agreement between the parties which had been performed for several years and which one of them insisted was valid and binding. Digest taken from 94 Am. St. Rep. p. 623. And the principle is well stated in the Georgia case as follows:

"It is well settled that the law favors com-

promises, when made in good faith, whereby disputed claims are settled, and especially is this true when related to family controversies; and a promise, when thus made, in extinguishment of a doubtful claim, furnishes sufficient consideration to support a valid contract. While it is not necessary that the contention which forms the basis of such a compromise shall be meritorious in order to support the promise, yet it is essential, in order to furnish a consideration therefor, that the contention be made in good faith and be honestly believed in."

—a position especially exigent here, where the agreement was entered upon and lived up to by the parties for twelve years, and until plaintiff's claim for the injury is otherwise barred by the statute of limitations.

[2, 3] Defendant insists further that there is no evidence of a valid agreement by any one having authority to bind the company. This contract to take on a crippled employee for life is so out of the usual that authority to make it would assuredly not come under the ordinary powers of a mere foreman or boss, or even of an agent of mere general powers. *Stephens v. Lumber Co.*, 160 N. C. 108, 75 S. E. 933, 41 L. R. A. (N. S.) 1141. But, in addition to the testimony of plaintiff that Roberts, who purported to act for the company, was "operating the mill at the time," there were facts in evidence tending to show that the company paid for the operation amputating plaintiff's arm, and that the owner of the plant and the general superintendent both personally knew of the injury and the amputation, and that plaintiff was taken back into their employment at the same wages, notwithstanding the loss of his arm, and they knew, or should have known, the condition of his return and the agreement concerning his employment, assuredly they had every opportunity to know, and there were facts sufficient to excite inquiry as to the terms of his further employment. As said in *Powell v. Lumber Co.*, 168 N. C. 632, 84 S. E. 1032:

"The scope of the implied authority of an agent may be extended by acts indicating authority which the principal has approved or knowingly or, at times, negligently permitted the agent to do in the course of his employment."

It appeared that this man having only one arm was on the employer's pay roll at the price of a full hand for 12 years, and, if the management did not know of the terms of plaintiff's employment, their negligence in this respect should be imputed to them for knowledge.

[4] Again, it is very earnestly contended by appellant that the contract is too indefinite, and for this reason no recovery can be had thereon. It will be noted that this exception assumes the existence of the contract, and the jury has established it ac-

ording to plaintiff's version. This being true, there is no uncertainty as to the terms which the parties have selected in which to express their agreement that plaintiff, during his life, would be given a living wage required for the support of himself and family. The person, the purpose, and the time of the contract are clearly given, and the only objection at all possible would be as to the difficulty in fixing upon the amount to be paid, or the value of the contract to plaintiff in case of breach. It is said by an intelligent writer on the subject that the law does not favor, but leans against, the destruction of contracts on account of uncertainty; therefore the courts will, if possible so construe the contract as to carry into effect the reasonable intent of the parties, if it can be ascertained. 6 R. C. L. p. 648. And by another that this intent may be determined at times by reference to extrinsic facts relevant to the inquiry. 1 Page on Contracts (2d Ed.) § 101. Applying these principles, and by reference to the facts in evidence, the capacity of the plaintiff to earn wages, his physical condition, the number of his family, the cost of necessities for an ordinary livelihood, together with the mortuary tables, also in evidence, would, with other facts, afford data, in our opinion, to enable a jury to come to a reasonable estimate as to the value of the contract held by plaintiff, reduced, of course, by the amount he would be able to earn by diligent effort, and in this aspect the case was considered by the jury and the damages awarded. Contracts not dissimilar have been upheld with us and other courts of approved authority. *Rhyme v. Rhyme*, 151 N. C. 400, 66 S. E. 348; *Lumber Co. v. Lumber Co.*, 165 Ala. 268, 51 South. 767, 138 Am. St. Rep. 66; *Henderson v. Spratlen*, 44 Colo. 278, 98 Pac. 14, 19 L. R. A. (N. S.) 655.

[5] As to the statutes of limitations, the suit is on the contract, and in this instance the right of action did not accrue to plaintiff till a breach of same, which occurred in 1920. *Pinnix v. Smithdeal*, 182 N. C. 410, 109 S. E. 265.

On careful consideration, we find no reversible error, and the judgment on the verdict is affirmed.

No error.

(183 N. C. 491)

McQUEEN v. GRAHAM. (No. 288.)

(Supreme Court of North Carolina. May 10, 1922.)

1. Boundaries ¶6—Contention of boundary in deed not being the run of a swamp, but a line near edge, held reasonable.

Under a deed calling for a corner in "a log road at or near the last edge of Long branch [a swamp, with a run therein]; thence with the east edge of said branch," it is a reasonable

contention that the line did not go to the run, but only skirted the swamp "at or near the east edge" thereof.

2. Boundaries ¶40(1)—Location held for jury.

Evidence held to make the location of a boundary line called for by a deed a question for the jury.

3. Adverse possession ¶103—Title to whole lappage acquired by junior grantee under actual possession of part.

The senior grantee having no actual possession within the lappage, the junior grantee by actual adverse possession of part of the lappage may acquire title to all of it.

4. Adverse possession ¶80(1)—Conflicting evidence as to location of land covered by deed does not make deed any less color of title as to land claimed included.

Conflicting evidence as to whether land in dispute is included within the boundary lines of a deed when such lines are properly located does not prevent the deed from being color of title to such land.

5. Appeal and error ¶1050(2)—Admission of immaterial evidence harmless.

Admission of testimony immaterial to the real issue of location of a certain boundary is harmless.

6. Evidence ¶471(29)—Testimony that deed covers land in dispute competent if within witness' knowledge.

It is competent for a witness to state that a deed covers land in dispute, when he is stating facts within his knowledge.

7. Evidence ¶471(26)—Testimony of witness' own knowledge that boundary was surveyed as straight line competent.

Witness may testify to a boundary as surveyed being a straight line, he having been present when it was surveyed, so that he was testifying of his own knowledge.

8. Boundaries ¶35(1)—Evidence of acreage admissible in case of doubtful boundary.

As a circumstance to be considered on the disputed and doubtful location of a boundary line, the fact that under one location the deed will contain a large excess over the acreage called for by the deed is competent.

9. Boundaries ¶35(3)—Surveyor who made map may testify to acreage.

It is competent for the court surveyor who made the official map and had actual knowledge of the facts to testify to the actual acreage if a boundary be located as contended for by plaintiff.

Appeal from Superior Court, Cumberland County; Kerr, Judge.

Action by W. L. McQueen against R. J. Graham. Judgment for defendant, and plaintiff appeals. No error.

Averitt & Blackwell and Sinclair, Dye & Clark, all of Fayetteville, for appellant.

Cook & Cook and Rose & Rose, all of Fayetteville, for appellee.

WALKER, J. The plaintiff brought this suit against the defendant, claiming ownership of a tract of land of 100 acres in Cumberland county, and alleging that the defendant had committed a trespass on the land. The defendant admitted the ownership by the plaintiff of the land adjoining that of the defendant. He denied that he committed any trespass and alleged that he was the owner of the disputed land under the deed referred to in his answer. There was a survey ordered by the court, and the land was surveyed, when, as is alleged, the plaintiff was present with his deeds, and when the defendant was not present, but sufficient information was obtained by the surveyor to ascertain the location of the disputed land, and it appears from the testimony of the surveyor and from his plat that there was, as argued by defendant, a case of lappage of about 15 acres between the boundaries of the plaintiff's deed and the boundaries of the defendant's deed. It is true that the plaintiff showed a chain of paper title running back for some years, and there was evidence on the part of the plaintiff of possession. The defendant also introduced paper title running back for some years, and he asserts that the evidence of his possession of the 15 acres lappage was direct and plenary, showing that he had been in actual possession of the disputed territory since the date of his deed, in 1903. He had cut wood and timber on it, had worked the turpentine, and had actually cleared up and cultivated a portion of it.

The plaintiff contended that Long branch constitutes the defendant's boundary, and the defendant contended that it was the "McQueen line," which is some 10 or 12 chains east of the actual run of Long branch. One issue, as to the ownership and possession of the land, was submitted to a jury, and the verdict was in favor of the defendant. Judgment, and plaintiff appealed.

We will take up the exceptions in the order adopted by the plaintiff in his brief:

Assignment of error No. 6 is treated by counsel first, and it seems to be taken entirely to the contention made by the plaintiff that the defendant's deed covered no land east of Long branch, for the reason that the first call of the defendant's deed is as follows:

"Beginning at a black gum in Yarborough's corner and runs with his line * * * to McQueen's line; thence as said line."

If it had been ascertained definitely by the jury, or had been admitted that "McQueen's line" was in Long branch, the plaintiff might have reason to complain, but it will be noted:

[1] (1) That the deed to the plaintiff does not call for the run of Long branch, but corners in "a log road at or near the east edge of Long branch; thence with the east edge of said branch," etc. Under this phrase-

ology it can be reasonably contended that the line did not go to the run of the branch, but only skirted the edge of the swamp, "at or near the east edge of" the branch.

[2] (2) Defendant contends that, if there were no other evidence than the deeds offered by the plaintiff as to the location of his western line, the plaintiff might successfully maintain his position, but there is evidence in the record to show that the "McQueen line," as generally recognized in the community, was a straight line on the edge of the hill and on the east side of Long branch. E. G. Blake stated that he was present when the land was surveyed, and the survey was made on the east edge of the swamp, and the line was a straight line. And the witness Yarboro testified that the "McQueen line" was a straight line along the east edge of Long branch, and that there were marks on the line below the point B as it appears on the blueprint. The witness D. S. Jackson stated that, when Mr. Jessup, the county surveyor, ran the original line, he was present, and that the division line called for a straight line. If this testimony was to be believed by the jury, and his honor properly submitted the question to them, they had the right, under the same, to answer the issue in the defendant's favor.

The authorities cited in plaintiff's brief do not apply to the facts of this case. There was no dispute as to the location of Long branch, but there was a dispute as to the location of what was known in the community as the "McQueen line," and there was evidence on the part of the defendant to the effect that the McQueens had never had possession of any of the property west of the straight line contended for by the defendant as being the "McQueen line." When the actual location of the McQueen line was in dispute, the court left the fact to be determined by the jury.

[3] The defendant having introduced evidence of a deed covering the 15 acres lappage, if it did cover it, and an actual adverse possession, under that deed, since 1903, he was entitled to have the matter submitted to the jury under a proper charge from the court, so that they could pass upon the issue as to whether the land belonged to the plaintiff or to him. Even though the plaintiff may have shown a senior paper title, if the defendant could show that he was in the actual adverse possession of the lappage under a deed which covered the land in dispute, and the plaintiff could only show constructive possession, then the jury could answer the issue in the defendant's favor. *Simmons v. Box Co.*, 153 N. C. at page 261, 69 S. E. 146; *Currie v. Gilchrist*, 147 N. C. 648, 61 S. E. 581. In this case the court held as follows:

"We may therefore take it to be settled by this court by a long and unvarying line of decisions that, if the person who claims under the

older title have no actual possession on the lappage, such possession, although of a part only, by him who has the junior title, if adverse and continued for seven years, will confer a valid title for the whole of the interference, the title being out of the state.⁴

See, also, *Boomer v. Gibbs*, 114 N. C. 76, 19 S. E. 226; *Asbury v. Fair*, 111 N. C. 251, 16 S. E. 467; *Howell v. McCracken*, 87 N. C. 399; *Kerr v. Elliott*, 61 N. C. 601.

In the same case the court holds that, when there is a claim by a junior grantee of title by adverse possession, under color, of the lappage of certain lands, and his possession is of such character and so continuous and adverse as to indicate that he is claiming the land beyond the boundaries of the plaintiff's deed, upon competent evidence, the question is one for a jury, under proper instructions from the court as to the legal effect of the possession.

[4] We do not see how it can be seriously contended that defendant's deeds do not constitute color of title. There is no contention that the deeds do not cover any land at all or that they are in any way void for indefiniteness or uncertainty of description. If there was no doubt about the fact that the McQueen line was located as claimed by the plaintiff, it might then be contended with some reason that the deed covered no part of the land at all, but, when several witnesses testify positively that they were present when the division line was run, and that this division line is a part of defendant's boundary, the judge did not err in allowing the jury to decide the controversy.

It appears from plaintiff's brief that he mainly relied upon the assignment of error No. 6, and that his other exceptions relate only to the admission of evidence.

[5] Plaintiff contends that it was not proper to allow the surveyor, Smith, to testify as to his efforts to find the beginning corner, A, and what Yarboro, the adjoining landowner, told him about it. This evidence does not seem to be material to the real controversy, and, if there was any error, it was harmless. *Singleton v. Roebuck*, 178 N. C. 203, 100 S. E. 314, where the court said:

"It was competent for the witness, when asked about the corner at the pine, to state that he knew where the stump was, and, besides, it appears to have been harmless and not prejudicial."

[6] Exceptions were taken to questions asked the witness Yarboro as to whether certain descriptions included the land in dispute. In *Singleton v. Roebuck*, supra, cited to us, the court held that it is competent for a witness to state that a deed covers the land in dispute when he is stating facts within his own knowledge.

[7] Other exceptions referred to in the assignments of error relate to the testimony of the witness Blake as to the location of the

line between McQueen and Graham, and he testified of his own knowledge that this line is a straight line. This testimony was clearly competent to show the location of the boundary line between plaintiff and defendant, which was a pertinent inquiry to be settled by the jury. He was not giving an opinion or hearsay, but was testifying to an actual fact because he was present when the Jackson land on the west of the line was surveyed, and it appears that "the defendant's land is a part of a tract known as the Jackson land."

[8, 9] Certain exceptions relate to the cross-examination of plaintiff's witness Smith, by which it was shown that the boundaries of plaintiff's deed, if run to the edge of Long branch, would include 156.6 acres, instead of 100 acres, as appears from the description set out in the complaint. This court has held in several cases that, while ordinarily the number of acres mentioned in a deed constitutes no part of the description, yet, where there is doubt as to the location of the land, or some of the lines, evidence which tends to show the acreage may sometimes be relevant and important. In *Currie v. Gilchrist*, 147 N. C. 656, 61 S. E. 584, the court used this language:

"Ordinarily the number of acres mentioned in a deed constitutes no part of the description, especially when there are specifications and localities given by which the land may be located; but in doubtful cases it may have weight as a circumstance in aid of the description, and in some cases, in the absence of other definite descriptions, may have a controlling effect."

See, also, *Whitaker v. Cover*, 140 N. C. 280, 52 S. E. 581; *Harrell v. Butler*, 92 N. C. 20; *Baxter v. Wilson*, 95 N. C. 137.

And as said in *Lumber Co. v. Hutton*, 152 N. C. at page 541, 68 S. E. at page 4:

"Where the location or boundary is doubtful, quantity becomes important."

See, also, *Peebles v. Graham*, 128 N. C. 227, 39 S. E. 25; *Brown v. House*, 116 N. C. 866, 21 S. E. 938; *Cox v. Cox*, 91 N. C. 256.

It was certainly competent for the court surveyor to testify as to the actual acreage, according to the plaintiff's contention, when he had made the official map and had actual knowledge of the facts.

The defendant emphasizes the fact in his brief that, though the plaintiff lost on the issue submitted to the jury, he has now really more land than his deed calls for, but this is immaterial unless it may have some slight bearing on the location of the land in dispute, but we have not considered it in that light.

The crucial question is as to the location of the McQueen line, and, as the evidence was not all one way and there is some doubt upon the question, it presented a case for the jury.

The case of *Rowe v. Cape Fear Lumber*

Co., 133 N. C. at marginal page (Ann. Ed.) 439, 45 S. E. at page 833, may be applicable here and show that the question raised as to the location of the land was a proper one for the jury. We there said:

"The court seems to have excluded these deeds upon the supposition that this court had ruled at the former hearing of the case that when Catskin swamp was called for it meant the edge of the swamp, and that the line should stop there. We do not so understand the former ruling. It is true that Furches, C. J., in *Rowe v. Lumber Co.*, 128 N. C. 301, said that certain authorities cited by him tended to sustain the view 'that a call to a swamp, and along a swamp, only goes to the swamp,' but by reference to other parts of the opinion, especially at page 302, it will be seen that he was referring to a call for an object on the margin of the swamp, and not to a call for the swamp generally, for he says: 'But the calls on the other two tracts on the east side are to points on the margin or banks of the swamp, and thence with the swamp.' We cannot think that the learned Chief Justice intended to repudiate the principle laid down in *Brooks v. Britt*, 15 N. C. 481, that where there is a call for a swamp it is for the jury to say whether the margin or the run is intended, for he cited that case as one of the authorities in support of what he had said at page 304. The last expression of the opinion must be qualified and restricted by the particular facts of the case to which it referred. We still adhere to the doctrine so well stated by Gaston, J., in *Brooks v. Britt*, supra, that where a swamp is called for, whether the run in the boggy and sunken land, or the margin of such boggy and sunken land, is the call of the grant, depends 'upon facts fit to be proved and proper to be passed upon by the jury'; so that in this case, where there is such a call, it must be governed by that principle, and likewise, where there is a call for Catskin or Catskin swamp or Catskin creek, whether the call refers to the run or the boggy or sunken land, it must, under the same authority, depend upon facts 'fit to be proved' and proper to be considered by the jury. This ruling will apply to all deeds not calling for the run in such manner as to leave no doubt that it was intended as one of the lines of the tract."

The court took the right view of the case, and no error is found in the record.

No error.

(133 N. C. 535)

FREEMAN v. DALTON. (No. 362.)

(Supreme Court of North Carolina. May 17, 1922.)

1. Master and servant §330(1)—Automobile driver's use of car in owner's business not presumed.

In an action for injuries to a motorcyclist, who was hit by an automobile driven by the alleged agent of defendant, the fact that defendant owned the automobile did not raise a presumption of law that the automobile was being used in defendant's business, and thereby shift the burden of this issue to defendant.

2. Master and servant §330(3)—Ownership of automobile evidence used in owner's business.

In an action for injuries, caused by the alleged agent of defendant driving defendant's automobile into plaintiff, the ownership of the automobile was evidence from which the jury might infer that it was being used in defendant's business at the time of the injury.

3. Master and servant §330(3)—License number on automobile held evidence of ownership.

In an action for injuries, caused by an automobile running into plaintiff, the fact that defendant's license number was on the automobile was some evidence of his ownership of the car.

Appeal from Superior Court, Forsyth County; Harding, Judge.

Action in the county court by J. R. Freeman against J. A. Dalton. From a judgment for plaintiff, affirmed by the superior court, defendant appeals. New trial granted.

This action was brought to recover damages for injuries, alleged by the plaintiff to have been caused by the negligence of the defendant, and tried in the Forsyth county court at the May term, 1921. From the judgment of the latter court, appeal was taken to Forsyth superior court, which affirmed the said judgment.

The specific allegations of the plaintiff were that, in September, 1920, the plaintiff was the owner of a motorcycle, and the defendant, Dalton, was at that time the owner of a 7-passenger Studebaker touring car, which was being driven by one Boyd Samuels, the agent of said defendant. The plaintiff was riding his motorcycle through Wauhtown, a suburb of Winston-Salem, N. C., coming towards Winston-Salem, and running along his right-hand side of the road at the rate of about three miles an hour, and the automobile of Dalton was going in the opposite direction at the rate of about 30 miles an hour, being driven by one Samuels, who was at that time the agent of the defendant, Dalton, and using the automobile in the business of Dalton. The automobile of the defendant was being driven along the wrong side of the road, at the rate of about 30 miles an hour, and recklessly run into the motorcycle of the said plaintiff, throwing the plaintiff to the ground and injuring him and practically demolishing his motorcycle.

The defendant denied these allegations and alleged that the automobile was not owned by him, but by his wife, and was, at the time of the injury, being used by the Interurban Motor Line, of which the defendant, J. A. Dalton, was manager, the automobile having been loaned temporarily by Mrs. Dalton to the motor line, for the purpose of carrying some passengers to Winston-Salem; that, on the driver's return, and as he was passing

through Wauhtown, a suburb of Winston-Salem, running along the right-hand side of the road at a moderate rate of speed, and while he was in the act of passing some trucks which were parked on his right-hand side, the plaintiff, J. R. Freeman, suddenly and without any warning to the defendant, rode out from between two of these trucks into the street and directly in front of the automobile driven by Boyd Samuels; that, observing the dangerous condition created by the plaintiff, Samuels applied his brakes and cut the automobile to the left in an effort to avoid the collision, but that, in spite of his efforts, there was a collision from which plaintiff received personal injuries and from which damage resulted to the motorcycle.

The court charged the jury as follows:

"Three issues are submitted to you for the decision of the case. The first issue reads: 'Was the defendant the owner of the automobile which collided with the plaintiff, and was the automobile being used in the business of the defendant?' The burden is on the plaintiff, Freeman, to satisfy you, by the greater weight of the evidence, that such was the case. If he has so satisfied you, you will answer the issue 'Yes,' otherwise 'No.' I will say, however, that, if the plaintiff Freeman has satisfied you by the greater weight of the evidence, that the defendant Dalton was the owner of this automobile, which collided with the plaintiff, that Dalton was at that time the owner of it, the fact that he was the owner would raise the presumption that the automobile was being used in his business, and, in that event, that is, if the plaintiff Freeman has satisfied you that Dalton was the owner of the automobile, then the burden would be put on Dalton to show, by the greater weight of the evidence, that, although he was the owner of the automobile, it was not being used in his business. So, if you find that Dalton was the owner of the automobile at that time, you would answer the issue, 'Yes,' unless Dalton has satisfied you, by the greater weight of the evidence, that it was not being used in his business at the time of the collision."

The defendant duly excepted to the charge as above set forth and to each part of it.

There was evidence on the question of negligence by the defendant, the two acts of negligence alleged being that Samuels, the chauffeur, was driving in excess of 25 miles an hour, and that he drove to the left instead of to the right of the open space in the road.

The jury rendered a verdict in favor of the plaintiff; judgment for him, and defendant appealed to the superior court, which affirmed the judgment of the county court, and defendant then appealed to this court.

H. M. Ratcliff and Holton & Holton, all of Winston-Salem, for appellant.

W. T. Wilson and Wallace & Cohen, all of Winston-Salem, for appellee.

WALKER, J. (after stating the facts as above). [1] The first question is, whether the

learned judge was correct in charging the jury that, if they found by the greater weight of the evidence that the defendant was the owner of the automobile which collided with the plaintiff's motorcycle, this fact would raise a presumption that the automobile was being used in the defendant's business, and in that event the burden would be on Dalton to show, by the greater weight of the evidence, that, although he was the owner of the automobile, it was not being used in his business. This instruction placed the burden on the defendant not only to prove, if he was the owner of it, that the automobile was not used in his business, but to establish it by preponderance or the greater weight of the evidence, whereas the burden of the issue was upon the plaintiff throughout the case, not only to show that the defendant was the owner of the automobile, but that it was, at the time, being used in his business.

[2] The defendant had not pleaded any separate or independent defense, but his answer contained solely a denial of the allegations of the complaint, and therefore did not shift the burden of the issue to the defendant, and require him to show affirmatively, and by the greater weight of the evidence, that, while he was the owner, the automobile was not being used in his business. The evidence in the case did make out a prima facie case for the plaintiff, and entitled him to have the case submitted to the jury without further proof. This is what, we think, was held in *Clark v. Sweeney*, 176 N. C. 529, at pages 530 and 531, 97 S. E. at page 474, where the evidence was stronger against the defendant than it is here. It was said by the court there:

"The pleadings admit that the automobile was owned by the defendant, Dr. John Sweeney, and that his wife was in the car at the time of the injury, and that their son Fred was driving the car. From this evidence the jury could well draw the inference that, at the time of the injury to the plaintiff, the son was acting as agent for his father, and 'was about his master's business,' " citing *Moon v. Matthews*, 227 Pa. 488, 76 Atl. 219, 29 L. E. A. (N. S.) 856, 136 Am. St. Rep. 902; *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224.

This does not decide that any presumption was raised "that the son was acting as agent of his father and about his father's business," but that the jury would be warranted in drawing an inference therefrom, that such was the case, without further proof being offered by the plaintiff, or appearing in the case. And, in *Lanville v. Nissen*, 162 N. C. 93, at page 102, 77 S. E. 1096, at page 1100, we held, as follows:

"The plaintiff must not only show that the person in charge was defendant's servant, but the further fact that he was at the time engaged on the master's business. Evidence of the mere ownership of the machine is insuffi-

cient.' To the same effect, *Sarver v. Mitchell*, 35 Pa. Sup. 69, and numerous cases there cited."

This view of the case keeps it in line with *White v. Hines*, 182 N. C. 275, 109 S. E. 31; *Page v. Manufacturing Co.*, 180 N. C. 335, 104 S. E. 667; *Shepard v. Telegraph Co.*, 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796, and the many other authorities cited in *White v. Hines*, supra. There may be a presumption that the car was being used in the defendant's business, but it is not a presumption of law but one of fact, and it does not shift the burden of the issue to the defendant, in the sense that he must rebut the presumption, or disprove the allegation, that the car was being used in his business, by the greater weight of the evidence. It merely is in itself evidence of the fact, and carries the case to the jury. This is fully discussed and explained in *White v. Hines*, supra, and the cases cited therein, where it is said that, if the prima facie case be called a presumption, the presumption is only evidence for the consideration of the jury and does not change, or shift, the burden of the issue. Justice Adams said, in *White v. Hines*, supra, at page 288 of 182 N. C., at page 31 of 109 S. E.:

"Such prima facie case does not necessarily establish the plaintiff's right to recover. Certainly, it does not change the burden of the issue. The defendant may offer evidence or decline to do so at the peril of an adverse verdict. If the defendant offer evidence, the plaintiff may introduce additional evidence, and the jury will then say whether, upon all the evidence, the plaintiff has satisfied them by its preponderance that he was injured by the negligence of the defendant."

And, summing up, he further said:

"In all instances of this character, after the plaintiff has established a prima facie case of negligence, if no other evidence is introduced, the jury will be fully warranted in answering the issue as to negligence in favor of the plaintiff, but will not be required to do so as a matter of law. When such prima facie case is made, it is incumbent upon the defendant to offer proof in rebuttal of the plaintiff's case, but not to the extent of preponderating evidence. The defendant, however, is not required, as a matter of law, to produce evidence in rebuttal; he may decline to offer evidence at the peril of an adverse verdict. If he offer evidence, the plaintiff may introduce other evidence in reply, and the jury will finally deter-

mine whether the plaintiff is entitled, by the greater weight of all the evidence, to an affirmative answer to the issue; for, throughout the trial, the burden is upon the plaintiff to show, by the greater weight of the evidence, that he is entitled to such answer."

White v. Hines, supra, has been approved in two cases decided at this term to the same effect, and which make clear the error in the charge to the jury as to the presumption that the automobile was being used in the business of the defendant. *Harris v. Mangum*, 183 N. C. —, 111 S. E. 177, and *Cotton Mills Co. v. Railroad Co.*, 183 N. C. —, 110 S. E. 660. Referring to the nature of the proof and the effect of it in making a prima facie case, Justice Adams said, in *Harris v. Mangum*, supra:

"In some of the decisions the word 'presumption' seems unfortunately to imply the right of the plaintiff to recover, unless the defendant introduces evidence in rebuttal and to this extent assumes the burden of proof; whereas, the 'presumption' is nothing more than evidence to be considered by the jury."

There is evidence in this case, upon which the jury could well and reasonably infer that the car belonged to the defendant and was being operated for him in his business, but the jury should have been allowed to pass upon it and to find the fact without imposing too great a burden upon the defendant to disprove the fact, or to overcome a presumption as to the same fact, by the greater weight of the evidence.

The proposition laid down in *Lanville v. Nissen*, 162 N. C. at pages 102 and 103, 77 S. E. 1096, finds support in what is said by *Huddy on Automobiles*, § 283; *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731.

[3] We do not see why the fact that the defendant's license number or plate was on the automobile was not some evidence, or a circumstance tending to show, with the other proof, his ownership of the car. There was conflicting evidence about it, but this was for the jury, and, in that respect, the county court and the superior court ruled correctly. But there was error in the charge, as we have above indicated, which requires another trial of the issues.

New trial.

(183 N. C. 528)

CILLEY et al. v. GEITNER et al. (No. 508.)

(Supreme Court of North Carolina. May 17, 1922.)

1. Guardian and ward §167—Property of nonresident ward may be transferred to nonresident guardian without appointment of resident guardian.

Under C. S. §§ 2195, 2196, providing that a nonresident guardian of a nonresident ward may apply to have property in this jurisdiction removed to the residence of the ward, to effect the removal of such property it is not necessary to appoint a resident guardian to defend the proceedings.

2. Guardian and ward §167—Real property of nonresident ward may be converted without appointment of resident guardian.

Under C. S. § 2180, permitting conversion of property of a ward when the interest of the ward will be promoted thereby, and sections 2195, 2196, under which the appointment of a resident guardian is not necessary to transfer property of a nonresident ward to the jurisdiction where the ward resides, where wards were represented by their next friend, their real estate could be converted into personal property to effect a removal into the jurisdiction where they and their guardian resided.

Appeal from Superior Court, Catawba County; Bryson, Judge.

Action by Gordon H. Cilley and others against G. H. Geitner and others. From judgment for defendants, plaintiffs appeal. Reversed.

A former appeal, heard at the fall term of 1921, is reported in 182 N. C. 714, 110 S. E. 61. It is agreed that the record in that appeal shall, so far as applicable, be accepted as the record in this appeal.

The plaintiffs filed a petition before the clerk of the superior court of Catawba, in which they alleged that under the provisions of the last will and testament of A. A. Shuford the surviving executors had allotted to the several heirs the property therein described, including the real and personal property allotted to Alda Cilley and Adelaide Cilley, heirs at law of Maude E. Cilley, who was a daughter of the testator. The defendants admitted an agreement for the distribution of the property devised, and denied any inclination to delay the distribution, but insisted that Gordon H. Cilley, surviving husband of Maude Cilley, had no interest in the property, and that they could not recognize any agreement to that effect made by him and Alfred G. Clay, foreign guardian of Alda and Adelaide Cilley.

The plaintiffs prayed judgment that Gordon H. Cilley be decreed to be the owner of a one-third interest, and Alfred G. Clay of a two-third interest in the property devised to

the heirs of Maude Cilley; that a commissioner be appointed to sell the real estate so devised; that the allotment of the property be confirmed, and the foreign guardian be authorized to remove the assets of his wards to Pennsylvania.

After the decision of this court was certified, the plaintiffs prayed judgment in conformity with the opinion, whereupon Judge Bryson rendered the judgment following:

"First. That petitioner, Gordon H. Cilley, is not entitled to any right, title, interest or estate in any of the property allotted by defendant executors to the interest of Maude E. Cilley and belonging to the estate of A. A. Shuford, but the same and every part thereof is the property of his children, Adelaide Harper Cilley and Alda Virginia Cilley.

"Second. Inasmuch as no guardian has been appointed in the state of North Carolina for Alda Virginia Campbell Cilley and Adelaide Harper Cilley the court concludes it has no power to render a decree for a sale of the lands allotted to the interest of Maude E. Cilley, deceased ancestor of the infant petitioners, and cannot order such sale, there being no proper representative for the infant petitioners before the court, although the court is of opinion and so finds that a sale of the lands belonging to the infant petitioners would materially promote their interests, and that the facts with respect to such sale are as stated in the petition.

"Third. Alfred G. Clay, as guardian appointed by the orphans' court of Philadelphia county, Pa., is not authorized to sue in the courts of North Carolina, and his appearance in this court and cause and ratification by him as such guardian of the settlement made by the defendant executors is without legal effect, although for the purposes of this proceeding the court doth appoint him next friend for Alda Virginia Campbell Cilley and Adelaide Harper Cilley, after making due inquiry as to his fitness.

"Fourth. The petitioners have complied with the provisions of the statute with respect to the filing of the bond and certified copies of the appointment of Alfred G. Clay as guardian for Alda Virginia Campbell Cilley and Adelaide Harper Cilley, the bond being sufficient in amount and ability of sureties to protect the estate of his said wards, and the letters duly authenticated, and the court would order the delivery of the personal property allotted to the interest of Maude E. Cilley, and as stated in the petition, to said guardian of Alda Virginia Campbell Cilley and Adelaide Harper Cilley, but the court concludes that it is without power to order a removal of their funds or property to the state of Pennsylvania without the presence before the court of a guardian appointed under the laws of North Carolina.

"Fifth. The court adjudges that the allotment made by the defendant executors to the several persons, entitled under the will of A. A. Shuford, and as stated in the petition, is fair, just, and equitable; but, there being no guardian representing Adelaide Harper Cilley and Alda Virginia Campbell Cilley before the court appointed under the laws of this state, the court

holds that it is without power to ratify such settlement.

"Wherefore the court doth adjudge that this proceeding be, and it is, dismissed, at the cost of the petitioners."

W. B. Council, of Hickory, and Mark Squires, of Lenoir, for appellants.

Self, Bagby & Aiken, of Hickory, for appellees.

ADAMS, J. [1] His honor's exclusion of Gordon H. Cilley, as the representative of his wife, from participation in the property acquired by Alda and Adelaide Cilley under the will of A. A. Shuford, conforms to the opinion of this court as expressed in the former appeal; but we think his honor erred in holding as a conclusion of law that the court, in the absence of a guardian duly appointed in this state, had no power to remove the personal property of the nonresident devisees to the place of their residence. Alda and Adelaide Cilley reside in Pennsylvania, and there Alfred G. Clay was duly appointed as their general guardian. His honor finds from the record that the plaintiffs have complied with the statute in filing a certified copy of the appointment of the guardian in Pennsylvania, and that the bond filed by him is sufficient both as to the amount and as to the financial ability of the sureties to protect the estate of his wards. His honor also says that he would order the transfer of the fund to the foreign guardian if he had the legal right to make such order.

The statute provides that "where any ward * * * residing in another state * * * is entitled to any personal estate in this state, * * * whether the same be in the hands of any guardian residing in this state, or of any executor, administrator or other person holding for the ward, * * * or if the same * * * be not in the lawful possession or control of any person, the guardian * * * duly appointed at the place where such ward * * * resides, may apply to have the estate removed to the residence of the ward * * * by petition filed before the clerk," and that the application "shall be proceeded with as in other cases of special proceedings. * * * Any person may be made a party defendant to the proceeding who may be made a defendant in a civil action"—but there is no absolute requirement that a resident guardian be appointed to defend in such proceedings. C. S. §§ 2195, 2196.

[2] Furthermore, we think his honor erroneously concluded that the court had no power to order a sale of the real estate of the wards, inasmuch as they had no guardian resident in this state. Section 2180 of the Consolidated Statutes is applicable to a proceeding instituted by a guardian for the con-

version of property when the interest of the ward will be promoted thereby, and the proceeds are intended to be used for a special purpose; but, since by virtue of the statute the appointment of a resident guardian is not necessary for the transfer of a ward's funds to a nonresident guardian, and since the plaintiffs are represented by their next friend, there appears to be no valid reason why this proceeding should not be maintained to ratify the agreement of distribution, to remove the wards' personal property, and incidentally to convert the wards' real estate into personal property in order to effect such removal.

Our conclusion is that the proceeding can be maintained, and accordingly that his honor's judgment of dismissal should be reversed.

Reversed.

(183 N. C. 457)

IN RE HARRISON'S WILL. (No. 255.)

(Supreme Court of North Carolina. May 10, 1922.)

1. Wills \S 130—Letter not written "animus testandi" not admitted as holographic will.

In a will contest where the jury found that the paper writing was not written "animus testandi," by which is meant that it was not alleged testatrix's purpose that the writing should operate as a testamentary disposition of her property and was not found among the valuable papers and effects of alleged testatrix (C. S. § 4144), it may not be probated as a holographic will.

2. Wills \S 324(1)—Where animus testandi doubtful, submission to jury proper.

Where the animus testandi of a paper writing was doubtful or at least ambiguous as appeared from the face of the instrument, the submission of the issue to the jury was proper.

3. Witnesses \S 159(3)—Testimony of caveator that alleged testatrix kept alleged will in unlocked drawer admissible.

In a will contest, the admission of evidence by a caveator that the bureau drawer in which the writing alleged to be a will was found was not usually locked was admissible, notwithstanding C. S. § 1795, as witness could testify whether the drawer was locked and as to the custom of keeping it locked as matter within her own knowledge and did not entail a recitation of personal transaction with alleged testatrix.

Hoke, J., dissenting.

Appeal from Superior Court, Wake County; Bond, Judge.

In the matter of the alleged will of Mrs. Eugenia Harrison, deceased. From judgment refusing probate, propounders appeal. No error.

Issue of devisavit vel non raised by a caveat to the will of Louisa Eugenia Harri-

son. Alleged want of execution, mental incapacity, and undue influence are the grounds upon which the caveat is based.

The jury returned the following verdict:

"(1) Did Louisa Eugenia Harrison write all of paper writing propounded with intent that it should be operative as her last will and testament, and was it found, after her death, among her valuable papers or effects? Ans. No.

"(2) If said Louisa Eugenia Harrison wrote said paper writing propounded, did she, at that time, have sufficient mental capacity to make and execute a valid last will and testament? Ans. No.

"(3) Was the execution of said paper writing, if written by said Louisa Eugenia Harrison, procured by undue influence exerted over her as alleged by caveators? Ans. Yes.

"(4) Is said paper writing the valid last will and testament of said Louisa Harrison? Ans. No."

"The court answered the fourth issue as a legal inference from answers 1, 2, and 3."

R. N. Simms, H. E. Norris, and W. B. Snow, all of Raleigh, and J. M. Templeton, Jr., of Cary, for appellants.

Pou, Bailey & Pou and Willis Smith, all of Raleigh, for appellees.

STACY, J. [1] The paper writing propounded, and which is called in question by the caveat filed herein, is alleged to have been found, shortly after the death of Mrs. Harrison, securely wrapped in some clothes supposed to have been put aside by the deceased to be used as her shroud. The burial clothes, containing the alleged will, were found in the top bureau drawer in Mrs. Harrison's room. This drawer was locked at the time, and it also contained her purse, or, at least, she was in the habit of keeping her purse and other effects in this drawer. The alleged will was sealed in an envelope and addressed to Alice, Maude, and Clyde, daughters of the deceased. The following is a verbatim copy of the paper writing propounded:

"December 21, 1914.

"Alice, Maud and Clyde, my dear children, when I am dead want you to have 50 achers of my land run off and give Grove deed to it if he is living then devied equal between you three childred if either of you die without having any children at that wons death I want that wons part to go to Maud children, now my dear children please do just like ive ask you to do when I am dead and gone, dont want eny of you to ware black for me, think it looks better not preten to start it then only part black now do as I say about it dont forget to burn all my old things I want you all to do just like ive told you, dont want eney won to read this while I am living.
Genia Harrison."

The record contains over a hundred exceptions, and it would be a work of supererogation to consider them in detail or seriatim. Indeed, we deem it unnecessary to go beyond the first issue; for, if this be answered cor-

rectly and without error, the remaining issues and exceptions relating thereto become immaterial.

The jury has found as a fact that the letter or script, if genuine and in the handwriting of the deceased, was not written "animo testandi," by which is meant that it was not her purpose or intention that said paper writing should operate as a testamentary disposition of her property (In re Johnson, 181 N. C. 305, 108 S. E. 841); or else the jury has determined that the same was not found among the valuable papers and effects of the decedent (C. S. § 4144). This is the necessary meaning of the answer to the first issue; and, under the jury's finding, the letter or instrument propounded may not be admitted to probate as a valid holograph will. *Spencer v. Spencer*, 163 N. C. 83, 79 S. E. 291.

[2] The animus testandi of Mrs. Harrison being doubtful or at least ambiguous, as appears from the face of the instrument, we think his honor was justified in submitting the question to the jury for determination.

"It is essential that it should appear from the character of the instrument, and the circumstances under which it is made, that the testator intended it should operate as his will, or as a codicil to it." In re Bennett, 180 N. C. 5, 103 S. E. 917.

[3] Propounders object because Mrs. Raspberry, one of the caveators, was permitted to testify that the bureau drawer, in which it is alleged the script was found, was not usually kept locked; that Mrs. Harrison was not in the habit of keeping it locked; that there was a key to the drawer; and that sometimes it was locked and at other times it was not. It is urged that this testimony should have been excluded, under C. S. § 1795, as violative of the rule against offering evidence of personal transactions or communications between the interested witness and the deceased person; but we do not think the evidence in question falls within the inhibition of the statute. It was competent for the witness to say whether or not the drawer was locked and to testify as to the habit or custom of keeping it locked. This was a matter within her own knowledge and did not perforce entail a recitation of any personal transaction or communication with the alleged testator. *Carroll v. Smith*, 163 N. C. 204, 79 S. E. 497; *McCall v. Wilson*, 101 N. C. 598, 8 S. E. 225. The extent of her observation and the opportunity she may have had to know about the matter, independent of any transaction or communication with the deceased, were inquired into on the cross-examination; and this was proper as affecting her credibility and the weight of her testimony, but not necessarily its competency. In re Bradford's Will, 110 S. E. 586, at the present term.

In Lane v. Rogers, 113 N. C. 171, 18 S. E.

117, it was held that the witness might say she saw the book in the hands of the deceased, at the time and place in question, but not that the deceased handed her the book. See, also, *McEwan v. Brown*, 176 N. C. 249, 97 S. E. 20, and *Sawyer v. Grandy*, 113 N. C. 42, 18 S. E. 79.

After a careful examination of the record, we have found no reversible error, with respect to the trial of the first issue, and it is therefore unnecessary for us to consider the remaining exceptions.

No error.

HOKE, J., dissenting.

(183 N. C. 795)

STATE v. BENSON. (No. 469.)

(Supreme Court of North Carolina. May 10, 1922.)

1. Homicide §253(1)—Evidence held to show first degree murder.

Evidence held sufficient to support a conviction of murder, in the first degree.

2. Homicide §22(2)—“Murder in the first degree” defined.

Murder in the first degree is the unlawful killing of a human being with malice, premeditation, and deliberation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Murder in First Degree.]

3. Homicide §14(1) — “Premeditation” defined.

Premeditation means thought of beforehand for some length of time, however short.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Premeditation—Premeditation.]

4. Homicide §14(1)—“Deliberation” defined.

Deliberation means an intention to kill, executed in a cool state of the blood in furtherance of a fixed design to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deliberate—Deliberation—Deliberately.]

5. Homicide §23(2)—“Murder in the second degree” defined.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Murder in Second Degree.]

6. Homicide §11—“Malice” defined.

Malice is not only hatred, ill will, or spite, but that condition of mind which prompts one to take the life of another intentionally, without just cause, excuse, or justification.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malice.]

7. Homicide §3—Pistol or gun is deadly weapon.

A pistol or gun is a deadly weapon.

8. Homicide §31—“Manslaughter” defined.

“Manslaughter” is the unlawful killing of a human being without malice, premeditation, and deliberation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manslaughter.]

9. Homicide §13, 144—Killing with deadly weapon presumed unlawful and malicious.

It is presumed that a killing with a deadly weapon was unlawful and malicious.

10. Homicide §239, 244(3), 248—Defendant must prove provocation, self-defense, or accident to satisfaction of jury.

When it is shown that defendant killed deceased with a deadly weapon, the burden is on defendant to prove not by the greater weight of the evidence nor beyond a reasonable doubt, but to the satisfaction of the jury, such legal provocation as will rob the crime of malice, or excuse it altogether on the ground of self-defense, accident, or misadventure.

11. Homicide §45—Legal provocation, to reduce crime to manslaughter, must be more than words.

The legal provocation which will reduce second degree murder to manslaughter must be more than words, as language, however abusive, neither excuses nor mitigates the killing, and the law does not recognize circumstances not amounting to an actual or threatened assault.

12. Homicide §44—One who kills another in heat of passion caused by assault is guilty only of manslaughter.

One who kills another in the heat of passion caused by an assault, and not from premeditation, deliberation, and malice, is guilty of no more than manslaughter.

Appeal from Superior Court, Iredell County; McElroy, Judge.

Bob Benson was convicted of murder in the first degree, and he appeals. Affirmed.

Criminal prosecution, tried upon an indictment charging the defendant with murder.

There was evidence on behalf of the state tending to show that J. Robert Dishman, accompanied by Van Benfield, was traveling in a Ford car along a public highway in Iredell county, when late in the afternoon of Sunday, September 18, 1921, he approached a horse and buggy standing near the edge of the road. The horse was tied to a post with the buggy angling across the road. At the approach of the automobile the horse suddenly jerked back, and that threw one of the buggy wheels out past the middle of the road. The car struck the buggy wheel, and broke it as it pushed the buggy out of the way. This seems to have been the only damage done, except the breaking of some pieces of the harness.

Van Benfield testified:

"I examined the buggy, looked over the wheel and saw it was broke, and I told Mr. Dishman I would crank the car. I started to crank the car to get back in the road to see how bad it was torn up. I started to crank the car and Bob Benson and Jule Cowan come out there. I started to give it a jerk, and Benson said to me: 'Don't you crank that car.' I started again, and he run right up over me, and said, 'Damn you, don't you crank that car.' Dishman said to me: 'Son, don't crank it.' And I never cranked it. Benson commenced cussing Dishman, told him, damn him, he had torn up his horse and buggy, and had him to pay. And he would repeat it several times, and Mr. Dishman said: 'I will pay you. I have done it, and I will pay for it.' Benson said: 'You have tore up my horse and buggy.' And Dishman said to Benson: 'Get Dr. Cruse, and, if the horse is hurt, I will pay for it.' Dishman told Jule Cowan to go in the house and get the lantern and see how bad it was hurt and how bad the horse was hurt, and Dishman said, if anything was hurt, he would pay for it. Cowan went to the house to get the lantern. Benson commenced pulling off his coat, a white palm beach coat. He threw it down in the buggy, and he said: 'I will go get the officers; they will assess the damages.' Mr. Dishman said: 'Get the officers.' Said: 'I will pay whatever they assess it.' And he left to go to Mr. Privette's to phone for the officers.

"Benson left. Jule Cowan came back out with the lantern. When Benson left, Dishman said: 'Go, get the officers. I will sit on the fender of the machine and wait till you get back.' He sat on the fender of the machine, and when Jule come out with the light he told Jule to sit by him; Benson was gone. Benson was gone 30 minutes. When Benson came back Mr. Dishman was sitting on the fender of the machine, and he said to him: 'Did you get the officers?' And his answer was: 'Damn you; you tore up my horse and buggy, and you have got me to pay.' Mr. Dishman said to him: 'Did you get the officers?' And he said: 'Damn you; you tore up my horse and buggy, and you have got me to pay.' Mr. Dishman said to him: 'Did you get the officers?' And he said: 'Damn you; you tore up my horse and buggy, and you have got me to pay.' Dishman asked him the third time if he got the officers, and he said: 'I ain't telling you but what I didn't get the officers. Damn you; you tore up my horse and buggy and you got me to pay.' Dishman said to him: 'I could have paid you long ago, if you had told me how much it was.' Benson left the road, and went in Jule's house. Dishman stayed there at the side of the car. I told Mr. Dishman to 'get in the car, and let's go; there was no reasoning to it.' Mr. Dishman got in the car. I just started to crank the car, had given it a half jerk, and there were two shots fired out at Jule Cowan's house. I just raised up. Mr. Dishman said: 'Crank it, son; he is not going to shoot nobody'—and I just pulled the flood bar. The shots sounded like a .32 rifle, .32 pistol or .38; wasn't no shotgun; no .22 rifle. I pulled the flood bar, and started to crank the car by spinning it, turning it around and around. When the shots were fired, hadn't spun it none yet, but I went to spinning the car around and around, and spun it until it caught and started, and when the car

started, I raised up, and Benson was a-pounding Dishman over the head, and as he was hitting him over the head he said: 'Damn you; I will kill you.'"

It appeared to the witness that the defendant was hitting Dishman with a gun. The defendant himself told the officer, Fred Claywell, soon after he had been arrested, that he struck deceased with a pine pole about 3 feet long. The following is the defendant's account of the killing as related to the officer:

"He said he left his horse and buggy standing beside the road at Jule Cowan's. Said that Mr. Dishman and Mr. Benfield came along, and they struck his buggy. Said that he went out, and he asked Mr. Dishman what made him run into his buggy, and Mr. Dishman said: 'I didn't see your buggy until I was right against it.' Said: 'I didn't have time to stop.' He said, Mr. Dishman said: 'Your buggy was in the edge of the road anyhow.' And Bob said he said to him: 'You have got me to pay, Mr. Dishman.' And he said he said: 'All right. I will pay you.' Says: 'I will pay you whatever the damages is.' And he told him, he said: 'You have got to pay me, and pay me right now.' He said he said: 'All right; I will pay you whatever the damage is, or you can go get a new wheel, and I will pay for it, just which ever you had rather.' And Bob said to him, said: 'Damn you; I will go get the officers.' And Mr. Dishman said: 'All right; go get the officers, and I will stay right here until they come, and I will pay the damages, whatever they say it is.' And he went to Mr. Privette's, and he could not get Statesville—the line was out of order—and he said that he went back and he said: 'I went back with the intention of knocking hell out of him or making him pay for my buggy.' And he said that when he got back to the car he told Mr. Dishman: 'Damn you; you are going to pay me, and pay me right now.' And he said: 'Did you get the officers?' And he said that Mr. Dishman said: 'Well, I will pay you whatever it is.' And he says: 'You are going to pay me, or I am going to knock hell out of you.' Said he walked down to the lower side of the house, and picked up a pine pole 3 or 3½ feet long. He said he went back to the car and said: 'I just rapped him in the head.' He said: 'I hit him a hell of a lick the first time with both hands.'"

Dr. Davis testified that he examined the deceased at the hospital, and his skull was mashed just like an eggshell.

The defendant introduced no evidence, but asked the court to instruct the jury to return a verdict of murder in the second degree. This instruction was declined, and is the basis upon which the defendant predicates his appeal.

The jury found the defendant guilty of murder in the first degree, and from the sentence of death pronounced thereon this appeal is prosecuted.

J. H. Burke, of Taylorsville, Z. V. Turlington, of Mooresville, and L. C. Caldwell, of Statesville, for appellant.

J. S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

STACY, J. [1] The prisoner has had a fair trial. He has been convicted of murder in the first degree, and rightly so. His conduct was heartless and cruel. The deceased was unusually patient, and at no time was his manner threatening. On the contrary, again and again he reiterated that he was willing to pay the defendant for any damage he had sustained. There was abundant evidence to support the verdict.

His honor charged the jury fully upon every aspect of the case, and explained clearly the difference between the three degrees of an unlawful homicide, to wit, murder in the first degree, murder in the second degree and manslaughter.

[2] Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. State v. Thomas, 118 N. C. 1118, 24 S. E. 431.

[3] Premeditation means "thought of beforehand" for some length of time, however short. State v. McClure, 166 N. C. 328, 81 S. E. 458.

[4] Deliberation means that the act is done in a cool state of the blood. It does not mean brooding over it or reflecting upon it for a week, a day, or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. State v. Coffey, 174 N. C. 814, 94 S. E. 416. When we say the killing must be accompanied by premeditation and deliberation, it is meant that there must be a fixed purpose to kill, which precedes the act of killing, for some time, however short, although the manner and length of time in which the purpose is formed is not very material. State v. Walker, 173 N. C. 780, 92 S. E. 327.

[5] Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. State v. Lipscomb, 134 N. C. 695, 47 S. E. 44; State v. Fuller, 114 N. C. 885, 19 S. E. 797.

[6, 7] Malice is not only hatred, ill will or spite, as it is ordinarily understood—to be sure that is malice—but it also means that

condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. State v. Banks, 143 N. C. 652, 57 S. E. 174. It may be shown by evidence of hatred, ill will, or dislike, and it is implied in law from the killing with a deadly weapon, and a pistol or a gun is a deadly weapon. State v. Lane, 166 N. C. 333, 81 S. E. 620.

[8] Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. State v. Baldwin, 152 N. C. 822, 68 S. E. 148.

Manslaughter, plus malice, gives us murder in the second degree; and murder in the second degree, plus premeditation and deliberation gives us murder in the first degree. State v. Banks, 143 N. C. 652, 57 S. E. 174.

[9] When it is admitted or proven that the defendant killed the deceased with a deadly weapon, the law raises two presumptions against him: First, that the killing was unlawful; and, second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. State v. Fowler, 151 N. C. 732, 66 S. E. 567.

[10] The law then casts upon the defendant the burden of proving to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—but simply to the satisfaction of the jury (State v. Carland, 90 N. C. 675), the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the grounds of self-defense, accident, or misadventure. State v. Little, 178 N. C. 722, 100 S. E. 877.

[11, 12] The legal provocation which will reduce murder in the second degree to manslaughter must be more than words; as language, however abusive, neither excuses nor mitigates the killing, and the law does not recognize circumstances as a legal provocation which in themselves do not amount to an actual or threatened assault. 13 R. C. L. 706. If, however, the deceased assaulted the prisoner, that is, if he laid his hands upon him against his will, or struck him, or choked him, and the prisoner killed the deceased in the heat of passion, caused by the assault, and not from premeditation and deliberation and not from malice, he would not be guilty of more than the crime of manslaughter.

There is no error, appearing on the instant record, and the judgment must be affirmed. No error.

(183 N. C. 830)

TRITT v. GLOUCESTER LUMBER CO.
(No. 507.)

(Supreme Court of North Carolina. May 17, 1922.)

1. Master and servant §=101, 102(8)—Ordinary care required in providing place to work.

The master's obligation to provide a reasonably safe place to work is not absolute, but merely requires the exercise of ordinary care.

2. Master and servant §=293(2)—Instruction held erroneous as imposing absolute duty to provide reasonably safe place.

An instruction on the master's duty to provide a reasonably safe place to work, which omits to charge that he need only exercise ordinary care in so doing, is reversible error.

Appeal from Superior Court, Transylvania County; Shaw, Judge.

Action by Sallie Tritt administratrix of Carl Tritt, deceased, against the Gloucester Lumber Company. There was denial of liability and plea of contributory negligence, and on issues submitted the jury rendered a verdict for plaintiff assessing the damages. Judgment on the verdict and defendant excepted and appealed. New trial.

Martin, Rollins & Wright, of Asheville, and W. E. Breese, of Brevard, for appellant.

Ralph Fisher and Lewis Hamlin, both of Brevard, and Sutton & Stillwell, of Sylva, for appellee.

PER CURIAM. There were facts in evidence tending to show that on or about June 4, 1921, plaintiff's intestate, an employee of defendant company on the logging train in said county, while engaged in his duties as brakeman on one of defendant's trains, fell, or was thrown or jolted, off said train, and run over and killed. There was testimony on the part of plaintiff tending to show that the falling from the train and the consequent death was caused by an unusual, unnecessary, violent jerking of the train, and also because of the defective condition of the roadbed at the place of the injury. There was testimony for the defendant to the effect that the roadbed was in sound condition where the injury occurred, and further that there was no unusual or violent jerking of the train at the time. In submitting these opposing views the court, among other things, charged the jury as follows:

"Now the court instructs you that it was the defendant's duty to provide a reasonably safe place for the plaintiff to work, and, if it failed to provide such a safe place for him to work, and in consequence of that the death of intestate was caused, and those facts are found by

the greater weight of the evidence, it is your duty to answer the issue, 'Yes.'"

[1, 2] It is the established rule in this jurisdiction that the obligation to provide for employees a safe place to work, or a reasonably safe place to work, is not absolute, but it is required that the employer must do this in the exercise of ordinary care, and a charge that omits this as an element in the standard of duty will be held for reversible error. This is held in *Gaither v. Clement Co.*, a case at the present term, 111 S. E. 782, where the correct position as approved and illustrated in numerous decisions is stated for the court in an opinion by Associate Justice Adams. In deference to that authority which we regard as controlling on the facts of the present record, we are of opinion that for the error indicated defendant is entitled to a new trial; and it is so ordered.

New trial.

(183 N. C. 676)

BURCH v. BUSH. (No. 256.)

(Supreme Court of North Carolina. March 29, 1922.)

Appeal from Superior Court, Franklin County; Bond, Judge.

Action by W. A. Burch, administrator, against J. D. Bush. Judgment for plaintiff, and defendant appeals. Affirmed.

Civil action to recover moneys alleged to be due the plaintiff, and withheld by the defendant, on a logging and lumbering contract. Upon denial of liability and issues joined, the jury returned the following verdict:

"(1) Was the administratrix of S. L. Burch really able and willing to finish cutting the timber according to contract? A. Yes.

"(2) Was the administratrix of S. L. Burch kept from cutting the timber according to contract by any act of the defendants Bush & Co.? A. Yes.

"(3) What damage, if any, did defendants Bush & Co. sustain by failure of administratrix of Burch to cut said timber according to contract? A. Nothing.

"(4) What sum was withheld by defendants Bush & Co. under 10 per cent. clause of contract? A. \$445.

"(5) In what sum, if anything, is estate of S. L. Burch indebted to defendants Bush & Co. by reason of overpayments on measurements? A. Nothing."

From a judgment on the verdict in favor of plaintiff, the defendant appealed.

Willis Smith, of Raleigh, for appellant.

Wm. H. & Thos. W. Ruffin, of Louisburg, for appellee.

PER CURIAM. Affirmed on authority of same case, *Burch v. Bush*, reported in 181 N. C. 125, 106 S. E. 489.

No error.

(183 N. C. 678)

(111 S.E.)

POWELL v. CAMP MFG. CO.**PAGE v. SAME.**

(Nos. 223, 224.)

(Supreme Court of North Carolina. March 22, 1922.)

Appeal from Superior Court, Duplin County; Devin, Judge.

Separate actions by R. C. Powell and C. B. Page against the Camp Manufacturing Company. Judgment for plaintiff in each case, and defendant appeals. Affirmed.

Stevens, Beasley & Stevens, of Warsaw, for appellant.

George R. Ward, of Wallace, and Ward & Ward, of Newbern, for appellee.

PER CURIAM. This case was before us at the fall term, 1920, and is reported in 180 N. C. 330, 104 S. E. 687. The facts were set out fully by Walker, J., in delivering the opinion on the former appeal, and need not be repeated here. From a perusal of the record it appears that the case has been tried in substantial conformity with the law, as heretofore declared, and the present judgment must be affirmed.

No. 223, Powell v. Camp Manufacturing Company, being an action for damages arising out of the same fire, and caused by the same engine, for like reason must be affirmed. See, also, Williams v. Camp Mfg. Co., 177 N. C. 512, 99 S. E. 370.

Let judgment be certified that in both cases we find

No error.

(119 S. C. 67)

WILSON et al. v. POSTON et al.
(No. 10868.)

(Supreme Court of South Carolina. April 18, 1922.)

Deeds §126—Provision held insufficient to create fee conditional; "without issue."

Under Civ. Code 1912, § 3551, providing that where property is limited to take effect upon the death of any person without issue, or other equivalent words, these words shall mean the failure of issue after the death of such person, a grant to a child, followed by a provision that, if grantee dies without lawful heirs, the property must return to the grantors' estate, was not sufficient to create a fee conditional.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Die Without Issue.]

Appeal from Common Pleas Circuit Court of Williamsburg County; Jas. E. Peurifoy, Judge.

Action by J. H. Wilson and other against L. J. Poston and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded for new trial.

Agreed statement of facts on which the case was tried by the circuit judge:

"This is an action brought by the plaintiffs against the defendants for the recovery of the tract of land described in the complaint, and it is agreed by and between the undersigned attorneys representing all the parties to this action that the legal issues involved in this case shall be tried upon the pleadings and the following admitted facts, to wit:

"T. R. Wilson and M. F. Wilson were husband and wife, and were residents of the county of Williamsburg and state of South Carolina. On or about the 13th day of July, 1911, and for a number of years prior thereto, the said T. R. Wilson and M. F. Wilson owned and possessed in fee simple a tract of 940 acres of land situate in said county and state, of which the tract of land described in paragraph 1 of the complaint herein formed a part. Of the marriage of T. R. Wilson and M. F. Wilson the following children were born, namely: J. H. Wilson; J. D. Wilson; Maggie Wilson, who afterwards married one S. F. Epps; Stella Wilson, who afterwards married a Mr. Burgess; Martha Ella Wilson, who afterwards married a Mr. Burgess; Louise Wilson, who afterwards married a Mr. Coker; J. C. Wilson, Addie Wilson, T. M. Wilson, Jessie Wilson, who afterwards married the defendant L. J. Poston; Robert Wilson, who died about 20 years ago, before his father and mother, without marrying and leaving no children; and Mat Wilson, who also died before his father and mother without marrying and leaving no children.

"Maggie Epps died before her father and mother, but left surviving her the following children: Mattie Hughes, Lucile Dennis, Effie Ryan, Maria Haselden, Charlton Epps, and Mildred Lilyander. After the death of T. R. Wilson and M. F. Wilson, and before the death of Mrs. Jessie Wilson Poston, Lucile Dennis died, leaving as her heirs at law her children, Margaret Dennis, Walter E. Dennis, Mildred Lucile Dennis, and her husband, W. W. Dennis.

"Charlton Epps and Mildred Lilyander are infants over the age of 14 years.

"The said children of Lucile Dennis are all infants under the age of 14 years and reside with their father, W. W. Dennis, in the town of Kingstree, county of Williamsburg and state aforesaid.

"On or about the said 13th day of July, 1911, the said T. R. Wilson and M. F. Wilson, desiring to divide said tract of land among their nine living children and the heirs of their predeceased daughter, Maggie Epps, so as to effect a settlement of their estates in their lifetime, called in a surveyor, and divided the said 940-acre tract of land into 10 smaller lots, each containing 94 acres, and on said date conveyed one of said smaller lots to each of their nine living children, and one to the heirs of their predeceased daughter, Maggie Epps; the deeds of conveyance therefor being thereafter, to wit, on or about the 7th day of October, 1911, duly recorded in the office of the clerk of court for Williamsburg county. The 94-acre tract of land described in paragraph 1 of the complaint herein is the tract of land that was conveyed by the said T. R. Wilson and M. F. Wilson to

through Wauhtown, a suburb of Winston-Salem, running along the right-hand side of the road at a moderate rate of speed, and while he was in the act of passing some trucks which were parked on his right-hand side, the plaintiff, J. R. Freeman, suddenly and without any warning to the defendant, rode out from between two of these trucks into the street and directly in front of the automobile driven by Boyd Samuels; that, observing the dangerous condition created by the plaintiff, Samuels applied his brakes and cut the automobile to the left in an effort to avoid the collision, but that, in spite of his efforts, there was a collision from which plaintiff received personal injuries and from which damage resulted to the motorcycle.

The court charged the jury as follows:

"Three issues are submitted to you for the decision of the case. The first issue reads: 'Was the defendant the owner of the automobile which collided with the plaintiff, and was the automobile being used in the business of the defendant?' The burden is on the plaintiff, Freeman, to satisfy you, by the greater weight of the evidence, that such was the case. If he has so satisfied you, you will answer the issue 'Yes,' otherwise 'No.' I will say, however, that, if the plaintiff Freeman has satisfied you by the greater weight of the evidence, that the defendant Dalton was the owner of this automobile, which collided with the plaintiff, that Dalton was at that time the owner of it, the fact that he was the owner would raise the presumption that the automobile was being used in his business, and, in that event, that is, if the plaintiff Freeman has satisfied you that Dalton was the owner of the automobile, then the burden would be put on Dalton to show, by the greater weight of the evidence, that, although he was the owner of the automobile, it was not being used in his business. So, if you find that Dalton was the owner of the automobile at that time, you would answer the issue, 'Yes,' unless Dalton has satisfied you, by the greater weight of the evidence, that it was not being used in his business at the time of the collision."

The defendant duly excepted to the charge as above set forth and to each part of it.

There was evidence on the question of negligence by the defendant, the two acts of negligence alleged being that Samuels, the chauffeur, was driving in excess of 25 miles an hour, and that he drove to the left instead of to the right of the open space in the road.

The jury rendered a verdict in favor of the plaintiff; judgment for him, and defendant appealed to the superior court, which affirmed the judgment of the county court, and defendant then appealed to this court.

H. M. Ratcliff and Holton & Holton, all of Winston-Salem, for appellant.

W. T. Wilson and Wallace & Cohen, all of Winston-Salem, for appellee.

WALKER, J. (after stating the facts as above). [1] The first question is, whether the

learned judge was correct in charging the jury that, if they found by the greater weight of the evidence that the defendant was the owner of the automobile which collided with the plaintiff's motorcycle, this fact would raise a presumption that the automobile was being used in the defendant's business, and in that event the burden would be on Dalton to show, by the greater weight of the evidence, that, although he was the owner of the automobile, it was not being used in his business. This instruction placed the burden on the defendant not only to prove, if he was the owner of it, that the automobile was not used in his business, but to establish it by preponderance or the greater weight of the evidence, whereas the burden of the issue was upon the plaintiff throughout the case, not only to show that the defendant was the owner of the automobile, but that it was, at the time, being used in his business.

[2] The defendant had not pleaded any separate or independent defense, but his answer contained solely a denial of the allegations of the complaint, and therefore did not shift the burden of the issue to the defendant, and require him to show affirmatively, and by the greater weight of the evidence, that, while he was the owner, the automobile was not being used in his business. The evidence in the case did make out a prima facie case for the plaintiff, and entitled him to have the case submitted to the jury without further proof. This is what, we think, was held in *Clark v. Sweaney*, 176 N. C. 529, at pages 530 and 531, 97 S. E. at page 474, where the evidence was stronger against the defendant than it is here. It was said by the court there:

"The pleadings admit that the automobile was owned by the defendant, Dr. John Sweeney, and that his wife was in the car at the time of the injury, and that their son Fred was driving the car. From this evidence the jury could well draw the inference that, at the time of the injury to the plaintiff, the son was acting as agent for his father, and 'was about his master's business,' citing *Moon v. Matthews*, 227 Pa. 488, 76 Atl. 219, 29 L. R. A. (N. S.) 856, 136 Am. St. Rep. 902; *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224.

This does not decide that any presumption was raised "that the son was acting as agent of his father and about his father's business," but that the jury would be warranted in drawing an inference therefrom, that such was the case, without further proof being offered by the plaintiff, or appearing in the case. And, in *Linville v. Nissen*, 162 N. C. 93, at page 102, 77 S. E. 1093, at page 1100, we held, as follows:

"The plaintiff must not only show that the person in charge was defendant's servant, but the further fact that he was at the time engaged on the master's business. Evidence of the mere ownership of the machine is insuffi-

cient.' To the same effect, *Sarver v. Mitchell*, 35 Pa. Sup. 69, and numerous cases there cited."

This view of the case keeps it in line with *White v. Hines*, 182 N. C. 275, 109 S. E. 31; *Page v. Manufacturing Co.*, 180 N. C. 335, 104 S. E. 687; *Shepard v. Telegraph Co.*, 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796, and the many other authorities cited in *White v. Hines*, supra. There may be a presumption that the car was being used in the defendant's business, but it is not a presumption of law but one of fact, and it does not shift the burden of the issue to the defendant, in the sense that he must rebut the presumption, or disprove the allegation, that the car was being used in his business, by the greater weight of the evidence. It merely is in itself evidence of the fact, and carries the case to the jury. This is fully discussed and explained in *White v. Hines*, supra, and the cases cited therein, where it is said that, if the prima facie case be called a presumption, the presumption is only evidence for the consideration of the jury and does not change, or shift, the burden of the issue. Justice Adams said, in *White v. Hines*, supra, at page 288 of 182 N. C., at page 31 of 109 S. E.:

"Such prima facie case does not necessarily establish the plaintiff's right to recover. Certainly, it does not change the burden of the issue. The defendant may offer evidence or decline to do so at the peril of an adverse verdict. If the defendant offer evidence, the plaintiff may introduce additional evidence, and the jury will then say whether, upon all the evidence, the plaintiff has satisfied them by its preponderance that he was injured by the negligence of the defendant."

And, summing up, he further said:

"In all instances of this character, after the plaintiff has established a prima facie case of negligence, if no other evidence is introduced, the jury will be fully warranted in answering the issue as to negligence in favor of the plaintiff, but will not be required to do so as a matter of law. When such prima facie case is made, it is incumbent upon the defendant to offer proof in rebuttal of the plaintiff's case, but not to the extent of preponderating evidence. The defendant, however, is not required, as a matter of law, to produce evidence in rebuttal; he may decline to offer evidence at the peril of an adverse verdict. If he offer evidence, the plaintiff may introduce other evidence in reply, and the jury will finally deter-

mine whether the plaintiff is entitled, by the greater weight of all the evidence, to an affirmative answer to the issue; for, throughout the trial, the burden is upon the plaintiff to show, by the greater weight of the evidence, that he is entitled to such answer."

White v. Hines, supra, has been approved in two cases decided at this term to the same effect, and which make clear the error in the charge to the jury as to the presumption that the automobile was being used in the business of the defendant. *Harris v. Mangum*, 183 N. C. —, 111 S. E. 177, and *Cotton Mills Co. v. Railroad Co.*, 183 N. C. —, 110 S. E. 660. Referring to the nature of the proof and the effect of it in making a prima facie case, Justice Adams said, in *Harris v. Mangum*, supra:

"In some of the decisions the word 'presumption' seems unfortunately to imply the right of the plaintiff to recover, unless the defendant introduces evidence in rebuttal and to this extent assumes the burden of proof; whereas, the 'presumption' is nothing more than evidence to be considered by the jury."

There is evidence in this case, upon which the jury could well and reasonably infer that the car belonged to the defendant and was being operated for him in his business, but the jury should have been allowed to pass upon it and to find the fact without imposing too great a burden upon the defendant to disprove the fact, or to overcome a presumption as to the same fact, by the greater weight of the evidence.

The proposition laid down in *Linville v. Nissen*, 162 N. C. at pages 102 and 103, 77 S. E. 1096, finds support in what is said by *Huddy on Automobiles*, § 283; *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731.

[3] We do not see why the fact that the defendant's license number or plate was on the automobile was not some evidence, or a circumstance tending to show, with the other proof, his ownership of the car. There was conflicting evidence about it, but this was for the jury, and, in that respect, the county court and the superior court ruled correctly. But there was error in the charge, as we have above indicated, which requires another trial of the issues.

New trial.

(183 N. C. 528)

CILLEY et al. v. GEITNER et al. (No. 508.)

(Supreme Court of North Carolina. May 17, 1922.)

1. Guardian and ward §167—Property of nonresident ward may be transferred to nonresident guardian without appointment of resident guardian.

Under C. S. §§ 2195, 2196, providing that a nonresident guardian of a nonresident ward may apply to have property in this jurisdiction removed to the residence of the ward, to effect the removal of such property it is not necessary to appoint a resident guardian to defend the proceedings.

2. Guardian and ward §167—Real property of nonresident ward may be converted without appointment of resident guardian.

Under C. S. § 2180, permitting conversion of property of a ward when the interest of the ward will be promoted thereby, and sections 2195, 2196, under which the appointment of a resident guardian is not necessary to transfer property of a nonresident ward to the jurisdiction where the ward resides, where wards were represented by their next friend, their real estate could be converted into personal property to effect a removal into the jurisdiction where they and their guardian resided.

Appeal from Superior Court, Catawba County; Bryson, Judge.

Action by Gordon H. Cilley and others against G. H. Geitner and others. From judgment for defendants, plaintiffs appeal. Reversed.

A former appeal, heard at the fall term of 1921, is reported in 182 N. C. 714, 110 S. E. 61. It is agreed that the record in that appeal shall, so far as applicable, be accepted as the record in this appeal.

The plaintiffs filed a petition before the clerk of the superior court of Catawba, in which they alleged that under the provisions of the last will and testament of A. A. Shuford the surviving executors had allotted to the several heirs the property therein described, including the real and personal property allotted to Alda Cilley and Adelaide Cilley, heirs at law of Maude E. Cilley, who was a daughter of the testator. The defendants admitted an agreement for the distribution of the property devised, and denied any inclination to delay the distribution, but insisted that Gordon H. Cilley, surviving husband of Maude Cilley, had no interest in the property, and that they could not recognize any agreement to that effect made by him and Alfred G. Clay, foreign guardian of Alda and Adelaide Cilley.

The plaintiffs prayed judgment that Gordon H. Cilley be decreed to be the owner of a one-third interest, and Alfred G. Clay of a two-third interest in the property devised to

the heirs of Maude Cilley; that a commissioner be appointed to sell the real estate so devised; that the allotment of the property be confirmed, and the foreign guardian be authorized to remove the assets of his wards to Pennsylvania.

After the decision of this court was certified, the plaintiffs prayed judgment in conformity with the opinion, whereupon Judge Bryson rendered the judgment following:

"First. That petitioner, Gordon H. Cilley, is not entitled to any right, title, interest or estate in any of the property allotted by defendant executors to the interest of Maude E. Cilley and belonging to the estate of A. A. Shuford, but the same and every part thereof is the property of his children, Adelaide Harper Cilley and Alda Virginia Cilley.

"Second. Inasmuch as no guardian has been appointed in the state of North Carolina for Alda Virginia Campbell Cilley and Adelaide Harper Cilley the court concludes it has no power to render a decree for a sale of the lands allotted to the interest of Maude E. Cilley, deceased ancestor of the infant petitioners, and cannot order such sale, there being no proper representative for the infant petitioners before the court, although the court is of opinion and so finds that a sale of the lands belonging to the infant petitioners would materially promote their interests, and that the facts with respect to such sale are as stated in the petition.

"Third. Alfred G. Clay, as guardian appointed by the orphans' court of Philadelphia county, Pa., is not authorized to sue in the courts of North Carolina, and his appearance in this court and cause and ratification by him as such guardian of the settlement made by the defendant executors is without legal effect, although for the purposes of this proceeding the court doth appoint him next friend for Alda Virginia Campbell Cilley and Adelaide Harper Cilley, after making due inquiry as to his fitness.

"Fourth. The petitioners have complied with the provisions of the statute with respect to the filing of the bond and certified copies of the appointment of Alfred G. Clay as guardian for Alda Virginia Campbell Cilley and Adelaide Harper Cilley, the bond being sufficient in amount and ability of sureties to protect the estate of his said wards, and the letters duly authenticated, and the court would order the delivery of the personal property allotted to the interest of Maude E. Cilley, and as stated in the petition, to said guardian of Alda Virginia Campbell Cilley and Adelaide Harper Cilley, but the court concludes that it is without power to order a removal of their funds or property to the state of Pennsylvania without the presence before the court of a guardian appointed under the laws of North Carolina.

"Fifth. The court adjudges that the allotment made by the defendant executors to the several persons, entitled under the will of A. A. Shuford, and as stated in the petition, is fair, just, and equitable; but, there being no guardian representing Adelaide Harper Cilley and Alda Virginia Campbell Cilley before the court appointed under the laws of this state, the court

holds that it is without power to ratify such settlement.

"Wherefore the court doth adjudge that this proceeding be, and it is, dismissed, at the cost of the petitioners."

W. B. Council, of Hickory, and Mark Squires, of Lenoir, for appellants.

Self, Bagby & Aiken, of Hickory, for appellees.

ADAMS, J. [1] His honor's exclusion of Gordon H. Cilley, as the representative of his wife, from participation in the property acquired by Alda and Adelaide Cilley under the will of A. A. Shuford, conforms to the opinion of this court as expressed in the former appeal; but we think his honor erred in holding as a conclusion of law that the court, in the absence of a guardian duly appointed in this state, had no power to remove the personal property of the nonresident devisees to the place of their residence. Alda and Adelaide Cilley reside in Pennsylvania, and there Alfred G. Clay was duly appointed as their general guardian. His honor finds from the record that the plaintiffs have complied with the statute in filing a certified copy of the appointment of the guardian in Pennsylvania, and that the bond filed by him is sufficient both as to the amount and as to the financial ability of the sureties to protect the estate of his wards. His honor also says that he would order the transfer of the fund to the foreign guardian if he had the legal right to make such order.

The statute provides that "where any ward * * * residing in another state * * * is entitled to any personal estate in this state, * * * whether the same be in the hands of any guardian residing in this state, or of any executor, administrator or other person holding for the ward, * * * or if the same * * * be not in the lawful possession or control of any person, the guardian * * * duly appointed at the place where such ward * * * resides, may apply to have the estate removed to the residence of the ward * * * by petition filed before the clerk," and that the application "shall be proceeded with as in other cases of special proceedings. * * * Any person may be made a party defendant to the proceeding who may be made a defendant in a civil action"—but there is no absolute requirement that a resident guardian be appointed to defend in such proceedings. C. S. §§ 2195, 2196.

[2] Furthermore, we think his honor erroneously concluded that the court had no power to order a sale of the real estate of the wards, inasmuch as they had no guardian resident in this state. Section 2180 of the Consolidated Statutes is applicable to a proceeding instituted by a guardian for the con-

version of property when the interest of the ward will be promoted thereby, and the proceeds are intended to be used for a special purpose; but, since by virtue of the statute the appointment of a resident guardian is not necessary for the transfer of a ward's funds to a nonresident guardian, and since the plaintiffs are represented by their next friend, there appears to be no valid reason why this proceeding should not be maintained to ratify the agreement of distribution, to remove the wards' personal property, and incidentally to convert the wards' real estate into personal property in order to effect such removal.

Our conclusion is that the proceeding can be maintained, and accordingly that his honor's judgment of dismissal should be reversed.

Reversed.

(183 N. C. 457)

IN RE HARRISON'S WILL. (No. 255.)

(Supreme Court of North Carolina. May 10, 1922.)

1. Wills \S 130—Letter not written "animo testandi" not admitted as holographic will.

In a will contest where the jury found that the paper writing was not written "animo testandi," by which is meant that it was not alleged testatrix's purpose that the writing should operate as a testamentary disposition of her property and was not found among the valuable papers and effects of alleged testatrix (C. S. § 4144), it may not be probated as a holographic will.

2. Wills \S 324(1)—Where animus testandi doubtful, submission to jury proper.

Where the animus testandi of a paper writing was doubtful or at least ambiguous as appeared from the face of the instrument, the submission of the issue to the jury was proper.

3. Witnesses \S 159(3)—Testimony of caveator that alleged testatrix kept alleged will in unlocked drawer admissible.

In a will contest, the admission of evidence by a caveator that the bureau drawer in which the writing alleged to be a will was found was not usually locked was admissible, notwithstanding C. S. § 1795, as witness could testify whether the drawer was locked and as to the custom of keeping it locked as matter within her own knowledge and did not entail a recitation of personal transaction with alleged testatrix.

Hoke, J., dissenting.

Appeal from Superior Court, Wake County; Bond, Judge.

In the matter of the alleged will of Mrs. Eugenia Harrison, deceased. From judgment refusing probate, propounders appeal. No error.

Issue of devisavit vel non raised by a caveat to the will of Louisa Eugenia Harri-

in making the attempt to cross, particularly as he was not expecting to cross the main line.

The motion for a directed verdict does not raise the question of the applicability of the crossing statute to the case, and there is no exception to the judge's ruling in this respect. We have therefore not considered it. There is a reference to it in the first exception, but only in support of the motion for a directed verdict.

The only other question remaining to be considered is the applicability of the rule in Danner's Case, which is locally as well known as the rule in Shelley's Case.

The doctrine declared in this famous case (4 Rich. 329) is conceded to be an exception to the rule that he who comes into court alleging injury by reason of the negligent act of another assumes the burden of establishing both injury and negligence. But, by reason of the nature of the animal injured, the ordinary circumstances of the injury, the improbability of the owner being prepared with evidence of the manner of its happening, and the facility with which the railroad company may produce the only witnesses to the event, the rule, as one of necessity, has been declared that upon evidence that stock has been injured by a railroad train a rebuttable presumption arises and continues through the trial that the injury was the result of the negligence of the railroad company.

Several considerations enter into the ratio decidendi:

(1) The nature of the animal, a brute creature with scarcely the instinct of self-preservation, unattended, is usually incapable of appreciating danger or escaping from it. In *Fowles v. Railway Co.*, 73 S. C. 306, 53 S. E. 534, following *Wilson v. Railway Co.*, 10 Rich. 52, and *Richardson v. Railway Co.*, 55 S. C. 334, 33 S. E. 466, the court held that the rule did not apply to the killing of a dog upon the track; that, by reason of his intelligence, rapidity of movement, and agility, "in this respect it is reasonable to place him on somewhat the same footing as a human being when in the possession of all his faculties and capable of seeing the danger and escaping from it." (2) The collision ordinarily occurs at an isolated part of the track, and frequently at night. (3) It always happens to an estray, which presupposes the absence of the owner. (4) The owner, being absent, is unable to be prepared with evidence of the circumstance tending to show negligence. (5) The facility with which the railroad company may produce, in most cases, the only witnesses to the event. (6) The presumption that attaches against one in a position to explain and does not do so.

The reasoning of the decision is not satisfactory, and has not been followed in a single case reaffirming the rule declared, of

which there are not less than 25. It is based upon the conception that in every case of forcible injury, whether in trespass *vi et armis* against the offending servant personally, or trespass on the case against the master on his imputed liability, the fact of injury raises a presumption of negligence—a principle that cannot be sustained in view of the axiomatic rule that negligence must be alleged and proved, and a principle which, if sustained on the general terms stated, would apply to all cases of tort. The opinion is weakened by the admitted fallacy:

"If the engineer drove over the cattle willfully, the company is not liable."

Great stress is laid in the opinion upon the failure of the railroad company to produce witnesses to explain the occurrence:

"When a party is charged with an act or declaration, which may subject him to an action, and does not deny it, his silence is construed into an admission."

And also upon the fact:

"The plaintiff may not have been present when his cattle were killed, and may not be able to discover who were the persons employed on the train when the damage was done."

We do not intend to intimate the slightest desire to question the salutary doctrine which the result of that case promulgates. What has been said is directed solely to a criticism of the grounds upon which it has been placed in that decision, and with a view to ascertain, by subsequent reaffirming decisions, the real and true ground of the rule.

In *Roof v. Railway Co.*, 4 S. C. 61, it is declared, evidently as the reason for the rule:

"The difficulty on the part of the owner from the absence generally of himself or third persons from the place in which the injury is inflicted, to show how it occurred, and the facility of the company, from its many employees present, to prove that it was accidental and unavoidable, makes it neither unreasonable nor unwise, when cattle are killed by the passing trains, to hold that *prima facie* the fact of negligence is established, throwing the onus of rebutting it on the company."

Discussing Danner's Case, in *Jones v. Railway Co.*, 20 S. C. 249, the court says:

"But what the court did decide was rather in the nature of a rule of evidence than otherwise, determining the quantum of testimony which might carry a case of this kind to the jury, and it seems to have been founded upon what the court regarded as a necessity in such cases."

After quoting from the opinion in that case, the court adds:

"This was the principle upon which the case turned, to wit, the fact that it was in the power of the defendant alone to explain, and that he failed to attempt it."

In *Walker v. Railway Co.*, 25 S. C. 141, the court declares:

"The rule in question was established upon the principle that, the facts and circumstances of the killing, upon which the issue of negligence in cases of this kind must be determined, being in most such cases entirely within the knowledge of the party committing the injury, it was right and proper that said party should be required to explain and exculpate. * * * Now in all these cases the party doing the injury is especially presumed to have the information as to all the facts and circumstances attending it, and there is no hardship in requiring him to bring these facts and circumstances forward to his exculpation, if they exist, and upon failure to do so that he shall be presumed to have committed the injury, which has been traced to his hands, through negligence."

Joyner v. Railroad Co., 26 S. C. 49, 1 S. E. 52, the court says:

"It was a judicial determination of the effect which such testimony offered by the plaintiff should have in all such cases, and it was established from the necessity of the case."

And further:

"But we think a careful reading of the cases will show that it was not the absence of testimony simply from the defendant which required the rule, but it was the absence of exculpating testimony, which, if it existed, the defendant alone has the power to produce, as it was not supposed that the plaintiff could know the facts, these occurrences frequently taking place in the nighttime and in unfrequented places, when no one is present except the employees of the road, the necessity of the case, therefore, requiring the rule."

Mr. Justice McIver (since Chief Justice) in his dissenting opinion upon the continuing effect of the presumption, recognizing the soundness of the rule, discusses the foundation upon which it rests, as follows:

"It is founded upon * * * necessity. * * * Indeed, it would be difficult to find any other foundation upon which it could rest. * * * The authorities clearly show that this rule was founded on the necessity of the case, arising from the fact that, where animals are killed by a railroad train, the owner of such animals is rarely able to produce witnesses to prove the circumstances under which they are killed, while the railroad company, having the control of their employees intrusted with the management of their trains, can readily produce such witnesses. * * * Such, then, being the nature and foundation of this purely artificial rule of evidence, it would seem clear that it is only applicable where the necessity for it exists."

In *Drennan v. Railway Co.*, 91 S. C. 507, 75 S. E. 45, a case under the signaling statute, the court said:

"The necessity of the case requires proof of more than ordinary negligence on the part of

the person injured. A like necessity caused a change in the rules of evidence, where cattle were killed by a railroad train, as will be seen by the case of *Danner v. Ry.*, 4 Rich. 329, in which it was held that there was a presumption of negligence arising from the mere act of killing the stock."

In *Moorer v. Railway Co.*, 103 S. C. 280, 88 S. E. 15, the rule is characterized as one "of necessity."

Considering then the rule and the foundation of it, under the principle, "*Ratione cessante lex ipsa cessat*," it cannot be made applicable except to those cases whose peculiar circumstances develop the conditions under which it was given birth. Where a team has been struck at or near a crossing, or upon the track at any other point, in broad daylight, the team being in control of the owner or his agent, the case does not present a single circumstance justifying, as of necessity, the application of so exceptional a doctrine.

Suppose that the driver of the team had received personal injury at the time the mule was killed and the wagon destroyed; would there be one rule applicable to the mule and another to the driver and the wagon?

The plaintiff's cause of action was for damage to the mule and to the wagon. Even assuming that the rule in *Danner's Case* applied to the killing of the mule, the presiding judge indiscriminately applied it to the whole cause of action, wagon and mule; no one would contend that it applied to the wagon.

We are not unmindful of the declaration of this court in the case of *Mack v. Railway Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 918:

"The killing of the mule by the defendant raised a presumption of negligence on the part of the defendant, and this presumption continued until it was rebutted by the testimony."

No question was raised in that case as to the applicability of the rule in *Danner's Case*. The defendant appears to have conceded its applicability, and contended that the presumption disappeared as soon as the defendant fully explained the circumstances—a contention which has great force, as may be seen from the dissenting opinion of Chief Justice McIver in *Joyner v. Railway Co.*, 26 S. C. 49, 1 S. E. 52, but which was overruled in that case.

The case was not intended to discuss or decide an apparently conceded point, and the declaration of the court under such circumstances is not conclusively binding upon this case.

The judgment of this court should be that the judgment appealed from be reversed, and that the case be remanded to the county court of Greenwood county for a new trial.

(119 S. C. 120)

STATE v. GEORGE. (No. 10761.)

(Supreme Court of South Carolina. Dec. 6, 1921.)

1. Courts ⇨87(1)—Federal decision is not binding except in case involving federal question.

The state courts are not bound to follow the federal decisions except in cases involving a federal question, and therefore a decision by the Supreme Court of the United States that a person attacked is not bound to retreat before invoking the right of self-defense is not conclusive on the state court.

2. Homicide ⇨118(1)—Party attacked must retreat, if possible, before invoking a right of self-defense.

A charge that if one can give back or retreat without increasing his danger, and thus avoid taking human life, it is his duty to do so, and unless he has done so he cannot plead self-defense, was correct.

Appeal from General Sessions Circuit Court of Edgefield County; Frank B. Gary, Judge.

John L. George was convicted of manslaughter, and he appeals. Appeal dismissed.

Jno. C. Sheppard and S. M. Smith, both of Edgefield, and Cole L. Blease and Claud N. Sapp, both of Columbia, for appellant.

Solicitor T. C. Callison of Lexington, N. G. Evans, of Edgefield, and A. F. Spigner, of Columbia, for the State.

GARY, O. J. The defendant was indicted for murder, and was convicted of manslaughter.

The only exception upon which he appealed is as follows:

"That his honor, the circuit judge, erred in charging the jury as follows: 'There is still a fourth element that he must establish; he must show you that he had no other reasonable means of escape, except to take the life of the assailant.' The law says that if one can give back or step aside, or retreat without increasing his danger, and thus avoid taking human life, it is his duty to do so, and unless he has done so, it will not permit his plea of self-defense. It being respectfully submitted that the above language is not in accord with the law, as laid down by the United States Supreme Court, in such cases."

The appellant's attorneys rely upon the case of *Brown v. United States*, reported in 256 U. S. 335, 41 Sup. Ct. 501, 65 L. Ed. 618.

The syllabus of the case is as follows:

"A person attacked by another with a knife, does not, as a matter of law, exceed the bounds of lawful self-defense, if he stands his ground and kills his assailant, where he has sufficient reason to believe, that he is in imminent danger of death or grievous bodily harm, from his assailant."

[1, 2] The appellant herein was not tried in a federal court, nor for the violation of a federal law. The state courts are not bound to follow the federal decisions, except in cases involving a federal question, which was not the case in this instance. The fact that a ruling may be made on the trial of a case in a federal court does not thereby make it a federal question. The charge was free from error under the decisions rendered by the courts of this state.

Appeal dismissed.

WATTS, FRASER, and COTHRAN, JJ., concur.

(119 S. C. 101)

ZEIGLER v. THOMPSON et al., School Trustees. (No. 10875.)

(Supreme Court of South Carolina. April 18, 1922.)

Schools and school districts ⇨87(1)—Legislature held to have plenary power to authorize issuance of school district bonds for school purposes.

There being no restrictions on the issuance of bonds by a school district such as are contained in Const. art. 8, § 7, and article 10, § 11, requiring the state, cities, and towns to submit to the voters questions as to creating and increasing debts thereof, the Legislature has plenary power to authorize issuance of bonds by a school district for school purposes.

Appeal from Common Pleas Circuit Court of Orangeburg County; I. W. Bowman, Judge.

Suit by William V. Zeigler against W. B. Thompson and others, trustees of School District No. 26. Decree for defendants, and plaintiff appeals. Affirmed.

Wolfe & Berry, of Orangeburg, for appellant.

Julian S. Wolfe, of Orangeburg, for respondents.

COTHRAN, J. The issue is clearly stated in the circuit decree. The main question is whether or not the General Assembly has the power to authorize the issue of bonds by a school district for school purposes.

It is held in the case of *Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421, that the power of the General Assembly to authorize the issue of bonds by a territorial subdivision is limited only by the Constitution and the governmental character of the purpose for which the bonds are to be issued; that the Constitution requires a submission of the question to the qualified voters only in the case of bonds proposed to be issued by the state or by a city or town. Changing the declaration of the court in the case of *Carrison v. Ker-shaw County*, 83 S. C. 88, 64 S. E. 1018, so as

to make it appropriate to the case at bar, we may say:

"While article 10, § 11, of the Constitution forbids an increase of the public debt of the state without submitting the question to the qualified electors, and while article 8, § 7, forbids any city or town creating a bonded debt without submitting the question to the qualified electors of the city or town, we find no such restriction on the power of the Legislature with respect to the issuance of bonds by a county. In the absence of such restriction the power of the Legislature in the matter is plenary."

The judgment of this court is that the decree appealed from be affirmed.

GARY, C. J., and FRASER and MARION, J.J., concur.

WATTS, J., did not participate on account of sickness.

(119 S. C. 171)

JUMPER v. DORCHESTER LUMBER CO.
et al. (No. 10864.)

(Supreme Court of South Carolina. April 11, 1922.)

1. Pleading ~~§~~367(3), 369(2) — **Complaint setting up several causes of action held not subject to motion to make more definite.**

Where, in an action by a broker against a lumber company, the complaint jumbled together a cause of action for specific performance of a contract to convey land, an action to secure an interest in land with a lien therefor, and an action to recover a specified amount for each 1,000 feet of lumber on the land purchased by plaintiff for defendant, defendant's remedy against the complaint was a motion to compel an election, and not a motion to make the complaint more definite by specifying the oral and written parts thereof.

2. Specific performance ~~§~~116¾ — **Complaint seeking enforcement of oral contract for conveyance of land demurrable.**

In an action for specific performance of a contract for the conveyance of land, a complaint showing on its face that the contract is wholly in parol sets forth a contract within the statute of frauds, and is demurrable.

3. Pleading ~~§~~367(3) — **Complaint for specific performance of contract to convey land, partly oral and partly written, held subject to motion to make definite.**

A complaint by a broker against a lumber company for specific performance of a contract to convey to plaintiff certain land as a part of his compensation, or to secure an interest in the land to a specified amount with a lien therefor, and which alleges that the contract was partly in writing and partly in parol, is subject to a motion to make definite by specifying the particular parts in writing and in parol respectively, in order that defendant may properly plead thereto.

4. Brokers ~~§~~43(1) — **Complaint to recover for purchasing timber at so much per thousand feet on land held not to present contract within statute of frauds.**

A complaint by a broker against a lumber company to recover for timber land purchased for defendant at the rate of 50 cents per thousand feet of timber on the land does not present a contract within the statute of frauds, and need not specify that the contract was partly in writing and partly in parol.

5. Appeal and error ~~§~~90, 91(6) — **Overruling of motion to make definite held appealable.**

An order overruling a motion to make definite and certain a complaint by a broker against a lumber company, which improperly joins three distinct causes of action relating to land, and shows on its face that the contract is partly in parol, but without indicating which part is verbal and which in writing, affects a substantial right, and involves the merits of the case, and is appealable.

Appeal from Common Pleas Circuit Court of Hampton County; R. W. Memmlinger, Judge.

Action by W. J. Jumper against the Dorchester Lumber Company and others. Defendants' motion to make petition more definite and certain was overruled, and it appeals. Affirmed, and appellee's motion to dismiss appeal denied.

Legoré Walker, of Summerville, for appellants.

Brown & Bush, of Barnwell, and George Warren, of Hampton, for respondent.

COTHRAN, J. Action for compensation as purchasing agent of the defendant company in the acquisition of certain real estate. The plaintiff alleges a contract, partly in writing and partly in parol, by which his compensation was to be measured either by a conveyance to him of the land with a reservation of the timber rights, or by payment to him of 50 cents per thousand feet of timber on the property purchased, estimated on a stumpage basis; that in compliance with said contract he negotiated for the company the purchase of certain lands for which the defendant paid \$150,000; that there are 100,000,000 feet of timber thereon, estimated upon a stumpage basis; that the land, exclusive of the timber, is worth \$60,000.

The defendants moved for an order requiring the plaintiff to make his complaint more definite and certain by specifying the oral and written parts, respectively, of the contract. The motion was refused, and the defendants appeal. The respondent moves to dismiss the appeal upon the ground that the order is not appealable until after final judgment.

[1] The plaintiff has jumbled three separate and distinct causes of action in one complaint: (1) An action for specific performance of a contract by which he was entitled

to a conveyance of the land, exclusive of the timber rights; (2) an action to secure an interest in the land to the extent of \$60,000 with a lien thereon therefor; (3) an action for 50 cents per 1,000 feet of timber on the land, estimated at 100,000,000 feet, \$50,000.

It is impossible to tell from the complaint which of these causes of action the plaintiff intends to rely upon; he has the legal right to rely upon any one that he chooses. It is a proper case for a motion by the defendants to require the plaintiff to elect upon which cause of action he will proceed to trial.

[2] Should he elect to proceed upon the equitable cause of action for specific performance of the alleged contract to convey to him the land exclusive of the timber, the following principles would be applicable: The plaintiff is under no obligation to describe the character of the evidence upon which he relies to establish the contract, and a complaint alleging the execution of a contract without reference to such character would not be subject to a demurrer or to a motion to make definite and certain. *Groce v. Jenkins*, 28 S. C. 172, 5 S. E. 352. If the allegation had been that the contract was wholly in parol, the defendants' demurrer under the statute of frauds would have been entertained. *Williams v. Salmond*, 79 S. C. 460, 61 S. E. 79; *Mendelsohn v. Banov*, 57 S. C. 147, 35 S. E. 499.

[3, 4] As the allegation is that the contract was partly oral and partly written, it must be assumed that the oral part was an essential, or at least an important, element; the defendants would be entitled to be informed as to this, in order that they might shape their future course in pleading. Should he elect to proceed upon the equitable cause of action to secure an interest in the land to the extent of \$60,000, with a lien thereon therefor, the same principles would be applicable. Should he elect to proceed upon the legal cause of action for 50 cents per 1,000 feet of timber, such a contract would not be within the statute of frauds, and there would be no necessity for a specific statement of what part of it was in writing and what in parol, as he would be entitled to rely upon either or both elements.

[5] Under the case of *Blakely v. Frazier*, 11 S. C. 123, the order appealed from affects a substantial right, involves the merits, and is appealable. See, also, *Hawkins v. Wood*, 60 S. C. 521, 39 S. E. 9; *Bolin v. Ry. Co.*, 65 S. C. 222, 43 S. E. 665; *Lynch v. Spartan Mills*, 66 S. C. 12, 44 S. E. 93.

The judgment of this court is that the respondent's motion to dismiss the appeal be refused, and that the order appealed from be affirmed.

GARY, C. J., and FRASER, J., concur.

WATTS, J., did not participate on account of sickness.

(119 S. C. 59)

HARRELSON v. JOHNSON. (No. 10884.)

(Supreme Court of South Carolina. April 28, 1922.)

Malicious prosecution \Leftrightarrow 35(1)—Discharge on preliminary investigation sufficient termination.

The discharge of accused by a magistrate on preliminary investigation is such a termination of the prosecution as will sustain an action for malicious prosecution.

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Georgetown County; R. W. Memminger, Judge.

Action by A. B. Harrelson against A. P. Johnson. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

Capers G. Barr, of Georgetown, and L. M. Gasque, of Marion, for appellant.

James W. Wingate and M. W. Pyatt, both of Georgetown, for respondent.

COTHRAN, J. Action for malicious prosecution. The appeal is from an order overruling a demurrer to the complaint, upon the general ground, specifying the particular objection that it failed to allege a final determination of the prosecution claimed to have been maliciously instituted.

The sole question at issue in the appeal is whether or not the discharge of a defendant by a magistrate, upon preliminary investigation, is such a termination of the prosecution as will supply that necessary element in a subsequent action for malicious prosecution. Narrowing the issue still further, it is whether the element referred to is established by the termination of the particular proceeding instituted, or must there be an adjudication of the innocence of the party prosecuted.

My conception of the law is that the remedy accorded a citizen of damages for a malicious prosecution is intended to prevent and redress the malicious abuse of the process of the law, and that, when the particular proceeding instituted in malice had been legally terminated, the remedy of the injured party has matured; he is not required to await an acquittal, an adjudication of his innocence, which may never come, and may be purposely prevented. A contrary ruling would permit a maliciously disposed prosecutor to hail the defendant before every magistrate in the country, or before the same magistrate a dozen times, and be immune from damages by allowing the case to be dismissed by the magistrate.

As is said in 18 R. C. L. 23:

"To require a trial of the action on the merits resulting in an acquittal, would be to per-

mit a prosecutor to do all the damage which a malicious prosecutor can possibly effect, and then deny the accused the opportunity to vindicate himself by a trial, by having the proceeding quashed or dismissed and thus escaping all liability for the wrong unlawfully inflicted. So, as a general rule, all that is required is that there be an end to the particular proceeding."

The precise point was raised and decided in conformity with this view in the following cases: *Rider v. Kite*, 61 N. J. Law, 8, 38 Atl. 754; *Long v. Rogers*, 17 Ala. 540; *Schaefer v. Cremer*, 19 S. D. 656, 104 N. W. 468; *Mentel v. Hippely*, 165 Pa. 558, 30 Atl. 1021; *Secor v. Babcock*, 2 Johns. (N. Y.) 203; *Findley v. Bullock*, 1 Blackf. (Ind.) 467; *Comisky v. Breen*, 7 Ill. App. 369; *Gibbs v. Ames*, 119 Mass. 60; *Sayles v. Briggs*, 4 Metc. (Mass.) 421; *Moyle v. Drake*, 141 Mass. 238, 6 N. E. 520; *Eagleton v. Kabrich*, 66 Mo. App. 231; *Clark v. Cleveland*, 6 Hill (N. Y.) 344; *Robbins v. Robbins*, 133 N. Y. 598, 30 N. E. 977; *Streight v. Bell*, 37 Ind. 550; *McWilliams v. Hoban*, 42 Md. 56; *Jones v. Finch*, 84 Va. 204, 4 S. E. 342; *Graves v. Scott*, 104 Va. 372, 51 S. E. 821, 2 L. R. A. (N. S.) 927, 113 Am. St. Rep. 1043, 7 Ann. Cas. 480—and many more could be cited upon the point. See full notes to 2 L. R. A. (N. S.) 927 and Ann. Cas. 1913A, 926, 26 Cyc. 58. In a note to 26 Am. St. Rep. 123, Judge Freeman states:

"It is sometimes stated that it (the prosecution) must have terminated in his acquittal, but this is not true. It is sufficient if the prosecution has ended, so that it cannot be reinstated nor further maintained without commencing a new proceeding; but it must have terminated in some of the several modes in which it is possible for a criminal proceeding to reach a stage beyond which the accused cannot be further prosecuted therein."

He further states:

"If the examining magistrate finds that there is not sufficient cause to hold the accused to answer, and therefore discharges him, that prosecution is thereby ended and the consideration that other prosecutions may be brought against the same person on the same charge * * * cannot prevent the action of the magistrate from having its effect as a termination of the prosecution before him, sufficient to support a civil action."

In the case of *Caldwell v. Bennett*, 22 S. C. 1, the plaintiff had been arrested, charged with stealing cotton from the field. He was carried before a magistrate, who on a preliminary examination dismissed the prosecution for insufficiency of evidence. The party prosecuted then brought an action for malicious prosecution. In sustaining refusal of nonsuit, the court said:

"For it is quite clear that there was testimony that the prosecution was ended."

In *Whaley v. Lawton*, 57 S. C. 256, 35 S. E. 558, the court says:

"For this reason the rule also requires that the prosecution must have been legally ended before any action for malicious prosecution can be commenced."

In the case last cited the court held that the prosecution had not been legally ended by a discharge of the prisoner by a ministerial magistrate of Charleston for the reason that he had no legal authority to discharge a defendant. The implication is strong that if he had had such authority his discharge would have constituted an end of the prosecution.

In *Shackleford v. Smith*, 1 Nott & McC. 36, it was held that a nol. pros. entered by the solicitor upon the warrant, without taking an order of discharge, was not a termination of the prosecution, for the very plain reason that he could have recalled his entry and tried the defendant.

In *Thomas v. De Graffenreid*, 2 Nott & McC. 143, it is held that the return of a "no bill," without an order of the court is not a termination of the prosecution, for another bill could be handed out.

To the same effect is *Teague v. Wilks*, 3 McCord, 465; *Heyward v. Cuthbert*, 4 McCord, 354.

The fact that the absence of an order of court in these cases was so emphasized by the court contains a strong implication that, if the order had been obtained, the discharge, though not an acquittal, would have ended the prosecution.

The case of *Glover v. Heyward*, 106 S. C. 489, 94 S. E. 878, seems to me absolutely conclusive of the question. In that case Mr. Justice Watts uses this language:

"Magistrate Weston had jurisdiction of the case, and dismissed the charge and discharged Glover, and that terminated the case as far as the warrant was concerned. His order was binding, and released Glover, and then Glover had the right to commence his action for damages."

The fact that the offense in that case was within the jurisdiction of the magistrate for trial cannot possibly affect the question. In the present case the magistrate had as full jurisdiction to discharge the prisoner as the magistrate in the last case cited; that the latter might have tried the case does not enlarge his power of discharge, or make it superior in any way to that of the magistrate in the case at bar.

The order appealed from is affirmed.

GARY, C. J., and WATTS, J., concur.

FRASER, J. (dissenting). This is an action for malicious prosecution. The complaint reads:

"(1) That heretofore, to wit, on the 15th day of January, 1920, the defendant applied for

and obtained from C. W. Rouse, Esq., a magistrate in and for the state and county aforesaid, an arrest warrant for the plaintiff, charging the plaintiff with breach of trust with fraudulent intent, in that the plaintiff did receive and collect from one Dave Shackelford a sum of \$100 or more on behalf of A. P. Johnson & Son, and did appropriate the same to his own use with intent to cheat and defraud A. P. Johnson & Son of the same against the form of the statute in such cases made and provided, a copy of the said arrest warrant being attached as a part and parcel of this complaint.

"(2) That under and by virtue of the said arrest warrant the plaintiff was arrested by the sheriff of Georgetown county, and was compelled to appear before the said magistrate and make arrangements for his release in order to avoid being committed to jail.

"(3) That the defendant willfully, wantonly, maliciously, and recklessly, and without probable cause, took out the said arrest warrant against the plaintiff and caused him to be arrested as aforesaid.

"(4) That on the 31st day of March, 1920, the plaintiff appeared before the said magistrate for a preliminary hearing under the said warrant, this being the date fixed for the hearing by the said magistrate, and at the said time and place the defendant and all of his witnesses were then and there examined under oath, before the said magistrate, as to the facts constituting the alleged charge of breach of trust with fraudulent intent brought against the plaintiff by the defendant, and, after the defendant and all of his witnesses were duly examined as aforesaid, the defendant wholly failed to make out a probable case against the plaintiff on the alleged charge, and the warrant was dismissed, and the plaintiff discharged and exonerated of and from the said charge, by the said magistrate, for the reason that there was no evidence to substantiate the said charge.

"(5) That the defendant, in order to obtain the said arrest warrant against the plaintiff, made an affidavit charging the plaintiff with having collected from one Dave Shackelford a sum of money over \$100, the property of A. P. Johnson & Son, and converted the said money to his own use with the intent to cheat and defraud the said A. P. Johnson & Son.

"(6) That, as plaintiff is informed and believes, the firm of A. P. Johnson & Son consists of the said A. P. Johnson and his son, Victor M. Johnson.

"(7) That, on account of the willful, wanton, malicious, reckless, and high-handed action of the defendant in taking out the said arrest warrant against the plaintiff without probable cause, and compelling the plaintiff to submit to the humiliation, disgrace, and embarrassment of being arrested on the alleged charge of breach of trust with fraudulent intent, and, further on account of the plaintiff having to

leave his work on several occasions to attend the hearing of the said case, and to employ attorneys to represent him, he has been damaged in the sum of \$2,500.

"(8) That the defendant's action in taking out the said arrest warrant against the plaintiff and thereby causing him to be arrested as aforesaid, without probable cause, was done willfully, wantonly, maliciously, recklessly, and with an intent to harass, embarrass, annoy, oppress and humiliate the plaintiff."

To this complaint the defendant demurred, on the ground that the complaint does not state a cause of action, in that it fails to state a final determination of the prosecution. The demurrer was overruled, and the defendant appealed.

The question is, Does the discharge of the prisoner on a preliminary hearing make such a final determination of the case as to form the basis of an action for malicious prosecution? The question is discussed and decided by the case of *Whaley v. Lawton*, 57 S. C. 256, at page 259, 35 S. E. 558, at page 559, we find:

"The first question depends upon several subordinate inquiries: First. Whether there was any allegation in the complaint in the first cause of action that the prosecution complained of was ended. The rule is well settled that such an allegation is essential to an action for malicious prosecution, for the very good reason that until the prosecution is ended, it cannot be known whether the prosecution is well founded or not; and, as is said in one of the cases hereinafter cited, 'this absurdity might follow—a plaintiff might recover in the action and yet be afterwards convicted on the original prosecution.' For this reason the rule also requires that the prosecution must have been legally ended before any action for malicious prosecution can be commenced."

The dismissal of the defendant on a preliminary hearing does not finally determine the matter, as a new warrant may be issued by another magistrate, or the matter may be carried before the grand jury. A careful reading of *Whaley v. Lawton* will show that the rule is clearly stated, and Mr. Chief Justice McIver declined to discuss the difference between the powers of the ministerial and judicial magistrate. The point decided is that the dismissal of a prosecution that is not a final determination of the matter is not the basis for a suit for malicious prosecution.

The order overruling the demurrer should be reversed, and the demurrer sustained.

(119 S. C. 97)

(111 S.E.)

T. L. BRICE & CO., Inc., v. BANK OF COLUMBIA et al. (No. 10857.)

(Supreme Court of South Carolina. April 11, 1922.)

1. Pleading \S 368—Amended complaint held to conform to order directing separate statement of causes of action.

In an action to recover demurrage loss on a carload of oats, where seller directed C. Bank to order its correspondent bank to return a draft and deliver the bill of lading, and C. Bank sent an unconfirmed telegram, collect, which correspondent bank refused to receive, and the telegraph company failed to notify C. Bank of its failure to deliver the telegram, an amended complaint alleging the negligence of each bank and the telegraph company and their joint negligence conformed to an order directing that causes of action be separately stated.

2. Action \S 50(6)—Complaint alleging several and joint negligence of defendants held not misjoinder of causes of action.

In an action to recover demurrage loss on a carload of oats, where seller directed C. Bank to order its correspondent bank to return a draft, and deliver the bill of lading, and C. Bank sent an unconfirmed telegram, collect, which correspondent bank refused to receive, and the telegraph company failed to notify C. Bank of its failure to deliver the telegram, a complaint alleging the negligence of each bank and the telegraph company, and their joint negligence, is not defective for misjoinder of causes; there being concurrent negligence of the three defendants.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by T. L. Brice & Co., Inc., against the Bank of Columbia, the Western Union Telegraph Company, and the First National Bank of Florence. From an order overruling a demurrer, and refusing to dismiss plaintiff's amended complaint, defendant First National Bank appeals. Affirmed.

Arrowsmith & Muldrow, of Florence, for appellant.

James B. Murphy, of Columbia, for respondent.

FRASER, J. It is alleged that the plaintiff delivered to the defendant the Bank of Columbia a draft for \$2,377.62 on Nesmith Powell Company, of Florence, S. O. To the draft there was attached a bill of lading for a carload of oats. Subsequently the plaintiff instructed the Bank of Columbia to order its correspondent bank to deliver the bill of lading without the payment of the draft, and to return the unpaid draft. The Bank of Columbia wired its codefendant, the First National Bank of Florence, to deliver the bill of lading and return the draft. The telegram was sent collect. The Bank of Columbia did not confirm the telegram by let-

ter or otherwise. The First National Bank of Florence refused to pay for and receive the message. The Telegraph Company did not notify the Bank of Columbia that it had failed to deliver the telegram. These circumstances are alleged to have resulted in loss to the plaintiff by way of demurrage and otherwise in the sum of \$737.76. The plaintiff brought suit against the three defendants with one cause of action. The complaint alleged as follows:

"On information and belief, that the defendant the bank of Columbia, S. C., undertook to transmit said instructions by wire, failing to confirm the same by letter, but that, owing to the negligent manner in which the same was sent and transmitted by the defendant the Western Union Telegraph Company and owing to the negligence of the defendant the First National Bank of Florence, S. C., in receiving and ascertaining the contents of said message and of said instructions, and in failing to follow the same, the said defendant the First National Bank of Florence, S. C., negligently and carelessly failed and refused to surrender said bill of lading to said Nesmith Powell Company, Inc., kept and retained the same until on or about October 9, 1920; of all of which the defendant failed to notify the plaintiff."

The First National Bank of Florence moved to require the plaintiff to state his causes of action separately. This motion was granted, and the plaintiff served an amended complaint with four causes of action. The first cause of action alleged the negligence of the Bank of Columbia; the second the negligence of the Western Union Telegraph Company; the third the negligence of the First National Bank of Florence; and the fourth the joint negligence of the three.

The First National Bank of Florence then made a motion to strike out the amended complaint, upon the ground that the amendments were not in accordance with the order directing the amendment, and demurred to the complaint on the ground of a misjoinder of causes of action. The trial judge overruled the demurrer, and refused to dismiss the complaint. From this order the First National Bank of Florence appealed, with two exceptions.

[1] I. The first assignment of error is:

"The county judge erred in refusing to strike out the amended complaint because the same did not in any way conform to the order requiring the amendment."

The motion was directed to the complaint as a whole. The amended complaint did comply with the order. The order requiring the complaint to be amended is in the record. The record shows that the amended complaint separates the causes of action. There was no error here.

[2] II. The second assignment of error is:

"The county judge erred in overruling and in not sustaining the demurrer to the amended complaint because it appears from the face thereof that the respondent is attempting to sue three several defendants, upon three several, separate, and distinct acts of negligence, as it is alleged in the same complaint without any allegation showing community of interest or wrongdoing, concert of action, or joint commission of wrong."

The appellant's error is the conception that the wrongs complained of are several, separate, and distinct. If the Bank of Columbia had written, or the telegraph company had notified the Bank of Columbia of the failure to deliver, or the First National Bank of Florence had acted on the information it had, then the injury would not have occurred. What the facts may be are not now before the court, but the theory of the plaintiff is that it was the concurrent negligence of the three that caused his loss; that it took the negligence of the three parties combined to work his loss, and there was no error in sustaining the amended complaint.

If this were not true, then the plaintiff might bring three suits for \$700 each, and collect \$2,100, when his loss was only \$700.

The order appealed from is affirmed.

GARY, O. J., and COTHRAN, J., concur.

(119 S. C. 115)

PINSON v. ANDERSON et al. (No. 10873.)

(Supreme Court of South Carolina. April 18, 1922.)

Trial 247—Striking out charge after making it held reversible error.

In an action on a contract whereby defendants employed plaintiff to sell their lands at auction under an agreement that if defendants refused to confirm sale they would pay plaintiff 50 per cent. of the expenses thereof, in which it was shown that the sale did not bring the agreed upset price and was called off, and the defense was that defendants were not requested to confirm the sale, the action of the court in striking out an instruction that the law does not require a man to do a useless thing was reversible error, in that the jury may have thought that plaintiff was bound to demand of defendants that they comply with the bids that had been made before he could claim any part of the expense money.

Gary, C. J., dissenting.

Appeal from Greenwood County Court; C. C. Featherstone, Judge.

Action by J. L. Pinson, trading as the Southeastern Realty Company, against W. H. Anderson and another. From a judgment for defendants, plaintiff appeals. Reversed.

The alleged contract directed to be reported is as follows:

"Agreement to Sell.

"The undersigned owner hereby places with Southeastern Realty Company, hereinafter referred to as Company, the following described lands in Greenwood County, state of S. C.: All that tract or parcel of land situated in above county and state and bounded by lands of W. J. Moore, Mrs. Briggs, and C. & W. C. right of way, containing 25 acres, more or less, being the identical tract as survey R. B. Cheat-ham, April 1920.

"The company is authorized to cut the same into such parcels as it deems proper and offer the same for sale at auction or otherwise. The purchase price fixed for the whole is eight thousand and no/100, plus actual expense sale and preparing land, ——— dollars. If a sale of the whole is made to one or more purchasers, the owner will make and execute to the purchaser or purchasers good marketable titles in fee, freed from liens and encumbrances and will carry two-thirds dollars of the purchase price on purchase-money mortgage bearing 7 per cent. interest for one and two years; balance to be paid in cash. Possession will be given in immediately after contract of sale and when same has been complied with.

"The owner will pay company no per cent. of purchase price for its services and fifty per cent. of amount in excess of \$8,000.00 after adding amount equal to actual expenses and preparing land for sale, cutting streets, etc.

"The owner reserves the right to withdraw lands from sale by paying company all expenses incurred and no per cent. commission on purchase price above named.

"The owner will pay company no per cent. commission and fifty per cent. of all expenses incurred if a sale is made by the owner or owner refuses to confirm sale.

"This contract is exclusive and is to terminate on the 1st day of May, 1920.

"Witness my hand and seal this 29 day of April, 1920.

—————, Owner. [L. S.]

"Witness:

—————."

A blank probate form on the bottom of the contract not filled in is omitted.

Tillman, Mays & Featherstone, of Greenwood, for appellant.

Grier, Park & Nicholson, of Greenwood, for respondents.

FRASER, J. The respondents, Anderson and Rudisll, bought a tract of land and employed the appellant to resell it for them. The parties met and wrote out a contract. While the contract was not signed, both respondents admit in evidence that the written contract expressed the agreement between them. They differed in their construction of the contract. The answer denies the plaintiff's construction of the contract. The complaint alleges that the plaintiff incurred expense in preparation for the sale to the amount of \$1,078.76, and that the defendants owed them one-half thereof, to

wit, \$486.38. The defendant also denied the expense account. The defendants demurred to the complaint, setting up the statute of frauds. The plaintiff demurred to the plea of the statute of frauds. When the plaintiff called up his demurrer, the presiding judge said, "Go ahead; I will pass on it later." His honor did not pass on the demurrer. The jury found for the defendants.

It seems that there was an upset price of \$8,000. Before the sale was completed, the bidding stopped, and it was evident that the upset price could not be secured, and the sale was called off. One of the defendants said, "The sale called itself off."

There is a clause in the so-called contract that reads (let the whole be reported):

"The owner will pay company [plaintiff] no per cent. commission and fifty per cent. of all expenses incurred if a sale is made by the owner, or owner refuses to confirm sale."

The defendants say we were not requested to confirm a sale, and therefore we are not liable. The plaintiff claims that it would have been useless to demand of the defendants compliance when the price bid was not sufficient, and the plaintiff is not required by the law to do a useless thing.

The defendant Anderson testified:

"Q. At the size of the bids made out there it would have been foolish to ask you to confirm them? A. At the price. Yes, sir.

"Q. Pinson knew that you wouldn't accept them? A. Yes, sir.

"Q. You agreed to call off the sale? A. I guess that we agreed. I told you once that they quit bidding.

"Q. It would have been foolish to gone on with the sale? A. Yes, sir. If they had offered me \$8,000 they would have gotten the land."

At first his honor charged the jury, "I charge you that the law does not require a man to do a useless thing," and then said, "Strike it out." There are two exceptions, but only one question raised. The striking out of the charge, after making it, was error, in that the jury may have thought that the plaintiff was bound to demand of the defendants that they comply with the bids that had been made before they could claim any part of the expense money.

The judgment is reversed.

WATTS, J., concurs.

COTHRAN, J. I concur in the reversal of this judgment as indicated in the opinion of Mr. Justice FRASER, but by a somewhat different course of reasoning.

Action upon a contract under which the plaintiff, as a real estate broker, undertook to subdivide and sell at auction a tract of land which belonged to the defendants. The plaintiff at an expense of \$1,076.76, put on the sale with brass band and barbecue ac-

companiment, but the bids offered were not satisfactory, not attaining the upset price agreed upon of \$8,000, and by agreement with the owners the sale was called off. The plaintiff sued the defendants for one-half of the \$1,076.76 expenses, \$538.38, less a credit of \$52, \$486.38, and bases his claim upon his construction of the contract, that if the sale did not realize the upset price the defendants would share the expenses with him.

The parties made a verbal agreement covering their several engagements, and reduced it to writing, which, however, by inadvertence was not executed prior to the auction sale. Both, however, agree that the unsigned paper correctly represented the terms of their agreement. We may treat it therefore as if it had been signed, for the purposes of this action, and construe it accordingly.

The contract means: (1) That the land should not be sold for less than what would net the defendants \$8,000; (2) that the compensation of the plaintiff should be ascertained by and limited to this scheme: From the gross amount of sales deduct the upset price of \$8,000, plus the expenses, and divide the net profits equally between the plaintiff and the defendants; (3) that if before the sale the defendants should withdraw the land from sale, which they reserved the right to do, they would pay all expenses incurred; (4) that if the defendants should themselves make a sale of the land, they should pay the plaintiff one-half of the expenses incurred; (5) that if after the sale had been made by the plaintiff the defendants would refuse to confirm the sale, they should pay to the plaintiff one-half of the expenses incurred.

The stipulations 2, 3, and 4 may be eliminated, as the contingencies therein provided for did not occur. The controversy is determinable by the construction of stipulation 5; the agreement by the owners to pay one-half of the expenses in the event that they should refuse to confirm the sale. Does that mean a refusal to confirm the sale in the event that it brings the upset price, plus expenses, or a refusal in the event that it does not? It is provided in stipulation 4, set forth above, that in the event that the sale brought the upset price, plus the expenses, the plaintiff should be reimbursed *all of the expenses*, and be entitled to one-half of the overplus. If stipulation 5 should be held to apply to a failure to confirm the sale under these circumstances, limiting the plaintiff simply to a reimbursement of one-half of the expense, the plaintiff would be held to have surrendered his right under stipulation 4, not only to reimbursement of *all* the expense but to his share of the profits; a conclusion patently contrary to the intention of the parties. If the sale did not bring enough to meet the upset price the defendants had a

perfect right to refuse to confirm it, and this is the only contingency to which stipulation 5 is reasonably applicable.

The trial judge was in error in not construing the contract as above indicated, and in refusing to charge that the law does not require a man to do a useless thing, in connection with the request of the plaintiff that the plaintiff had a right to consider that the sale was not confirmed.

GARY, C. J., dissents.

(119 S. C. 124)

HOPKINS v. OAKLAND CLUB et al.

HOPKINS et al. v. SAME.

(No. 10855.)

(Supreme Court of South Carolina. April 11, 1922.)

Adverse possession ¶115(1)—instruction directing verdict for defendants held error in view of the evidence.

In an action to enjoin the defendants from going upon plaintiff's land and making surveys, etc., and that plaintiff's title be adjudged valid, an instruction by the court, at the conclusion of plaintiff's showing in chief and without any evidence from defendants, directing the jury to bring in verdict for defendants, *held* error; there being more than a scintilla of evidence as to plaintiff's title by adverse possession.

Appeal from Common Pleas Circuit Court of Berkeley County; S. W. G. Shipp, Judge.

Action by George W. Hopkins against the Oakland Club, Santee Timber Corporation, and E. Golden Filer. From a judgment for defendants Oakland Club and Santee Timber Corporation, the plaintiff and defendant E. Golden Filer appeal. Reversed and remanded.

The following are the exceptions referred to in the opinion:

I. His honor erred in directing a verdict for the defendants Oakland Club and Santee Timber Corporation against the plaintiff, George W. Hopkins, and the defendant E. Golden Filer; whereas, he should have held, in accord with the evidence, that there was ample proof to establish the legal title and possession of the said Hopkins and Filer to the premises described in the complaint, and to establish all the material allegations of the complaint and of the answer of the said E. Golden Filer, requiring the case to go to the jury.

II. His honor erred in holding (a) that plaintiff and the defendant, Filer, had shown nothing more than occasionally going over the lands and hunting; that the only evidence that has been shown in this case is that the claimants, who lived in the cities, had an agent down there, who occasionally went over there and hunted on the land, and who once or twice

put up notices along the river, on one side of it, towards the river, forbidding anybody to trespass on it, that the agent ceased to go over there after 1909, and nobody was in possession of it at all; (b) that because sometime a person gets a title by adverse possession, the law does not presume he is in possession; and (c) that where a person has a legal title, the law presumes he has possession of it, but there is no proof; and his honor erred in therefore directing a verdict; whereas, he should have held, in accord with the proof, that the evidence showed much more than that to establish the title and possession of Hopkins and Filer to the premises involved, in fact, independently of the tax deed, or its validity, showed their title and possession under color of title to have ripened into both the presumption of a grant and title by adverse possession even prior to any trespass or attempt to cloud title by Oakland Club or Santee Timber Corporation, or their predecessors, who were only owners of an adjacent property attempting to exceed the bounds of their own muniments and plat by recently making a new plat and spreading documents on record purporting to embrace, and trespassing on, Hopkins' and Filer's land, but not possessing it for the required time, without which they could not, in law, even question the sufficiency of Hopkins' and Filer's prior adverse possession, which gave Hopkins and Filer a presumption of present possession sufficient to maintain this action.

III. His honor erred in holding that counsel had offered some scintilla of evidence, but the scintilla must be something from which you can draw a reasonable inference that the person was in actual possession of the land, and in, therefore, directing a verdict; whereas, he should have held that the evidence of Hopkins' and Filer's title by adverse possession was much more than a mere scintilla, and that even a scintilla would have required the submission of the issue to the jury.

IV. His honor erred in ignoring the evidence adduced by Hopkins and Filer, showing that one of the predecessors of Oakland Club and Santee Timber Corporation had disclaimed title to the premises in question, and in not submitting that issue to the jury.

V. His honor erred in holding that plaintiff's title is not legal for the reason that the county treasurer had no authority to issue executions, therefore, the tax sale was void, it being the duty of the sinking fund commission to make these sales rather than the county treasurer, and in, therefore, directing a verdict; whereas, he should have held the tax sale and deed valid and regular, or, even if irregular and void, not open to the attack of Oakland Club and Santee Timber Corporation, because

(a) Oakland Club and Santee Timber Corporation, under the evidence, were mere trespassers without title, or claim of title, sufficient to enable them to question the tax deed, the right to impeach a tax sale being the right only of the owner of the property at the time of the sale, or of those claiming under such owner, and there was no showing that these corporations were such owner, or claiming under such owner; on the contrary the evidence showing that the tract they claimed did not at that time

embrace the premises in dispute, which extended two miles further than their claim.

(b) There was no showing that Oakland Club, or Santee Timber Corporation, or those under whom they claimed, paid or tendered the taxes and levies for which the land was sold, with the costs, prior to the sale, at the proper time, and to the properly authorized officials, as required by law prerequisite to an attack on the tax title, if the sale was a bona fide effort on the part of the state or county to collect taxes justly due (which issue should have been submitted to the jury), the evidence clearly showing that the predecessors of Oakland Club and Santee Timber Corporation did not pay any taxes on the land in dispute at that time, or thereafter.

(c) There can be no collateral attack on a tax title.

(d) The evidence showed that the tax sale and deed were made in accordance with the accepted custom and interpretation of the laws prevailing at that time, which, if technically not strictly correct, should be recognized and enforced by the court, as a rule of property growing out of common error.

VI. His honor erred in excluding from the evidence the original Record Book V-2, and the 24 tax deeds there recorded, which were similar to the one in this case, issued the same way, and with similar executions, and which were competent and relevant to show that, if the instant tax sale and deed were not technically regular, the irregularity was in pursuance of the accepted custom and interpretation of the laws prevailing at that time, which should be recognized on the ground of common error.

VII. His honor erred in sustaining the objections to the examination of the witness J. B. Morrison, tending to show by what authority he made the instant tax deed, whether or not at that time he was undertaking to get all these lands on the tax books; whether or not he made any similar sales at that time; whether or not in his experience as sheriff he sold numerous tracts of land in the name of unknown and even abandoned land, where the authority that he had for the sale was execution from the county treasurer; what was the common practice during his term of office as to how the execution should be issued for the sale of unknown lands or abandoned lands; and whether or not he knew what was the general practice throughout the state for the sale of lands of this character, which testimony was competent and relevant to show that any alleged irregularity in the present tax sale and deed was merely due to the accepted custom and interpretation of the law prevailing at that time, which should be recognized and enforced as a rule of property on the ground of common error.

VIII. His honor erred in holding that, the tax deed not being legal, plaintiff cannot avail himself of the two-year statute of limitations, and in therefore directing a verdict; whereas, he should have held that the very purpose of such statute was to protect one claiming under an assailable tax deed if not contested within that time, otherwise the statute is without force or meaning.

John H. Clifton and M. W. Seabrook, both

of Sumter, and N. N. Newell, of Moncks Corner, for appellants.

L. D. Lide, of Marion, A. T. Smythe, of Charleston, E. J. Dennis, of Moncks Corner, and Octavus Cohen, of Charleston, for respondents.

GARY, C. J. The following statement appears in the record:

"This action was commenced on December 22, 1917. The substance of the complaint is that the plaintiff and the defendant Filer are the owners of and have and claim title to, and are seized as tenants in common of, a tract of 1,895 acres of land in Berkeley county, of which a partition sale is desired; that the premises consist entirely of swamp lands, in the deep swamps of Santee river, impracticable for actual residence or the usual uses of husbandry, and is therefore unoccupied real property, although the plaintiff and his cotenant are seized and possessed thereof in such manner, and to such extent as lands of that character are susceptible of; that plaintiff is informed and believes that the defendants Oakland Club and Santee Timber Corporation claim some interest therein adverse to the said Hopkins and Filer, and have entered and trespassed on the land, caused surveys to be made, and spread upon the public records of the county, instruments purporting to be deeds, plats, etc., affecting the premises, with intent to create a cloud upon their title, and claim an interest adverse to them; and, although such acts of trespass have not yet been long enough continued or committed in a manner sufficient to ripen into an adverse title, still they are continued and repeated occurrences, and may be continued unless restrained by the court; otherwise Hopkins and Filer will be subject to constant harassment from the said Oakland Club and Santee Timber Corporation, who are seeking to embarrass their title, and will lose the same if the acts are permitted to continue for a sufficient length of time longer; and demands judgment for injunction against the acts complained of; that the title of Hopkins and Filer be adjudged valid, in fee simple in possession, and the claim of Oakland Club and Santee Timber Corporation null and void and their cloud on Hopkins' and Filer's title removed; for damages against Oakland Club and Santee Timber Corporation and for partition with E. Golden Filer.

"Oakland Club and Santee Timber Corporation raise an issue of title, and set up the statute of limitations for 10 and 20 years, respectively, and adverse possession.

"E. Golden Filer admits the complaint and joins in its prayer, and sets up against Oakland Club and Santee Timber Corporation the statute of limitations for 10 and 20 years, respectively, and, after alleging that under a valid sale for defaulted taxes the predecessors of Hopkins and Filer were put or went into possession, sets up the 2-year statute of limitations against contesting such tax title, and that the taxes and levies for which the land was sold were not paid, prior to the sale, to the properly authorized officials.

"The case was tried before his honor, S. W. G. Shipp, and a jury. At the conclusion of the plaintiff's showing, and without any evi-

dence from the defendants, a verdict was directed in favor of the defendants Oakland Club and Santee Timber Corporation against the plaintiff George W. Hopkins and the defendant E. Golden Filer."

After hearing argument, pro and con, and without announcing a decision, the judge suggested to Mr. Lide that he could not grant a nonsuit in this case, being an equitable action, and requesting him to look up certain authority during the noon recess, whereupon the court adjourned for dinner. Upon the reconvening of the court, Mr. Lide produced the authority asked for, and stated that the court was correct about not being able to grant a nonsuit in this case, but asked that it be made a direction of verdict, which his honor proceeded to do without hearing further from counsel for plaintiff and the defendant, Filer. In directing the verdict his honor said:

"I have thought about this case very seriously. It has given me some trouble, especially these swamp lands, but it strikes me that a person ought to show something more than merely occasionally going over a place and hunting. Under this recent case *Sprott v. Sprott* the title held by the plaintiff in the case is not a legal title, for the reason that the county treasurer had no authority to issue executions. Therefore the sale was void as far as the tax sale is concerned; it being the duty of the sinking fund commission to make these sales rather than the county treasurer. That has been recently held.

"Therefore the deed did not convey a legal title; consequently the plaintiff cannot avail himself of the statute which provides that unless the owner of the land brought suit within 2 years, he could not afterwards contest the title. Therefore the statute does not apply, and the plaintiff has offered no legal title. The deed is good as color of title. By color of title it is meant that he had a deed or had a plat or had anything that describes the claim that the person makes and gives a description of the land he sets up a claim to.

"Where a person has that kind of paper, he has color of title, and where no one is upon the land, and he takes actual possession of the land and occupies it, and commits and continues acts of ownership on it, holds domain over it to the exclusion of everybody else, holds it notoriously, openly, for a continuous period of 10 years, he acquires a legal title.

"The only evidence of ownership that has

been shown in this case is that the claimants, who lived in the cities, had an agent down there, who occasionally went over there and hunted on the land, and who once or twice put up notices along the river, on one side of it, towards the river, forbidding anybody to trespass on it. That agent ceased to go over there after 1909, I believe, and nobody was in possession of it at all; because sometimes a person gets a title by adverse possession, the law does not presume he is in possession. Where a person has a legal title, the law presumes he had possession of it, but there is no proof.

"Counsel has offered some scintilla of evidence, but a more recent decision of our Supreme Court says the scintilla of evidence must be something from which you can draw a reasonable inference that the person was in actual possession of the land.

"That being my view about it, I do not see any use of going further into the case. If I am wrong, the Supreme Court will correct me about it.

"That being my view of it, I direct the jury to write out the following verdict: 'We find for the defendants Oakland Club and Santee Timber Corporation against the plaintiff George W. Hopkins and the defendant E. Golden Filer.'"

The plaintiff George W. Hopkins and the defendant E. Golden Filer appealed upon exceptions, which will be reported.

There is a preliminary question to be determined. On application of the plaintiff's attorneys, this court granted permission to review the case of *Sprott v. Sprott*, 114 S. C. 62, 96 S. E. 617. After due consideration, the court adheres to its ruling in that case.

The only question in the case, practically, is whether there was error on the part of his honor the presiding judge, in directing a verdict in favor of the two corporations. Our conclusion is that there was more than a scintilla of evidence to sustain the allegations of the complaint, and that his honor the circuit judge erred in directing a verdict. We do not deem it advisable to discuss the testimony in detail, as there must be a new trial, and the rights of either the plaintiff or the defendants might, thereby, be prejudiced.

Reversed and remanded for a new trial.

WATTS, FRASER, and COTHRAN, JJ., concur.

(119 S. C. 122)

STATE v. JOHNSON. (No. 10858.)

(Supreme Court of South Carolina. April 11, 1922.)

Seduction \Leftrightarrow 49—Evidence corroborative of prosecutrix held to make question of promise of marriage and deception for the jury.

In prosecution for seduction under Cr. Code 1912, § 389, evidence corroborative of prosecutrix held sufficient to make the question as to the promise of marriage and the deception practiced on prosecutrix a question for the jury.

Appeal from General Sessions Circuit Court of Horry County.

Ralph Johnson was convicted of seduction, and he appeals. Appeal dismissed.

The evidence corroborative of prosecutrix consisted of testimony of prosecutrix's mother that she heard defendant tell prosecutrix that he was going to marry her; that defendant himself told the mother that he was going to get married within six months; that defendant frequently visited prosecutrix; that prosecutrix did not go with other men during the same time; and that prosecutrix became pregnant during such time. Prosecutrix's father gave similar testimony. Other witnesses testified that defendant and prosecutrix were frequently together, and that defendant stated that he was going to marry prosecutrix.

Robert B. Scarborough, of Conway, for appellant.

L. M. Gasque, of Marion, for the State.

GARY, C. J. The defendant was indicted under section 389 of the Criminal Code, the provisions of which are as follows:

"Any male person above the age of sixteen years who shall, by any means of deception and promise of marriage, seduce any unmarried woman in this state, shall, upon conviction, be deemed guilty of a misdemeanor, and shall be fined or imprisoned, at the discretion of the court; but no conviction shall be had under this section, on the uncorroborated testimony of the woman upon whom the seduction is charged; and no conviction shall be had if upon the trial it is proved that such woman was, at the time of the alleged offense, lewd and unchaste: Provided, that if the defendant in any action brought hereunder, shall contract marriage with such woman, either before or after the conviction, further proceedings hereunder shall be stayed."

The jury rendered a verdict of guilty; and the defendant was sentenced to serve a term of 12 months on the public works of Horry county; whereupon he appealed to this court.

The sole question argued by the appellant's attorney is whether there was error on the part of his honor the presiding judge in the refusal of the motion for a directed

verdict in favor of the defendant on the ground that the testimony of the prosecutrix, Ila Johnson, was not corroborated as to the promise of marriage and deception charged in the indictment.

The appellant's attorney has failed to satisfy this court that the testimony does not support the finding of the jury.

Appeal dismissed.

FRASER and COTHRAN, JJ., concur.

(119 S. C. 78)

SUMNER v. BANKHEAD. (No. 10869.)

(Supreme Court of South Carolina. April 18, 1922.)

1. Specific performance \Leftrightarrow 8—Grant of specific performance is addressed to court's discretion, and refusal is not error where the contract is speculative.

Specific performance is addressed to the sound discretion of a court of equity, and where the judge found as a matter of fact that the contract was speculative, and such finding is abundantly sustained by the evidence, showing that the seller did not own the land at the time he made the contract to sell, and that he made a contract with his agent whose business it was to negotiate sales to divide the forfeiture money provided by the contract, his decision must be affirmed.

2. Specific performance \Leftrightarrow 128(1) — Where contract provided initial payment as measure of damages for breach, it was proper to give no damages in action for specific performance.

In an action for specific performance, the court did not err in refusing damages for breach of the contract, where the contract itself provided the measure of damages in the forfeiture of the initial payment, which has been paid.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Judge.

Action by R. E. Sumner against J. W. Bankhead for specific performance of a contract to convey land. Judgment for the defendant, and the plaintiff appeals. Affirmed.

Wilson & Wilson, of Rock Hill, and Marion & Marion, of Chester, for appellant.

Gaston & Hamilton, of Chester, for respondent.

FRASER, J. This is an action for specific performance, based upon the following contract:

"Sales Contract of Real Estate.

"Ross F. Roach, Broker.

"Rock Hill, S. C., August 23, 1920.

"\$19,425, or \$105 per acre.

"Articles of agreement between Ross F. Roach for R. E. Sumner of Rock Hill, S. C., and J. W. Bankhead of Lowryville, S. C.:

"Ross F. Roach agrees to sell and J. W. Bankhead agrees to buy the following described property: One 185 acres (more or less known as the John Roddry Lock View, about 2¼ miles east of Rock Hill, four tenant houses, one barn, for the sum of nineteen thousand, four hundred and twenty-five dollars for sound and unincumbered titles for one thousand nine hundred forty-two dollars and fifty cents (\$1,942.50) dollars of purchase price is acknowledged paid to bind the obligation until sound and unincumbered titles can be furnished by the owner, by or before January 2, 1921, when the remainder is to be paid as follows: Cash.

"Should any defect appear in the titles that cannot be corrected the amount paid is to be promptly refunded to the buyer by Ross F. Roach, Broker. The buyer is to have the privilege of examining the titles before completing payment. Taxes are to be paid by the owner up to January 2, 1921. It is understood by all parties interested that Ross F. Roach is to be responsible only for the amount in his hands, but is to use his best efforts to see that the contract is fulfilled by both buyer and seller. The amount paid to bind the obligation is to be forfeited, provided the buyer fails to comply. Said amount of forfeit is to be equally divided between the owner of the property and the broker.

"Witnesses:

"C. A. Reese, for.....R. F. Roach, Broker.

"E. S. Kirk, for.....J. W. Bankhead, Buyer.

"Arnold P. White, for..R. E. Sumner, Broker."

The respondent, the purchaser, refused to comply. The seller at the time of the making of the contract did not own the land, but had himself only a contract to purchase.

The case was tried before Judge Ernest Moore, who found that the contract was speculative, and under the case of Schmid v. Whitten, 114 S. C. 245, 103 S. E. 553, refused to require specific performance.

[1] Specific performance is addressed to the sound discretion of the court of equity. Judge Moore found as a matter of fact from the evidence that the contract was speculative. In so finding he is abundantly sustained by the evidence. The seller did not own the land at the time he made the contract to sell, and before he took title, or the time had arrived at which he could get the title, he made a contract of resale. The appellant may have changed his mind, or his circumstances may have changed. If the appellant contracted to purchase for his own use, it would have been easy to have explained his change of purpose. He offered no explanation, but, on the contrary, he made a contract of sale in which he and his agent, whose business it was to negotiate sales of land, should divide share and share alike the \$1,942.50, the forfeiture provided by the contract sued upon. The contract itself shows its speculative nature. It is true the case of Schmid v. Whitten, supra, was decided by a divided court, but it does not lose its binding authority for that reason. The first ground of exception cannot be sustained.

[2] II. The only other question is: Did his honor err in not giving damages for the breach of the contract?

There was no error here. The contract itself provided the measure of damages, in

the forfeiture of the initial payment, and that has been paid.

The judgment appealed from is affirmed.

GARY, C. J. (see opinion) and WATTS, J., concur.

COTHRAN, J. (see opinion), dissents.

GARY, C. J. (concurring). The decision in the case of Schmid v. Whitten, 114 S. C. 245, 103 S. E. 553, was rendered by a divided court, three to two; the writer hereof wrote a dissenting opinion, in which Mr. Justice Hydrick concurred. That case is conclusive of the question now under consideration. As it is still of force, and is now a part of the law of the land, we conceive it to be our duty to recognize its authority and follow it, until it is overruled.

It seems to us that any other course would lead to endless confusion and uncertainty.

COTHRAN, J. (dissenting). Action by vendor for specific performance of a contract for the sale of land.

The facts are as follows:

In the year 1920 one Good owned a tract of land, 185 acres, near Rock Hill, which he contracted to sell to the plaintiff, R. E. Sumner, for \$14,506.75; \$1,400 cash, which was paid, one-third of the remainder payable January 1, 1921, and the remaining two-thirds in three equal annual installments. This contract was entered into on the 27th of May, 1920.

On the 3d of August, 1920, the plaintiff, Sumner, contracted to sell the same place to the defendant, Bankhead, for \$19,425; \$1,942.50 cash, which was paid, and the remainder payable January 2, 1921.

On the 3d of September, 1920, Good executed a deed with renunciation of dower, conveying the land to the plaintiff, Sumner, which by agreement was deposited in escrow with the National Union Bank of Rock Hill, to be delivered to Sumner upon payment of the unpaid purchase price, \$13,108, on January 2, 1921. The bank held a mortgage upon the land given by Good, and the apparent expectation of the parties was that upon the defendant Bankhead's compliance with his contract on January 2, 1921, \$13,108 would be paid by Sumner to the bank, to be applied to the Good mortgage, and the deed of Good to Sumner held in escrow, delivered to Sumner.

Bankhead not complying with his contract on January 2, 1921, Sumner had to make other arrangements to pay the bank the amount necessary to obtain the deed held in escrow.

On January 3, 1921, Sumner tendered Bankhead a deed of the property, with renunciation of dower, and demanded the amount agreed to be paid. Bankhead refused to pay, and this action followed. No ques-

tion has arisen as to the ability of the plaintiff to comply with his part of the contract, and none as to the bona fides of the contract, adequacy of the consideration, or other element than as below stated.

The defendant interposed several defenses to the action, among which was the contention that the contract was a speculative one upon his part, and that the plaintiff, not owning the title to the land at the time of the contract, "was merely trading or speculating on a land contract." No other defense is considered by the circuit judge in his decree, and, as the respondent has served no notice to sustain it upon other grounds, the discussion will be limited to the single question above suggested. He held in his decree that both parties entered into the contract solely as a speculative transaction, and following *Schmid v. Whitten*, 114 S. C. 245, 103 S. E. 553, that the court of equity, in the exercise of the discretion vested in it, will refuse to decree the specific performance of such a contract, and dismissed the complaint.

The finding that the defendant entered into the contract as a speculation may be assumed to be true; but, assuming that Sumner entered into the contract with Good as a speculation, the contract with the defendant certainly was not; it was rather the consummation, the closing out, of a previous speculative intent, which should not be permitted to inject its poison into this valid contract.

But be that as it may, I cannot and do not subscribe to the doctrine declared in the *Schmid v. Whitten* Case, and am of opinion that it should be promptly and decisively overruled. With the greatest respect for the learned justices who constituted the majority of the court in the promulgation of that opinion, I think that the havoc it has played in commercial transactions, the disintegration of the moral obligation to comply with solemn contracts, and the opening of a port of refuge to those who, with their eyes wide open, and, their greed for quick riches excited, are willing to repudiate their engagements under disappointing results, are sufficient justification for holding that it does not declare the law or the morals of this state.

It is but recent history to recall the wild orgy of speculation that followed the inflation of prices of all products and labor, and the quick response in the values of real estate. The buyer took his chances with the seller, each acting upon his individual judgment as to a matter that was a legitimate subject of contract; sales were made and quick results followed in profits earned; the spinning top, resting upon a very slight foundation, maintained its equilibrium as long as it was revolving, and all went merrily; the revulsion came, something happened, we do not know what, the top ceased to

spin, and the crash came; many were caught with high-priced land upon their hands and contracts, honestly, legally, though speculatively, entered into, which tested their integrity, a storm that strained the stoutest timbers of the staunchest ships. Common honesty and manliness dictated compliance with losing ventures, the retention of the trust that others had reposed, and of self-respect. I think that it was unfortunate, an unkindness, to those for whom a natural sympathy was excited, who had been caught "with the bag to hold," to extend an opportunity of repudiating their obligations at the expense of their self-respect.

It is remarkable to me that the squealer, the welcher, the repudiator, should in such times be adopted as the ward of a court of equity, whose proud boast is the delight to do equity, and through whose portals the man with unchaste hands may not pass.

The facts in the *Schmid v. Whitten* Case were these: Schmid entered into a contract with Whitten to buy his land at an agreed price—very likely before the era of inflation and speculation dawned upon the country. Schmid then did what he had a perfect right to do, bargained the land to another, doubtless at a profit, and that buyer did the same thing with another. It is hard, but it is honest, to comply with a trade when two other trades of one's property at profits have been made and prices are booming. Whitten could not stand the test, and refused to comply when the time came, and Schmid sued for specific performance. The court held, I think without consideration of the obligations of Schmid to his vendee, or of that vendee to his vendee, that Whitten should not be compelled to comply, for the reason that Schmid was speculating, as also were his vendee and that of the latter; but that Whitten could be made to respond in damages. The result is that a new lawsuit between Schmid and Whitten is in order, a new one between Schmid and his vendee, and a new one between that vendee and his vendee; a train of litigation, all growing out of Whitten's failure to do what he solemnly agreed to do. As is said by Judge O'Neill in *Gregorie v. Bulow*, Rich. Eq. Cas. 235:

"The proceeding by bill for a specific performance of a contract for the sale of the land, is to be encouraged, instead of being discouraged. For in one case, it ends all litigation between the parties."

If the purpose to be accomplished by the *Schmid v. Whitten* Case be to discourage men "free, white and twenty-one" from entering into contracts of speculation, a purpose which is as impossible of accomplishment as to dam the Mississippi with sand, the means employed create a positive inducement for such enterprises. It presents a "heads and tails" proposition. If the advancement in value anticipated by the spec-

ulator be realized, he pockets his profits with the exultation of a "Jack Horner"; if not, he pleads the speculative feature of the contract, and, under the protection of *Schmid v. Whitten*, retires with a whole financial skin but with a tattooed reputation.

It is inconceivable to me that a court of equity will refuse specific performance of a contract upon the ground that the contract is unjust, inequitable, unconscionable, illegal, or contrary to public policy, and at the same time refer the plaintiff to another chamber in the temple of justice, with a memorandum to the judge of the law court directing him to award the plaintiff damages for a breach of the contract declared by the court of equity so unchaste as to be non-enforceable in that forum.

It will be noticed that the decision in the *Schmid v. Whitten* Case was based squarely upon the ground that the transaction was "a barefaced gambling and speculative" contract; that it was a manifestation of the "gambling speculative craze" extant; it is incomprehensible to me that the plaintiff relying upon a contract so characterized should be deluded with the hope of recovery in a court of law.

I agree that the facts disclosed in that case a speculative intent upon the part of *Schmid*, but I do not agree that that fact presented a feature of equitable cognizance upon which a denial of the remedy of specific performance could be justified, or that it amounted to gambling, which, of course, would have presented such a feature.

It is unquestionably true that the remedy of specific performance is not one of absolute right. The court of equity reserves to itself the exercise of its discretion, and will not award it when injustice will result. This, however, is a legal discretion, not an arbitrary one, and is controlled by the settled principles of equity jurisprudence. I think it follows from this that unless the court of equity can base its denial upon some fixed principle of equitable jurisprudence, such as fraud, misrepresentation, unconscionableness, imposition, illegality, and others, the denial is arbitrary and capricious, in violation of a plain legal right.

"This discretion is not an arbitrary or capricious one, but a sound judicial discretion, regulated by the established principles of equity." 38 Cyc. 549.

"The formula as to discretion therefore is habitually used by the court simply to indicate that the case is governed not by legal rules but by some equitable principles." 30 Cyc. 550.

"Now though there is no actual fraud charged on complaint, yet in order to entitle him to a specific performance of the agreement, it ought to be fair, certain, just, equal in all its parts and for adequate consideration. If any of these ingredients are wanting, the court will not decree a specific performance." *Clitherall v. Ogilvie*, 1 *Desaus*. 250.

"The bill seeks a specific performance of the contract for the sale of the land; but that is always in the discretion of the court, the discretion of equity." *Doar v. Gibbes*, *Bailey Eq.* 371.

In *Barksdale v. Payne*, *Riley Eq.* 174, the court says:

"Whenever there is a concealment, or misrepresentation of material facts, whether designedly or not, or a material breach of contract by the other party, * * * equity will not enforce the contract against him."

"Specific performance is not a matter of absolute right, but rests in the sound judicial discretion of the court, guided by established principles." *Davenport v. Latimer*, 53 S. C. 563, 31 S. E. 630; *Bull v. Fallaw*, 109 S. C. 306, 96 S. E. 147; *McChesney v. Smith*, 105 S. C. 176, 89 S. E. 639; *Anthony v. Eve*, 109 S. C. 255, 95 S. E. 513.

The right to specific performance is not absolute, but rests in the discretion of the court, which is not arbitrary or capricious, but to be exercised in accordance with the established principles of equity. *Woldenberg v. Riphan*, 166 Wis. 433, 166 N. W. 21.

Specific performance held within court's sound judicial discretion as informed and directed by principles, rules, and practice of equity. *Hess v. Bowen*, 241 Fed. 659, 154 C. C. A. 417.

"It is always desirable to make the least draft which is possible upon this undefined power of discretion, and to determine causes upon established rules." *Sweeney v. O'Hara*, 43 Iowa, 34.

"The matter of compelling specific performance is one of sound and reasonable discretion—of judicial, not arbitrary and capricious, discretion. There must be some reason founded in equity and good conscience for refusing the relief. Such reason has been generally found, by the court refusing it, in some mistake or fraud, or unconscionableness in the contract, or in some laches on the part of the plaintiff changing the circumstances so as to make it inequitable to compel a conveyance, where the claim is stale, or there is reason to believe it was abandoned." *Thompson v. Winter*, 42 Minn. 121, 43 N. W. 796, 6 L. R. A. 236.

For the equitable grounds upon which the chancellor may base his refusal, see the following cases: *Marthinson v. McCutchen*, 84 S. C. 256, 66 S. E. 120; *Cabeen v. Gordon*, 1 Hill Eq. 51; *Holley v. Anness*, 41 S. C. 354, 19 S. E. 648.

The contract between *Schmid* and *Whitten* was either valid, or it was invalid. It was not, and could not have been shown to have been, illegal, unconscionable, oppressive, unjust, or fraught with hardship to the seller; there was no suggestion of fraud, misrepresentation, or undue influence. The only alleged vice in it, sufficient, as held, to justify the chancellor in withholding the remedy of specific performance, was that the transactions of *Schmid* in connection with the contract evidenced a purpose on his part to speculate in the anticipated rise in the market value of the land; and, before the court of

equity would be justified in denying to a speculating party the remedy allowed to every contracting party to a valid legal contract; it must of necessity have interpreted the speculating contract as a gaming transaction and illegal. This it has done, and has relegated the plaintiff to a court of law for the recovery of damages for the breach of a contract which should necessarily be legal and enforceable. In other words, the court of equity declines to give relief on the ground that the contract is illegal, and remits the plaintiff to a court of law where he can recover only upon the theory that the contract was legal—a conclusion pretermitted by the decision.

Instances where the court of equity exercises its discretion are based upon equitable principles, such as the plaintiff's fraud, or misrepresentations, or defendant's mistake, or where the contract is incomplete or uncertain, or where the enforcement would be detrimental to the public welfare, or where the contract lacks mutuality, or where the plaintiff has been guilty of laches, or where the situation of the parties has changed owing to the delay, or that the contract involves a breach of trust, unfairness, or hardship, or that the consideration is illegal—all acknowledged subjects of equitable jurisdiction. I fail to find a single authority, outside of *Schmid v. Whitten*, containing even a suggestion that the speculative feature of a contract is a matter of equitable cognizance, unless it amounts to illegality, in which event the plaintiff would not be entitled to relief either at law or in equity.

To hold that a contract is illegal, simply because one or both of the parties intended to speculate upon the rise or fall of the market value, is to annul probably 90 per cent. of commercial transactions, and to stop the wheels of trade.

It is impossible to announce a doctrine applicable to land contracts and not with the same breath wither all other contracts of a similar nature.

Legitimate speculation is the life of trade. It is the moving spirit in the life of a merchant who buys goods to sell again, of the manufacturer who buys and manufactures and sells again, of the farmer who sows and reaps and sells.

I know of no law, and none has been cited, that a contract is to be annulled because of a speculative intent, except in instances where the gaming element is established; where no delivery is contemplated and the parties expect to settle simply upon differences at the delivery date.

"It is now regarded as well settled that a sale for future delivery is valid where an actual transaction is contemplated, and not a mere settlement by the payment of the difference between the market and the contract price at the time appointed for delivery; and this, even

though the transaction is entered upon as a speculation by one who neither has present ownership of, nor expects actually to receive, the subject of the sale, intending a purchase, or a resale, before the time of delivery." 22 L. R. A. (N. S.) 174 (note).

In *Ling v. Malcom*, 77 Conn. 517, 59 Atl. 698, it is held that, although contracts for the purchase of stocks of a fluctuating value upon a margin are speculative in character they are not for that reason illegal, when there is a bona fide employment of the broker to make a commercial purchase of the stocks, to be held for delivery upon payment of the purchase price.

In *Wheless v. Fisk*, 28 La. Ann. 731, it is held that the fact that a party buying gold, in order to profit by fluctuations in its value, furnished only a margin, did not make the contract immoral.

In *Peters v. Grim*, 149 Pa. 163, 24 Atl. 192, 34 Am. St. Rep. 599, it is held:

"A purchase of stock for speculation, even when done merely on margin, is not necessarily a gambling transaction."

That a purchase of stock on margin for speculation is not necessarily a gambling transaction is also held in *Hopkins v. O'Kane*, 169 Pa. 478, 32 Atl. 421; *Wagner v. Hildebrand*, 187 Pa. 136, 41 Atl. 34; *Taylor's Estate*, 192 Pa. 304, 43 Atl. 973, 73 Am. St. Rep. 812.

In *Kendall v. Fries*, 71 N. J. Law, 401, 58 Atl. 1090, it is held that evidence that stocks were bought on a margin, that the client was speculating, and that the stock was not at any time assigned or given to him, did not justify a conclusion that the parties were merely dealing in differences; but that the fact he bought on margin proved only that he bought for part in cash and part on credit.

In *Richter v. Poe*, 109 Md. 20, 71 Atl. 420, 22 L. R. A. (N. S.) 174, it is held, quoting from the syllabus:

"A speculative contract for the purchase and sale of stocks on margin is not invalid, as a gambling transaction."

"And where stocks or commodities are bought and sold upon speculation and on margin, it is not a gambling transaction if it is understood by the parties that they are to be delivered and paid for." 20 Cyc. 927.

A contract for the sale of goods to be delivered at a future day is not invalidated by the circumstance that, at the time of making the contract, the purchaser intends to resell before the time appointed for the delivery. *Western Union Telegraph Co. v. Littlejohn*, 72 Miss. 1025, 18 South. 418.

There can be no difference in principle between a contract for the future purchase of goods and one for land. Mr. Benjamin says, in reference to the former:

"A contract for the sale of goods to be delivered at a future day is valid, even though

the seller has not the goods nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer."

The statute of this state, aimed at the viciousness of future contracts, renders them illegal unless both parties at the time of the contract contemplate the actual delivery of the commodity; assuming as a matter of course that, if actual delivery be contemplated the contract is good, although both parties intended to speculate upon the price at the delivery date. Hundreds of farmers, even before the seed is in the ground, sell the future crop at a certain price, deliverable in the fall; they are speculating upon the price at the delivery date. Can it be contended that for that reason, taking the chance of its going up, they should not comply with their contract if it should go down? Or one who does not plant a seed has the unquestioned right to risk his judgment and buy cotton deliverable at a future date, speculating on the rise; shall he be allowed, because he was speculating, to take down his profits if there should be a rise, and repudiate his contract if there should be a decline?

In the case at bar, Sumner and Bankhead made a contract for the sale and purchase of the land, to be consummated at a future day; Bankhead paying cash 10 per cent. of the purchase price, \$1,942. There is not the slightest evidence that Sumner did not intend to make Bankhead a deed at the appointed time, or that Bankhead did not intend to pay the balance of the purchase money. What possible difference can it make that Sumner had bought the land expecting to sell at an advanced price, was speculating upon the rise in value, or that Bankhead bought from Sumner with like intent? Each was engaged in a perfectly legal transaction, the differentiating element of actual delivery being present; and, being legal, I see no reason why their undertaking should not be enforced.

There is not a single rule in equity which the seller in the case at bar has violated, and not a single reason, based upon equitable principles, which the buyer has invoked to excuse his compliance with his contract.

They were both full-grown men, capable of contracting; no complaint is made that the price at the time of the sale was greater than the value of the property; no fraud, mistake, misrepresentation, undue influence, or other matter of which equity will take cognizance is suggested. The whole defense is that Sumner had been speculating in land, which he had a perfect right to do, and that Bankhead was embarking upon a similar enterprise, which he also had a legal right to do; which, of course, is incompatible with

any suggestion of illegality; and, if not illegal, a chancellor would be utterly unable to base his refusal of a decree for specific performance upon a single feature of equitable cognizance, and under these circumstances a baseless refusal must be deemed arbitrary and capricious.

If therefore the fact that the contract was infected with the spirit of speculation does not present a feature of equitable jurisprudence, because such a spirit is entirely legitimate, the facts present no other possible feature of such jurisprudence, and the denial of the remedy of specific performance is absolutely without a basis, and would therefore be necessarily arbitrary and capricious.

"I am of opinion that the contract of sale is made in proper form, is fair, certain, upon sufficient consideration, free from accident, mistake or fraud, and in every respect lawful and binding at this time; and that the plaintiff is entitled to have specific performance of the defendant's agreement for the purchase of the Mims' tract." Chancellor Wardlaw in *Moorer v. Kopmann*, 11 Rich. Eq. 225.

In *Lumber Co. v. Matheson*, 69 S. C. 87, 48 S. E. 111, it is held that in the absence of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed or of any inequitable conduct on the part of the plaintiff, the latter is entitled, as a matter of right, to the remedy of specific performance.

A decree for the specific performance of a contract is a matter of right, when a proper case is presented, although said to rest entirely in the discretion of the court. That discretion is not arbitrary but governed by fixed rules. *Howard v. Moore*, 36 Tenn. (4 Sneed) 317.

"When a contract of which equity has jurisdiction conforms with certain equitable principles, which are quite limited in number, it is as much a matter of course, for a court of equity to decree specific performance, as for a court of law to give damages for breach of the contract." 36 Cyc. 550.

"While an application for specific performance is addressed to the discretion of the court, nevertheless, where a valid contract, which is fair and unobjectionable, is shown, the court is bound to give the relief sought." *Fowler v. Fowler*, 204 Ill. 82, 68 N. E. 414; *Baltimore R. Co. v. Brubaker*, 217 Ill. 462, 75 N. E. 523.

"While the decreeing of specific performance rests in the sound discretion of the court, yet, where the contract was fairly made, the price reasonable, and no reason exists for denying specific performance, it cannot be refused." *Faraday Co. v. Owens* (Ky.) 80 S. W. 1171; *Ry. Co. v. Herd* (Ky.) 14 Ky. Law Rep. 670. (Abstract.)

"Where the contract is valid, with no improper or fraudulent actions on either side, the court has no discretion as to enforcing specific performance." *Yazoo R. Co. v. So. Ry. Co.*, 83 Miss. 746, 36 South. 74.

"A court of equity has no right to exercise arbitrarily its discretion to withhold or decree specific execution for the sale or purchase

of land," and "such discretion must be controlled by established doctrines and principles of equity." *Collins v. Thomas*, 87 W. Va. 597, 105 S. E. 897.

"Generally, where the contract is unobjectionable, it is as much a matter of course for a court of equity to decree specific performance, as for a court of law to give damages for a breach of it." *Id.*

"Where the parties are competent to contract and have made an agreement reasonably certain in all its parts and one which is not objectionable for unfairness, or inequitable, specific performance will be granted as a matter of law and right; there being no room for the exercise of judicial discretion." *Carter v. Schrader*, 187 Iowa, 1245, 175 N. W. 329.

Where a contract for sale of land is reasonably certain and not objectionable for unfairness or inequity, there is no room for exercise of judicial discretion as to whether it should be specifically performed; such performance being a matter of right. *Heins v. Thompson*, 165 Wis. 563, 163 N. W. 173.

"The discretion of the court to compel the specific performance of a contract for the exchange of real estate is a sound judicial discretion, controlled by established principles; and where the contract is not inequitable, and where there are no other substantial reasons why it should not be executed, the court may not in its discretion refuse specific performance." *Posey v. Kimsey*, 146 Ky. 205, 142 S. W. 703.

Though a decree for specific performance rests in the sound discretion of the chancellor, it will be ordered as a matter of course if the evidence is sufficient and there are no equitable considerations against it. *Black v. Miller*, 158 Iowa, 293, 138 N. W. 535.

"Though specific performance cannot be demanded as a matter of absolute right, and it rests in sound judicial discretion, yet, where all the necessary incidents and conditions are proven by satisfactory evidence, the relief should be decreed as a matter of right, and not as a matter of favor." *Turn Verein Eiche v. Kionka*, 255 Ill. 392, 99 N. E. 684, 43 L. R. A. (N. S.) 44.

"Though the granting of specific performance rests in the discretion of the chancellor, it must not be exercised in an arbitrary or capricious manner, but is to be governed by sound legal rules and principles, and hence where a contract to sell land was free from unfairness, over-reaching or over keenness on plaintiff's part, a decree denying him specific performance should be reversed." *Kirkpatrick v. Pease*, 202 Mo. 471, 101 S. W. 651.

I therefore conclude:

1. That the remedy of specific performance of a contract for the sale or purchase of real estate rests in the discretion of the chancellor.

2. That that discretion is a judicial discretion, to be exercised and applied to the particular case, not arbitrarily or capriciously, but as controlled by the fixed principles of equity jurisprudence.

3. That unless the granting of the remedy

offend one or more of these fixed principles, the plaintiff has a legal right to the remedy.

4. That the element of speculation in a contract does not offend any principle of equity jurisprudence, unless it can be characterized as a gaming transaction.

5. That there is no evidence in the case tending to show that the contract in question had any element of a gaming transaction in it.

6. That the decree appealed from should be reversed, and the case remanded to the circuit court, with directions to grant the relief prayed for by the plaintiff.

FOSTER v. ROACH et al. (No. 10874.)

(119 S. C. 102)

(Supreme Court of South Carolina. April 18, 1922.)

Brokers \S 106—Answer to complaint of purchaser against vendor's broker for return of deposit insufficient for failure to show vendor's ability to perform.

Though the allegation of complaint of purchaser to recover of vendor's broker money deposited under contract of purchase that purchaser and vendor rescinded the contract be eliminated by general denial of the answer, yet the answer, setting up the contract, providing that purchaser was to get possession in 30 days or money back, and that vendor would give possession if a certain person would vacate, was insufficient in not showing that vendor was in a position to demand that the purchaser fulfill the contract.

Cothran, J., dissenting.

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Judge.

Action by J. Harry Foster against R. F. Roach and another. From an order overruling demurrer to the answer, plaintiff appeals. Reversed.

The answer and the circuit decree are as follows:

Answer.

The defendants, R. F. Roach and E. S. Kirk, individually and as partners trading under the firm name of Roach & Kirk, answering the complaint of the plaintiff, allege:

(1) That the defendants deny each and every paragraph of the complaint, except those specifically admitted hereafter.

(2) That they admit paragraphs 1 and 4 thereof.

(3) Further answering the complaint, the defendants allege that on the 21st day of January, 1920, the defendant R. F. Roach entered into a written agreement with E. H. Johnson, whereby the said R. F. Roach was empowered and directed to make sale of a certain house and lot, the subject of this action, at and for a stipulated price, and upon the conditions expressed in the said contract, a copy of which is hereto attached and made a part of this answer.

(4) That on the 22d day of March, 1920, R. F. Roach, J. Harry Foster, the plaintiff, and E. H. Johnson entered into a written agreement by which the said plaintiff agreed to buy certain real estate (the subject of this action), and as a part consideration for the payment of same deposited with the defendant R. F. Roach the sum of \$350, and it was expressly stipulated in the said contract: "The amount paid to bind the obligation is to be forfeited, provided the buyer fails to comply. Said amount of forfeit is to be equally divided between the owner of the property and the broker." A copy of the said agreement is hereto attached and made a part of this answer.

(5) That these defendants allege that, if any agreement was entered into by and between the plaintiff, J. Harry Foster, and E. H. Johnson, the owner of the property, that these defendants were not parties to the negotiations, did not agree to the same, and therefore, so far as their interest is concerned in the one-half of the deposited money, that they deny the right of the said parties to so agree as to affect the interest of these defendants.

(6) That the plaintiff failed and refused to comply with the terms of the said contract, and by reason thereof forfeited the said \$350, the deposited part consideration for the purchase of the real estate.

(7) That the defendants have surrendered to the said E. H. Johnson his one-half of the said \$350, to wit, \$175, and now hold the other half of the deposited money as their property by virtue of the agreement entered into by Ross F. Roach, J. Harry Foster, and E. H. Johnson.

Wherefore defendants pray that the complaint be dismissed with costs.

Decree.

This cause came on to be heard at chambers upon a motion made by the plaintiff, on notice to the defendants, for an order striking out the answer of the defendants upon the grounds alleged by plaintiff that the facts stated in the answer do not constitute a defense, that the allegations of the answer are frivolous, and that, upon the allegations of the complaint and answer, the plaintiff is entitled to judgment as prayed for in the complaint.

Upon consideration of this motion, the conclusion has been reached that the same cannot be granted.

The averment of the complaint is that the plaintiff entered into a contract for the purchase of a certain house and lot from one E. H. Johnson, such contract being made by plaintiff with the defendants as brokers; that plaintiff deposited as part payment of the purchase price the sum of \$350 in the hands of the defendants; that thereafter the plaintiff and E. H. Johnson agreed to rescind the contract of sale, Johnson agreeing to accept one-half of the \$350 (so deposited) as rent for the premises during the period in which the same had been occupied by plaintiff under the contract for the purchase thereof; and that therefore the plaintiff is entitled to recover from the defendants the remaining half of the sum aforesaid, which was paid over by him to the defendants and alleged is still to be in the hands of the defendants.

The defendants enter a general denial, admitting only the receipt by them of the \$350 paid by the plaintiff under the contract, and that

\$175 thereof was and is retained by defendants. By way of defense the defendants by answer set up the written contract, signed by the plaintiff, by the defendant Roach and by the owner, Johnson, for the sale by Johnson, through such brokers, to the plaintiff at a stipulated price, of the house and lot in question, in and by which contract it is stipulated that the amount paid by the plaintiff buyer to bind the contract, to wit, the sum of \$350, is to be forfeited in the event of failure by the plaintiff to comply with the terms of the contract by paying the purchase-money balance still due by a fixed date, the written contract declaring that in the event of failure to make such payment the sum of \$175 of the money already paid is to be retained by the defendants as the brokers negotiating the sale. Thereupon the contention of the defendants is that no such subsequent agreement between the plaintiff and the seller, Johnson, by way of rescission of the contract as alleged, where the defendants did not assent to such rescission, could in any way affect or defeat the rights of the defendants under the contract to retain the sum of \$175 here in question, the sum being reasonable compensation as stipulated in the contract for the services of the defendants as brokers in negotiating the sale.

The motion now made must be refused for several reasons. In the first place, the defendants deny the allegations of the plaintiff that there was a subsequent rescission of the contract as between Johnson and the plaintiff, thus raising a clear issue of fact.

Even, however, if it were an admitted fact that there was a rescission of the contract as between Johnson and the plaintiff, such action could not affect or prejudice the rights of the defendants, who did not participate in or assent thereto. The defendants, as well as the plaintiff and Johnson, had specific duties to perform under the contract and corresponding rights thereunder. The independent action of the plaintiff and Johnson could not affect or defeat the rights of the defendants under the contract. By the terms of the contract set out in the answer, upon failure by the plaintiff to pay the purchase money as therein stipulated, it was agreed by all parties that the sum of \$350 already paid by the plaintiff should be divided equally between the defendants as brokers and the original owner of the land, Johnson.

The answer alleges a failure of compliance by the plaintiff at the date fixed, and, upon such failure, the interest of the defendants in the money here in question became a vested interest, which could not be defeated by any agreement between the plaintiff and Johnson. See 31 Cyc. 1621; 89 Cyc. 1665.

The plaintiff, however, bases his motion upon the theory that the \$175 here in controversy must be regarded as a penalty, and hence that it cannot be retained by the defendants, and that plaintiff consequently has the right to recover it back.

The question as to whether a particular sum agreed to be paid upon breach of a contract is to be regarded as a penalty or as liquidated damages does not depend upon the name given it in the contract, whether it be called a "penalty," a "forfeiture," or "liquidated damages" in the contract. The right of the parties to agree by contract for the payment of a fixed amount as damages which will result to a par-

ticular party from a breach of such contract is well established as existing in all cases where the actual damages which will result from a breach of the contract are uncertain and incapable of being ascertained definitely by any satisfactory and known rule, which uncertainty arises from the nature of the subject itself or from the circumstances of the particular case. See 13 Cyc. 90.

"In order to determine whether the sum named in a contract as a forfeiture for noncompliance is intended as a penalty or as liquidated damages, it is necessary to look at the whole contract, its subject-matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach." 13 Cyc. 91. See, also, 8 R. O. L. p. 576; 13 Cyc. 102.

The same rule is announced and followed in *Williams v. Vance*, 9 S. C. 374, 30 Am. Rep. 26, and in *Lipscomb v. Seegers*, 19 S. C. 425. In the latter case this language is used: "It may be said that, where the damages are uncertain and not susceptible of ready ascertainment, and the sum fixed upon as damages is not unreasonable or unconscionable, in view of the probable damages, and, from the whole contract and surrounding circumstances, such appears to have been the intention of the parties, such sum will be treated as liquidated damages."

Applying these principles to the case at bar, it appears that the defendants acted as brokers in bringing the seller and buyer together and in negotiating the sale of certain premises by Johnson to the plaintiff; that an agreement was reached between the parties, whereby the plaintiff, as buyer, the defendants, as brokers, and Johnson, as the seller, agreed that \$350 should be paid by plaintiff in cash as part of the purchase price of the premises, the remainder of such purchase price to be paid by plaintiff at a fixed date in the then future, upon the making of which payment the conveyance should be made by Johnson to the plaintiff; that it was expressly stipulated in the written agreement, signed by Johnson, by the plaintiff and by the defendants, that \$175 of the amount so paid by the plaintiff should belong to and be retained by the defendants, evidently as payment for the services of the defendants in negotiating the sale to and purchase by the plaintiff of this property; and that it should be so retained by defendants, even if the plaintiff should fail to pay Johnson the remainder of the purchase money as stipulated by the contract. It is quite clear that it would be very difficult to ascertain or determine the amount of actual damages which would be sustained by the brokers in such a case by the breach of such a contract to purchase, where the compensation of such brokers depended upon their being able to procure a purchaser for the property ready, able, and willing to buy the particular property at a price and on terms satisfactory to the seller. The agreement by plaintiff that, in the event of his failure to carry out his contract, the sum of \$175 here in question should be retained by the defendants as compensation for their services, appears to be a reasonable contract, in view of the total price at which plaintiff contracted to buy this property and in view of the time and labor usual-

ly involved and consumed in the work of brokers engaged in procuring purchasers for property.

It follows, therefore, that the contract here in question as alleged by the defendants must be held to be a valid contract for the payment of a certain sum as liquidated damages by the plaintiff to the defendants, and that these allegations of the answer set up a valid defense to this action.

Even, however, if the stipulation in question could be construed as a penalty, such penalty would nevertheless stand as security for any actual damages sustained by defendants by reason of plaintiff's breach of his contract of purchase.

Hence the motion to strike out the allegations of the answer must be refused; and it is accordingly so ordered.

Dunlap & Dunlap, of Rock Hill, for appellant.

John A. Marion, of York, for respondent.

FRASER, J. The plaintiff brought his action against the defendants, Roach & Kirk, as copartners, to recover \$175, which he alleged was due him upon an uncompleted contract of sale of a lot of land in Rock Hill, in this state. The plaintiff alleged that he had made a contract to buy the house and lot from one E. H. Johnson; that the contract was made through the defendants, Roach & Kirk; that he paid to the said Roach & Kirk, as agents and brokers of Johnson, the owner, the sum of \$350 to bind the bargain; that the plaintiff and Johnson agreed to rescind the contract, but that the defendants refused to return the sum of \$175; that the plaintiff is entitled to a return of this sum and demands judgment for the same.

The defendants in their answer set up that they were duly authorized under a written contract to make the sale; that plaintiff, E. H. Johnson, and the defendant Roach (for Roach & Kirk) entered into a written agreement in which it was mutually agreed that the sum of \$350 was forfeited by the failure of the plaintiff to comply with his contract; that the sum of \$175 was due to defendants, under the tripartite contract, for the sale of the land. The defendants put in also a general denial.

The following is the contract relied upon by appellant:

"Sales Contract of Real Estate.

"Ross F. Roach, Broker.

"\$3,500.00. Rock Hill, S. C., 3/22/1920."

"Articles of agreement between Ross F. Roach, for E. H. Johnson, of Rock Hill, S. C., and J. Harry Foster of Rock Hill, S. C. Ross F. Roach agrees to sell and J. Harry Foster agrees to buy the following described property: One five-room cottage on the north side of East Black street, now occupied by Thackston—for the sum of thirty-five hundred dollars for sound and unincumbered titles for three hundred and fifty dollars of purchase price is acknowledged paid to bind the obligation until

sound and unincumbered titles can be furnished by the owner by or before April 22, 1920, when the remainder is to be paid as follows: Cash when papers are delivered. Purchaser is to get possession in thirty days, or money back.

"Should any defect appear in the titles that cannot be corrected, the amount paid is to be promptly refunded to the buyer by Ross F. Roach, broker. The buyer is to have the privilege of examining the titles before completing payment. Taxes are to be paid by the owner up to the date of transfer of papers. It is understood by all parties interested that Ross F. Roach is to be responsible only for the amount in his hands, but is to use his best efforts to see that the contract is fulfilled by both buyer and seller. The amount paid to bind the obligation is to be forfeited, provided the buyer fails to comply. Said amount of forfeit is to be equally divided between the owner of the property and the broker. The said E. H. Johnson will give possession if Thackston agrees to vacate the house.

"Witnesses: [Signed]

"A. R. White, for... Ross F. Roach, Broker.

"E. S. Kirk, for... J. Harry Foster, Buyer.
for... E. H. Johnson, Owner."

The plaintiff demurred to the answer, on the ground that it did not state a legal defense. (Let the answer and circuit decree be reported). The demurrer was overruled on several grounds, and the plaintiff appealed. The demurrer was overruled because the plaintiff alleged that the contract had been rescinded, and the general denial put that fact in issue. It appears to this court that the real question is before the court, and it must at last be decided on the papers now before the court, and it is not well to send the case back for further expensive litigation that cannot affect the final result. The rescission being eliminated by the general denial, we have a complaint that admits that the plaintiff and the seller had a contract of sale. The answer sets up a contract as the contract referred to. At this stage we must assume that the contract set up in the answer is the true contract.

The defendants have in their possession \$175, which they claim the right to hold under that contract and the allegations of the answer. Let it be assumed that the money paid is in the nature of liquidated damages. The defendants must show that the seller and his agents, the respondents, are in a position to demand of the buyer that he shall fulfill his contract. The contract says: "Purchaser is to get possession in thirty days or money back." It says further: "The said E. H. Johnson will give possession if Thackston agrees to vacate the house." The answer does not allege that the seller was in a position to tender possession within 30 days, or up to the time of the service of the answer. The contract further provides that Roach "is to use his best efforts to see that the contract is fulfilled by both buyer and seller." There is no allegation of any effort on the part of the respondents to secure a

fulfillment of the contract by either party. Roach was the admitted agent of the seller. The answer so states and sets up his written contract. It is true this contract provides for a division of the fund between the principal and agent, but the buyer was not concerned in that division, whether the contract was fulfilled or not. The only clause in the contract that connected the buyer with the agent of the seller was that Roach was "to use his best efforts to see that the contract was fulfilled by both buyer and seller." The answer sets up no effort to accomplish anything for the buyer.

The respondents have their contract with their principal, the seller, and their remedy, if any, is against their principal.

The order appealed from is reversed. This does not preclude an amendment if the circuit court sees fit to allow it.

GARY, C. J., and WATTS, J., concur.

COTHRAN, J. (dissenting). I agree fully with the very clear and convincing decree of the circuit judge and think that it should be affirmed.

The controversy has arisen over the terms of a written contract for the sale by one E. H. Johnson through his agents, Roach & Kirk, of a house and lot to the plaintiff. The agreed price was \$3,500, payable \$350 cash, and the remainder at stated times. The contract provides that, if the buyer (plaintiff) failed to comply with the terms of the contract, the cash payment of \$350, "the amount paid to bind the obligation," should be forfeited and equally divided between the owner of the property (Johnson) and the broker (Roach), acting apparently for his firm (Roach & Kirk).

This contract was signed by the three parties interested, Foster, Roach, and Johnson, the buyer, the broker, and the seller, and each of them was of course bound by the terms thereof, appropriate to their several obligations.

The complaint alleges that subsequently to the making of the contract Foster, the buyer, and Johnson, the seller, by mutual agreement, rescinded the contract of sale, Johnson accepting \$175, one-half of the initial cash payment of \$350, on account of five months' rent of the premises. It does not allege, and we must assume that such was not the fact, that the broker was consulted as to this rescission or that his interest in the so-called forfeit was considered at all. The plaintiff appears to have been careful in concluding the interest of Johnson therein, but indifferent to that of the brokers, which was identical with that of Johnson, and expressly made so by the signature of the plaintiff to the tripartite agreement.

The defendants in their answer deny the allegation of the complaint that there had been a rescission of the contract as between

the plaintiff and Johnson, and claim the benefit of the provision in the contract that, if the plaintiff failed to comply with his contract, they should be entitled to one-half of the initial payment agreed to be forfeited.

It does not make a particle of difference how it came about that the plaintiff failed and refused to comply with his contract, if, as a matter of fact, admitted by the answer, he did so fail and refuse. It might have occurred, and doubtless it did occur, as the plaintiff declares, by a rescission of the contract by agreement between him and Johnson; but the defendants were not parties to that agreement, and their rights could not be bartered away by the plaintiff and Johnson, both of whom by contract fixed what those rights were. Or it might have occurred, if the defendant's denial of a rescission be established, by the failure and refusal of the plaintiff to comply. In either event, the defendants are entitled to what the contract gives them.

It must be assumed that the brokers gave value received for their services; at least the plaintiff is in no position to dispute that fact after having agreed to the measure of their compensation and how it was to be paid by signing the contract in the event of his failure to comply.

The plaintiff settled with Johnson by applying his half of the \$350 to the rent of the premises for five months. Johnson received therefor no more than the rent, nothing under the contract. The plaintiff would settle with the brokers for the same \$175 with which Johnson was satisfied. If it required a new contract to settle with Johnson, why did it not require a new contract to settle with the brokers, who had an equal interest, by the plaintiff's express agreement, in the \$350?

In any aspect of the case, the order overruling the demurrer was right, and should be sustained.

(153 Ga. 306)

HOOPER et al. v. RUCKER. (No. 2982.)
(Supreme Court of Georgia. April 17, 1922.)

(Syllabus by the Court.)

1. Sufficiency of evidence.

The verdict is supported by evidence.

2. Appeal and error \S 216(2)—Instruction as to defendant's demand for reformation held not reversible error.

The excerpts from the charge on which error is assigned do not show cause for the grant of a new trial.

Error from Superior Court, Forsyth County; D. W. Blair, Judge.

Action by C. C. Rucker against G. M. Hooper and another. Judgment for plaintiff, and defendants bring error. Affirmed.

C. C. Rucker filed a petition against G. M. Hooper and Malinda Worley, alleging that the defendants were jointly indebted to him in the sum of \$1,961.42 principal, together with interest and attorney's fees, on a note given for the purchase of land. The defendant Worley filed an answer in which she denied that the defendants were jointly indebted in the sum named; and alleged that, while the defendants purchased the tract of land from the petitioner for the sum of \$3,600, each of the defendants was liable for only one-half the amount, and that neither was bound for the amount due by the other; that she is 72 years of age, old, infirm, ignorant, and unable to read or write; that she is a widow without children, having lived in another state until about one year ago, when she came to reside in Georgia with the other defendant and his wife, the latter being her niece; that she is ignorant of law, without business experience, and that she had about \$1,800, the same being all of her life savings and all of her property, with no prospect or probable chance of adding to the same, since she is unable to work; that her eyesight is bad, and she is infirm bodily and mentally; that the interests of the defendants in the purchase of the property were separate; that defendant did not agree to be in any way responsible for the debt of her codefendant, and this was so understood by all parties; that she at one time paid the petitioner \$400 in gold, and \$1,192.78 at a later date on her contract; that there is still due by her the sum of \$107.22; that she is ready and willing to pay the balance due by her if petitioner will make her a deed to the one-half undivided interest in the land, according to her contract; that the note and bond for title were prepared or caused to be prepared by plaintiff; that she did not read or have the same read over to her; that her signature to the note was made by mark, she being unable to write; that she made the aforesaid payments in utter ignorance of the terms of the note and bond; that the plaintiff took advantage of her ignorance, illiteracy, and lack of business experience and capacity, and thus overreached her, and therefore the acts as heretofore alleged were fraudulent and contrary to equity and good conscience, and the note and bond were void; and that, having refused to carry out the contract and agreement as made heretofore, the plaintiff has rescinded the original contract. The defendant prays for a judgment against the plaintiff for the amount already paid to her, and that she have a special lien upon the land described in the bond for title, and for general relief. The other defendant adopts the answer made by Mrs. Worley. The case proceeded to trial, and a verdict was returned in favor of the plaintiff for the amount sued for, with interest, but without attorney's fees.

The defendants moved for a new trial, the motion was overruled, and they excepted.

Geo. F. Gober, of Atlanta, and G. B. Walker, of Alpharetta, for plaintiffs in error.

J. P. Brooke, of Alpharetta, for defendant in error.

GILBERT, J. [1] 1. The motion for a new trial consists of the general grounds, and two grounds assigning error on portions of the judge's instructions to the jury. The evidence was sharply conflicting. The evidence on behalf of the defendant Malinda Worley showed a pitiable case of an old, illiterate woman, infirm in body and mind, having been overreached in a land trade, and having attached, by her mark, her name to contracts, the import and legal obligations of which she did not understand. She is a widow without children, practically a stranger in a strange land, having lately come to the state of Georgia to reside with her niece, the wife of the codefendant, bringing with her the fruits of her labors for a lifetime, aggregating the meager sum of \$1,800. With no prospect of ever acquiring more she was anxious to invest it in a small piece of farm land where she might be sure of possessing a home for her few remaining years. After paying the petitioner practically all of the money she had, significantly including \$400 in gold, she found that according to the contract as written she was obligated jointly with the other defendant for a sum double the amount she possessed, with no means of paying the remainder. While alleging her willingness to complete the payment of the \$1,800 in her own behalf, upon condition of receiving a deed to an undivided half interest in the land, she sought to be relieved, for the reasons above stated, from the obligation to pay the other half, which she insisted was due solely by her codefendant. The evidence for the petitioner showed that both of the defendants fully understood that the contract was a joint one in which both defendants were responsible for the entire amount of the purchase price agreed upon, and that both fully understood the contents and legal obligations of the written instruments comprising the contract. As to Hooper the evidence demanded a verdict for the plaintiff; and as to Mrs. Worley it authorized the verdict, and, as rendered, it has the approval of the trial judge.

[2] 2. The criticisms upon the charge do not show any material or substantial errors

of law. All of the special grounds of the motion for a new trial complain that the issues raised by the defendant Mrs. Worley were not sufficiently covered in the charge of the court to the jury. It is only necessary to refer in detail to one of these, which is that the court did not instruct the jury in regard to Mrs. Worley's amended answer praying for a reformation of the bond for title and the note sued on. The charge to the jury included the following:

"She (Mrs. Worley) amended her pleadings, in which she says she is able, ready, and willing to carry out her contract as originally agreed to by her, and prays the court if it should hold that said note and bond are not void, that the same be reformed so as to speak the real trade; that is, that she contracted and agreed to buy a one-half undivided interest in the said land, that she did not agree to make a note for the entire purchase price or to go surety for her codefendant for his part of the purchase money, and that, on payment of the balance of the one-half of the purchase money, that the plaintiff be decreed to make her a title or warranty deed to one-half undivided interest in the land." (The court instructed the jury to return a verdict against the defendant Hooper.) "The case now goes to you to find what the truth is between the plaintiff here and Mrs. Worley, and reach a verdict that will express the truth of the case. * * * If the defendant here, Mrs. Worley, has carried the burden and shown to you that the contract made, that the promissory note that she signed, was not the contract that she made for the purchase of this land, that she made a contract whereby she was to assume liability for only one half of the purchase price, and she was to have a bond for title to one-half undivided interest in this property, and also at the time she signed the promissory note sued upon she believed or understood that the note that she was signing was for one half of the purchase money and not for all of the purchase money, and that she was getting a bond for title for a half interest, why, then she would not be liable to the plaintiff for the balance of the purchase money, but would be liable, under her equitable plea here, for the balance of one-half of the purchase price of this land."

While the charge, in this regard, might have been more aptly stated, in the absence of a timely written request, and in view of the fact that the jury found against these contentions of the defendant Mrs. Worley, the same does not constitute reversible error.

Judgment affirmed.

All the Justices concur.

(153 Ga. 276)

NEAL v. NEAL. (No. 2915.)

(Supreme Court of Georgia. April 14, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 843(1)—Rulings on issue decided in favor of complaining party not considered.

The verdict and decree being against the prayer for cancellation, it is useless to pass upon the special grounds of the motion for a new trial which complain of rulings adverse to movant on that issue. Likewise it is useless to rule upon the same issue raised by demurrer and exception preserved.

2. Pleading \S 204(3)—Petition held to state cause of action for some equitable relief, and not subject to general demurrer as a whole.

The petition was sufficient to set out a cause of action for some equitable relief. The general demurrer to the petition as a whole was properly overruled.

3. Contracts \S 191, 215(1)—Grantee, under deed reserving reasonable support, bound to account therefor so long as she retains possession.

The deed conveys a fee-simple title to the grantee named therein, reserving to the grantor during his natural life "a reasonable support" out of the property. Where the grantee in such deed takes and retains possession of the property and the rents and profits arising therefrom, said grantee is bound to account for such "reasonable support" during the life of the grantor, so long as the grantee retains such possession.

4. Contracts \S 191, 215(1)—Grantee, under deed reserving reasonable support, not bound to retain possession and account for reasonable support; bound to account for reasonable support so long as she retains possession.

Where, as in this case, according to the undisputed evidence, the grantor and the grantee were husband and wife, living together as such on the land, cultivating it as a farm, and using the personal property as incident thereto, under the terms of the deed the grantee was not obligated to retain possession of the property, to manage the same and to account for the reasonable support of the husband out of the rents and profits, but if the grantee did retain exclusive possession and management of such property, and did retain the rents and profits arising therefrom, she is bound to account to the grantor out of the proceeds for a reasonable support according to the terms of the conveyance.

5. Sufficiency of evidence.

Applying the principles announced above, the evidence authorized the verdict and judgment against the defendant and in favor of the plaintiff for the sum of \$400, less \$50 paid by the defendant as a support for the year 1920. The judgment overruling the motion for a new trial will be affirmed, with direction that the decree be reformed by striking therefrom all portions except for a money judgment such as we have held to be authorized by the evidence.

Error from Superior Court, Glascock County; E. T. Shurley, Judge.

Suit by D. H. Neal against J. B. Neal. Judgment for plaintiff, and defendant brings error. Affirmed, with directions.

The petition, alleged, in substance, that petitioner, D. H. Neal, is 70 years old, and defendant, Josie B. Neal, his wife, is 35; that after the death of petitioner's first wife he became addicted to the excessive use of intoxicants; that subsequently to his marriage to defendant he endeavored, upon advice of his physician, to discontinue the use of whisky, his health and mental faculties having become greatly impaired; that, notwithstanding the advice of the physician and his endeavors in this direction, the defendant would order and keep in their home and offer and give liquor to him; that during this time she was continually persuading petitioner to convey to her his property; that on May 17, 1915, the defendant gave to petitioner, immediately after he arose, a large drink of whisky, and shortly thereafter carried him to Gibson, Ga., the defendant driving the horse; that before leaving their home defendant offered petitioner one or more drinks, which he drank; that on said date, being powerless, because of his weakened and enfeebled condition, to resist the importunities of defendant, petitioner yielded and did make a deed, conveying to the defendant a described tract of land containing some 125 acres, and personal property of the value of approximately \$1,000, but containing the provision that, "It is understood that I am to have a reasonable support out of my estate during my natural life;" that at the time of the execution of this deed because of the weakened condition above described, and his intoxication, which the defendant was instrumental in producing, he was incapacitated to make a free and voluntary disposition of his property; that immediately afterward the defendant began to abuse and mistreat petitioner, and finally, in September, 1919, moved from his room and refused to continue the marital relation; that in December, 1919, being unable to endure her treatment, he moved from the place, and has not lived with her since; that subsequently to the making of the deed above described the defendant incumbered the property by a deed to secure a loan of \$1,500; that she had paid no part of this loan; that she was incurring other liabilities; and that he had an interest in the land to the extent of his support. The prayers were that the deed made by petitioner be delivered up and canceled, and that his title to the property be re-established; that he have a decree fixing for himself a fair proportion of the rents and profits of the land and personal property for his support; that a receiver be appointed

for said property, with direction to impound the proceeds, less a reasonable support for himself and the defendant, for the purpose of discharging the incumbrance placed upon the property by defendant; that defendant be enjoined from disposing of the income from said property, except for the reasonable support of herself and petitioner, the same to be applied to the discharge of the incumbrance, and for general relief.

The defendant demurred to the petition, upon the grounds: (a) That it does not allege that petitioner had tendered back to defendant the benefits he received under the deed which he seeks to have canceled, and he is therefore seeking the aid of a court of equity without offering to do equity, and his petition should be dismissed; and that the allegations of the petition show that since executing and delivering the deed he has ratified the same, and therefore has no legal or equitable cause for its cancellation; (b) that petitioner has an adequate remedy at law; (c) that the facts alleged do not warrant the granting of injunction and appointment of receiver as prayed. These demurrers were overruled, and error is assigned upon exceptions taken pendente lite.

The trial of the case resulted in the finding by the jury that the deed should not be canceled; that from the income from the property petitioner should receive \$400 per year from February 1, 1920, less \$50, which had been paid since February 1, 1920. The court entered a decree. A motion for a new trial filed by the defendant was overruled, and she excepted.

L. D. McGregor, of Warrenton, for plaintiff in error.

E. P. & J. Cecil Davis, of Warrenton, for defendant in error.

GILBERT, J. Judgment affirmed, with direction. All the Justices concur.

(153 Ga. 301)

KITE v. VICKERY et ux.

VICKERY et ux. v. KITE.

(Nos. 2989, 2990.)

(Supreme Court of Georgia. April 14, 1922.)

(Syllabus by the Court.)

1. Specific performance §114(1)—Petition by purchaser to have right to deed established held sufficient.

The court did not err in overruling the general demurrer to the petition.

2. Specific performance §123—Nonsuit improper when petition sufficient and sustained by evidence.

The evidence being sufficient to authorize a verdict in behalf of the plaintiff, the court erred in granting a nonsuit.

(Additional Syllabus by Editorial Staff.)

3. Vendor and purchaser §170—Whether actual money tendered immaterial when tender refused on other grounds.

Where the refusal of a tender of payment under a bond for title was not placed upon any dispute as to the amount tendered, the manner of the tender, etc., but upon the vendor's absolute refusal to abide by the bond for title, it was immaterial whether the actual money in legal tender was handed or shown to the vendor.

4. Vendor and purchaser §170—Tender and rejection equivalent to compliance with bond.

A tender of a payment under a bond for title and its absolute rejection by the vendor was equivalent to a compliance by the purchaser with the terms of the bond.

5. Vendor and purchaser §98—Restoration essential to rescission.

Where the parties to a bond for title have not themselves agreed and prescribed the right of rescission and the circumstances under which it is to be exercised, restoration of the amount paid must be made by the vendor upon rescission of the contract.

Error from Superior Court, Campbell County; J. B. Hutcheson, Judge.

Action by J. O. Kite against T. J. Vickery and wife. Judgment of nonsuit, and plaintiff brings error, and defendants bring a cross-bill of exceptions. Reversed on the main bill, and affirmed on the cross-bill.

J. O. Kite filed a petition against T. J. Vickery and his wife, Mrs. L. M. Vickery, alleging in substance as follows: On September 27, 1916, T. J. Vickery executed to A. F. Copeland and J. W. Shuford a bond for title to described property. On November 18, 1918, Copeland and Shuford transferred said bond to petitioner. The consideration for the transfer was paid to Copeland and Shuford on November 17, 1917; but, owing to the absence of Shuford, the transfer was not actually signed until the date named above. Vickery, on executing the bond to Copeland and Shuford, delivered constructive possession of the property and rented the same by giving his note for the sum of \$200 as rent for the year 1917, and paid said note. Before taking the transfer of the bond, petitioner went upon the place and stated to Vickery, in the presence and hearing of Mrs. Vickery, that he contemplated purchasing the bond for title to the place; and Vickery said that Copeland and Shuford would fail to pay for the place, and, if so, he would sell the place to Kite for a less sum; but neither Vickery nor his wife made any objection to petitioner purchasing from Copeland and Shuford, and Mrs. Vickery made no claim to the property. On November 15, 1917, the date when the first purchase-money note fell due, petitioner tendered to Vickery the full amount thereof, but Vickery refused to ac-

cept it, and refused to carry out the terms of the bond for title. This tender was made after the trade had been made with Copeland and Shuford for the transfer of the bond for title, but before the same had actually been signed. Copeland, one of the vendees named in the bond for title, went with petitioner to Vickery when the tender of the amount due was made to Vickery. Petitioner notified Vickery that the latter would be allowed to remain in possession as a tenant, and that petitioner would demand \$200 rent for the year 1918. Vickery remained in possession, and is due petitioner said sum. In the fall of the year 1918, petitioner notified Vickery that, if he remained on the place during the year 1919, he would charge him as rent five bales of cotton; and Vickery did remain on said place during the year 1919, and is due your petitioner said rent. In the fall of the year 1919, petitioner took out a distress warrant against Vickery for said rent, to which Vickery filed a counter affidavit, and the issue thereon is still pending in court. Vickery remained on the premises during the year 1920, without making any new contract, and is due petitioner five bales of cotton for that year; and it was agreed by counsel that the issue made on the distress warrant be merged and tried together with this case.

Petition further alleges that while Mrs. Vickery had full knowledge of the sale of the land to Copeland and Shuford and the transfer of the bond for title, nevertheless she now claims that on August 8, 1915, her husband conveyed the land to her for a consideration of \$500. On December 8, 1917, such a conveyance was placed on the records. Petitioner alleges that Mrs. Vickery is estopped from claiming the land, because she saw and permitted him to purchase it without disclosing her secret equity; and for the further reason that, as petitioner believes, the deed made by Vickery to his wife was dated back and made for the purpose of hindering and delaying petitioner and preventing him from obtaining specific performance of the contract. Mrs. Vickery also, on December 28, 1917, executed to J. M. Hogan a mortgage on the land, and had the same recorded. The bond for title attached to the petition is in the usual form, and the consideration named therein is \$3,125, to be paid as follows: \$325 cash, the receipt whereof is acknowledged, and nine consecutive annual payments of \$800 each on the 15th day of November, 1917, and each year thereafter until the 15th day of November, 1927, when \$100 is to be paid, with interest at the rate of 8 per cent. The only reference to the failure on the part of the vendees to pay the purchase money is as follows:

"On failure of the said parties of the second part to pay the said sums of money or either of them at the time specified, then the said obligation to be void and of no effect."

The prayers of the petition are: (1) That it be decreed that T. J. Vickery has title to the property, and that petitioner as holder of the bond is entitled to a deed from said Vickery upon payment of the purchase money named therein. (2) For a judgment against Vickery for the rental alleged to be due, and that said sums recovered as rent be applied to the purchase money due on said notes set out in the bond for title. (3) That Vickery be decreed to be petitioner's tenant and accountable to him for rents and for general relief and process.

To the petition the defendants interposed the following demurrer: "That said petition sets forth no cause of action and is insufficient in law." The answer admits the execution of the bond for title to Copeland and Shuford, but it denies that the entire \$325 acknowledged as having been received in cash was actually paid, and alleges that only the sum of \$182 was paid in cash on the execution of the bond, and that the vendees promised but failed to pay the balance of \$143. Other material allegations of the petition were denied. The case proceeded to trial; and after the introduction of evidence by the plaintiff, substantially proving the case as laid in the petition, the court granted a nonsuit. The plaintiff excepted to this judgment, and the defendants excepted to the judgment overruling the general demurrer.

J. F. Golightly, of Union City, and Lester C. Dickson, of Fayetteville, for plaintiff.

H. A. Allen, of Atlanta, for defendants.

GILBERT, J. [1, 2] The petition set out a cause of action, and the evidence was sufficient to prove the case substantially as laid. Therefore it necessarily follows that the court erred in granting a nonsuit. Vickery v. Swicord, 151 Ga. 145, 106 S. E. 92. The defendants, Vickery et al., contend that under the terms of the bond, if the purchase-money notes were not paid at the times specified, the vendor had the right to rescind the trade. citing *McDaniel v. Gray*, 69 Ga. 433, and other later cases to the same purport. They point out that the vendors were still occupying the land in question, never having physically removed therefrom; and therefore contend that, time being of the essence of the contract, the vendors, upon failure of the purchaser to pay, might elect to pursue either one of the three remedies: First, to reduce the purchase-money notes to judgment, file a deed, and sell the land; or, second, bring ejectment; or, third, rescind the trade and hold possession of the land. The obstacle to the application of either of these remedies is readily seen by reference to the facts. The court having granted a nonsuit, the defendants, of course, introduced no evidence. The plaintiff proved the purchase of the rights of the original vendees in the bond for title previously to the maturity of the

first purchase-money note, and on the day that such note matured, in the presence of one of the original vendees, tendered to the vendor the full amount due, which the vendor refused to accept.

[3, 4] The refusal, under the evidence, was not placed upon any dispute as to the amount tendered, the manner of the tender, or other similar circumstances. It was placed upon the absolute refusal of the vendor to abide by the terms of the bond for title. It does not matter, therefore, whether the actual money in legal tender was handed to or shown to the vendor. Under such circumstances, it is not necessary to consider whether time is of the essence of the contract as stated in the bond for title. The tender and its absolute rejection was equivalent to a compliance with the terms of the bond. The answer of the defendants admitted that Vickery had received \$182 in cash at the time of the execution of the bond; the bond itself acknowledges receipt of \$325, which was due to be paid on the day the bond was executed. There was no evidence contradicting these facts; nor was there any evidence that the vendor elected to rescind the contract because the entire \$325 was not paid in cash, nor that there was any return of the amount received on the purchase price.

[5] As stated in the case of *McDaniel v. Gray*, *supra*, the vendors "should restore to the purchaser the amount of the purchase money paid, less such an amount as would prevent actual loss to them, by reason of the nonperformance of the contract on the part of the purchaser." The bond for title contains no provision authorizing the vendor to declare the amount received by him as part payment forfeited for a failure to make such payments. The general principle is that—

"Where the parties themselves have not agreed and prescribed the right of rescission and the circumstances under which it is to be exercised, restoration must be made."

Applying these principles to the facts of the case, the court erred in granting a nonsuit; and the judgment must be reversed on the main bill of exceptions. Judgment is affirmed on the cross-bill.

All the Justices concur.

(153 Ga. 262)

SHERIDAN v. SHERIDAN (two cases).
(No. 2789.)

(Supreme Court of Georgia. April 14, 1922.)

(Syllabus by the Court.)

1. Fraudulent conveyances \S 172(3)—Deed to defraud one having claim for injuries will not be canceled as between parties.

A deed made by a husband to his wife, to hinder, delay, or defraud a person who had a subsisting claim against the husband, for

personal injuries inflicted on him by the operation of an automobile which the husband was driving, although void as to such person, was good between the parties, and operated to put the title to the property therein conveyed in the wife; and a court of equity will not aid the husband, by the cancellation of such deed, and by the restoration to him of the property therein conveyed, although the wife importuned him to make the deed for the purpose aforesaid, and promised him to cancel the deed and put the title back in him when the reason for making this deed had ceased.

2. Cancellation of instruments \S 27—Deed not canceled when earlier deed to the same property was made to defraud creditor, and not subject to cancellation.

When the husband filed his petition to cancel two deeds made by him to his wife, the first conveying with other property, the premises in dispute, and the second deed conveying only the premises in dispute, on the grounds, that his deeds were without consideration, that they were procured by fraud practiced upon him by his wife, and by duress, that he was incapable mentally of making them, and that they had not been delivered; and when, on the trial of the case, it appeared from his own testimony that he was mentally capable of making the first deed, that the same was not procured by his wife by duress, that this deed was made for the purpose set out in the first headnote, and the jury found that this deed had been delivered, the court properly rendered a decree declaring title to be in the wife to the premises in dispute, and denying cancellation of these two deeds from the husband to the wife, and refusing to restore to the husband possession of the premises, although the jury found that the second deed was obtained by the wife by undue influence, and although the wife participated in the fraud which prompted the husband to make the first deed, and importuned and pressed him to make the first deed for said fraudulent purpose, promising to cancel the same and put title back in the husband; as the cancellation of the second deed would have been a vain and useless thing.

3. Errors at trial not considered.

The verdict and decree on a controlling issue being demanded by the undisputed facts, it is unnecessary to consider any of the errors alleged to have been committed by the court in the trial of the case.

Error from Superior Court, Hall County;
J. B. Jones, Judge.

Suit by L. D. Sheridan against Anna C. Sheridan. Judgment for defendant, and plaintiff brings error, and defendant brings a cross-bill of exceptions. Judgment affirmed, and cross-bill dismissed.

L. D. Sheridan filed his petition for cancellation of certain deeds against his wife, Anna C. Sheridan, and made this case: He and the defendant intermarried on June 11, 1916, and lived together until February, 1920. At the time of his marriage he was about 72 years of age, and was weak and

feeble in mind and body. At the time of his marriage the defendant was 38 years of age, robust in body and mind, and still enjoying all the vitality and vigor of youth. At the time of his marriage he was possessed of lands and other property of the value of \$20,000, while his wife was without property and adequate means of support. Shortly after their marriage his wife began to persuade him to make over to her all his property, on her promise to manage the same and to take care of him for the rest of his life. At the time, besides the natural weakness and feebleness that accompany old age, he was susceptible to frequent lapses, when his mind would be easily influenced and diverted from its natural condition. He was then especially affected by unusual worries and mental debility, and, in this condition, had little memory or will power, and his mental faculties were impaired. His physical and mental weakness was well known to his wife, and she took advantage of the same to gain an illegal advantage over him, and satisfy her selfish desires in getting control of his property, as is hereinafter stated.

About July, 1918, he had an accident while driving his automobile, and a negro boy was injured thereby. Pending threatened litigation therefrom, his wife took advantage of this opportune situation, and insisted that he make her a deed to all his property, she claiming that this would relieve him from liability in the pending litigation. He objected to this procedure; but his wife, with full knowledge of his mental condition as above described, continued to insist that the deed be made as she suggested. Finally, in his weakened condition, and amid the great trouble and worry occasioned by the above situation, he, not being mentally capable of contracting at the time, and not being free to act under the circumstances, yielded to the artful persuasion of his wife, and, acting against his better judgment and over his protest, he was overpersuaded and induced by his wife to sign a deed purporting to convey to her all his property.

A copy of this deed is attached to his petition as an exhibit. It is dated February 10, 1919, and conveys a house and lot in Gainesville, the subject-matter of this suit, one farm of 200 acres, except 50 acres, a lot 100 by 150 feet in Gainesville, and a lot in Commerce. The stated consideration of this deed is the sum of \$5, the natural love and affection of the grantor for the grantee, and the services the grantee as his wife had already rendered to the grantor and might in the future render to him.

This deed, he alleges, is null and void and should be canceled, because it was wholly without consideration, because the pretended consideration for it has totally failed, because the defendant has failed and still refuses to render to him the services described

in said deed as part of its consideration, because he was mentally incapable of contracting at the time the deed was signed, because he "was induced to sign the same by the fraud and undue influence of the defendant as heretofore shown," because he was induced by his wife to sign the same "under duress as heretofore shown," and because said deed was never delivered. Before any delivery he tore his name therefrom, thereby intending to destroy and never deliver the deed. About four months after he tore his name from the deed, and without his ever having delivered it, his wife, secretly and without his knowledge, obtained said deed and his signature which was torn therefrom, pasted them together, and had them recorded in the clerk's office of the superior court of Hall county. As soon as he learned of this, he asked his wife for an explanation of her conduct, informing her that he had not delivered this deed to her, and was not going to do so, and had not intended she should gain possession of it; whereupon she flew into a fit of anger, abused him, and continued nagging him thereafter. At this time he was old and feeble, his mind was easily deranged by worry and vexation, he was thereby easily incapacitated to transact business, and his wife was young and vigorous, and was aware of his condition, thereby taking undue advantage of the same; and fraudulently designing and intending to overreach his free will and choice, she continued to harass, threaten, annoy, and overpersuade him, until he became so worried, perplexed, and distressed that he did not have his own free will and choice, by reason of the said acts and conduct of his wife. When she had knowingly and willfully aggravated him into his mentally deranged condition, she told him that, if he would make her a deed to the home place, she would stop quarreling at and troubling him, and would live with him peacefully thereafter, and care for him as a true wife; and against his free will, he, not being left free to act in the circumstances, and not being in his normal mind, was thus induced to execute and deliver to his wife a deed conveying to her their home place.

A copy of this deed is attached as exhibit B to his petition. This deed is dated July 11, 1919. It recites a consideration of \$5, and other good and valuable consideration, and conveys to the defendant the house and lot in Gainesville, known as No. 37 North Bradford street, which is fully described in this deed. This deed is null and void and should be canceled because it was wholly without consideration, because he was mentally incapable of contracting at the time he signed it, because he "was induced to sign it by the fraudulent and undue influence of defendant as heretofore shown," because he "was induced by his wife to sign same under duress as heretofore shown," and because

the pretended consideration of the same has totally failed, in that, instead of ceasing her quarrelsome conduct and living with him peacefully and caring for him as a true wife should, and as she promised to do, she actually failed to do any of these things, she abused him and literally pushed him aside as her husband, and even went so far as to have illicit relations with other men. Finally she drove him from his own home, and now, in his old age and feebleness, he is a homeless wanderer. The house and lot conveyed by this deed is worth \$10,000 or other large sum. He has been deprived of the possession and rents thereof since February 1, 1920. His wife is holding said property adversely to him, and without legal right, claim, or title thereto. The defendant is insolvent. He prays that she be enjoined from selling, conveying, incumbering, leasing, or otherwise disposing of the property described in these deeds, that said deeds be set aside and canceled, and that said premises be restored to him.

The defendant demurred to this petition, on the ground that it set forth no cause of action. She demurred to all the allegations in reference to a cancellation of the deed last referred to as exhibit B, because the same do not show that the plaintiff, at the time of its execution, was non compos mentis, and because the same do not show any fraud or undue influence on the part of the defendant, or any other reason why the same should be canceled. The defendant demurred specially to one paragraph of the petition, because it set forth no facts showing either fraud or undue influence on her part toward the plaintiff. The court overruled the demurrer to the petition; and the defendant in due time filed exceptions pendente lite thereto, duly certified. In a crossbill of exceptions the defendant assigns error upon these exceptions pendente lite.

In answer, the defendant denied the substantial allegations of the petition touching the mental incapacity of the plaintiff and the charges of fraud, undue influence, and nondelivery of the deeds therein mentioned, and lack of consideration therefor. She further set up that the plaintiff had promised her that, if she would marry him, he would purchase and give to her a home; and that, in pursuance of this antenuptial contract, he bought and conveyed to her the house and lot in Gainesville. She further set up that her husband consulted an attorney, and presented to her a contract, which had been prepared by his attorney and which he desired her to execute, by the terms of which she should execute to him a deed of gift, conveying to him all the property embraced in his deed to her, bearing date February 10, 1919, except the house and lot in Gainesville, and that, upon her making to him such deed of gift, he would ratify said deed, pro-

vided that she, in consideration of said deed of conveyance of said house and lot, would relieve him from any and all claims that she had or might have in future against him or his property. She refused to execute said contract, and stated to her husband that she was willing to stand on the original prenuptial contract, and that she was willing to execute to him a deed of gift to all the property embraced in said deed, except said home place in Gainesville, and accept from him an additional conveyance of said property. The husband agreed to this disposition of the matter, and, in pursuance of this understanding, executed and delivered to her a deed to his home place, a copy of which is attached to his petition as exhibit B, and she executed and delivered to him a deed of gift to the remainder of the property embraced in his first deed to her, a copy of which is attached to his petition as exhibit A. She further set up, that, after her husband had made to her the second deed to the house and lot in Gainesville, she, with his knowledge, made valuable improvements thereon; expending from \$300 to \$400 in making them; and that he is estopped from now asserting title thereto.

On the trial of the case, there was no evidence that the plaintiff was mentally incapable of making his first deed to his wife. There was no evidence that this deed was executed under duress. The plaintiff testified that he made it, knowing it to be a sham, intending to delay, hinder, and defraud a person who had been injured by him in the automobile accident referred to in his petition. From this testimony it further appeared that this deed had been delivered. He procured an attorney to prepare it, executed it out of the presence of the defendant, and brought it and delivered it to his wife.

The trial judge required the jury to find a special verdict of the facts only, and to this end propounded to the jury certain questions. These questions and the answers by the jury are as follows:

"Was the first deed made in compliance with a marriage contract? Ans. No.

"Was the first deed made for the purpose of avoiding the payment of a claim for damages? Ans. Yes.

"Was the first deed delivered by the plaintiff to the defendant? Ans. Yes.

"Did the plaintiff have sufficient capacity to make the second deed? Ans. Yes.

"Was the deed made without being unduly influenced by the defendant? Ans. No."

Counsel for the plaintiff made no objection to the court submitting to the jury the special issues of fact, and the above questions, which are answered by the jury. Upon the rendition of said verdict, the court rendered a decree reciting that the jury had returned a verdict finding that the plaintiff had executed and delivered to the defendant the

deed of February 10, 1919, conveying to her, among other property, the house and lot in Gainesville, fully describing the same, and further reciting that it appeared from the pleadings and undisputed facts that the plaintiff had made and delivered to the defendant the deeds conveying to her this property, and that, while she was in possession of said premises, the plaintiff stood by and saw her treat said property as her own, and make valuable improvements thereon, without objection on his part. After these recitals, the court decreed that the title to said house and lot passed from the plaintiff to the defendant, that the title thereto is now in the defendant, and that she is entitled to the ownership and possession thereof against the plaintiff. The decree denied the prayers of the petition for cancellation of said deed, and the restoration of the property to the plaintiff.

To this decree the plaintiff filed his exceptions pendente lite, which set up the verdict containing the foregoing questions and the answers by the jury, and which further contain affidavits of six of the jurors who tried the case, that they meant to find in favor of the plaintiff. These exceptions likewise set out the decree, and assigned error thereon, on the ground that the same is contrary to the law and to the verdict rendered by the jury, the same not being authorized by the evidence and undisputed facts and the verdict, and that the court should have entered a decree in favor of the plaintiff for the premises in dispute and for the cancellation of the deeds from the plaintiff to the defendant. The plaintiff, during the term, made a motion for new trial, on the formal grounds, and, on the hearing he amended the motion by adding 23 additional grounds complaining of various instructions of the court to the jury; alleging that the court erred in requiring the jury to find the special issues of fact, and in propounding to them the questions hereinbefore set out, without intimation or notice to the plaintiff or counsel that he intended to do so before he began his charge to the jury; and that said questions did not cover the issues involved in the case; and especially that the court did not submit to the jury the question whether the plaintiff had sufficient mental capacity to make either of said deeds, and failed to submit to the jury the question whether they were made under duress. The court overruled the plaintiff's motion for new trial, and error is assigned on this judgment.

E. D. Kenyon, W. J. Phillips, and Howard Thompson, all of Gainesville, for plaintiff in error.

Charters, Wheeler & Lilly, of Gainesville, for defendant in error.

HINES, J. (after stating the facts as above). The view we take of this case is

that the decree rendered by the trial court was demanded by the verdict, and the undisputed facts in the record. If this conclusion is right, then it becomes unnecessary to consider the errors, if any, committed by the court in reaching the final conclusion reached in this case, and expressed in its decree.

On February 10, 1919, the plaintiff conveyed by deed to his wife a house and lot in Gainesville, Ga., a tract of 200 acres of land in Hall county, Ga., a lot lying just outside of the corporate limits of Gainesville, and a vacant lot at Commerce, Jackson county, Ga. The alleged consideration of this deed was \$5 cash, which the evidence discloses the wife actually paid, the natural love and affection which the grantor had for the grantee, and of the services which the grantee, as his wife, had already rendered unto the grantor, and might in the future render to him. In his petition the husband sought to have this deed canceled on the grounds: (1) That it was wholly without consideration; (2) that the pretended consideration had failed, as the defendant had refused and still refuses to render to petitioner the services which she was to render as a part of the consideration of this deed; (3) that the grantor was mentally incapable of contracting at the time said deed was made; (4) that the grantor was induced to sign this deed by the fraud and undue influence of the defendant; (5) that he was induced to sign the same under duress; and (6) because this deed was never delivered.

This formidable attack on this deed completely crumbled and collapsed when the time came for the plaintiff to sustain the grounds of this attack. It can be conceded, for the sake of the argument, that there was no consideration paid or to be paid by the grantee to the grantor for the property conveyed by this deed; although the wife testified that it was made in pursuance of a prenuptial contract by which the plaintiff agreed, if she would marry him, that he would buy and convey to her a home, and that, in pursuance of this agreement, she married him. Marriage is a valuable consideration, and the wife stands, as to property of the husband settled upon her by marriage contract, as other purchasers for value. Civil Code, §§ 3006, 4243. But it is utterly immaterial, under the facts of this case, whether this deed was bottomed on a consideration, or was purely voluntary and without consideration.

[1] There was no evidence that the plaintiff was mentally incapable of making this deed at the time he executed the same. On the contrary, the evidence shows that he possessed sufficient strength of mind to have a full and clear understanding of the fact that he was making this deed and the purpose

for which he was making the same. The fact that the grantor was induced by his wife to make this deed, in order to delay, hinder, or defraud his creditor, cannot avail the plaintiff. He was equally guilty with his wife. They are both in the same boat. As both are equally guilty of this fraud, equity will leave them where it finds them. There was no evidence that the plaintiff signed this deed under duress. The jury found that this instrument had been delivered by the plaintiff to his wife, and this finding is supported by the evidence. The testimony of the plaintiff shows that this deed was made by the plaintiff for the purpose of hindering, delaying, or defrauding a person who had, at the time of the conveyance, a valid, subsisting claim for damages for a trespass upon his person. *Wise v. Moore*, 31 Ga. 148; *Westmoreland v. Powell*, 59 Ga. 256. Such a deed is binding upon the parties, and conveys to the grantee a good title. The parties being in pari delicto, and the conveyance being an executed contract, the vendor cannot impeach it as a muniment of title in the vendee and have it canceled, whether the vendee really paid the recited purchase money or not, or whether she fraudulently induced him to make the conveyance for this purpose. *McCleskey's Adm'rs v. Leadbetter*, 1 Ga. 551, 557; *Galt v. Jackson*, 9 Ga. 151; *Tufts v. Du Bignon*, 61 Ga. 322; *Parrott v. Baker*, 82 Ga. 364, 370, 9 S. E. 1068; *Bagwell v. Johnson*, 116 Ga. 464, 42 S. E. 732; *Tune v. Beeland*, 131 Ga. 528, 62 S. E. 976; *Anderson v. Anderson*, 150 Ga. 142, 103 S. E. 160.

In his testimony, the plaintiff gives the history of the execution of the deed of February 10, 1919, by him to his wife. On direct examination he testified.

"I didn't want to be sued and have a judgment hanging over me, and she says, 'I will tell you what to do now. You make your property over to me, and I will cancel it back to you all right and they can't get it.' Well, I studied about it, and I think, well, maybe that will do for a while, and I can stave them off until I can get the money to pay it, and I done it. My wife first suggested that after I had told her about the circumstances; she says: 'I will tell you what to do, you make your property over to me, and I will cancel it back to you and they can't sell you out.' Of course I was not satisfied over that solution of the matter. I never done no such business as that, and I always pay my debts, but I had been used to minding her, sorter keeping her in a good humor all the time the best I could, and I consented to it and made the deed and handed it to her. I told her I made the deed and to look at it and hand it back to me, I was going to keep it."

Again, on cross-examination, in referring to this deed, plaintiff testified as follows:

"I made it in order to shun the damage suit for a while until I could get up the money. It was to be effective until I could get up the money and get rid of the damage suit to pay it off, and she asked me to do it, and I backed out.

I knew I was making a deed. I knew I was conveying her that property by this deed for a sham, just for a sham; and she said she would cancel it back. I think I understood all of that thoroughly. Was no misunderstanding about it. I was troubled mighty about this suit. I don't know as I did exactly know what I was doing when I made this deed. I can say anything you want me to. I want to tell the truth and nothing but it. I think I know I was making a deed when I made this deed here. I knew I was making it for the purpose of avoiding a damage suit as she asked to do. If I had understood it thoroughly I might have known it wouldn't be no account. I understood my part. My part was making the deed in order to avoid a damage suit. Yes, that was right. I have always looked after my own business. Others have tried to, but they didn't do it, partly not. I have always made my own trades and my own purchases, and sold my own property whenever I wanted to. I never had any mental trouble that would prevent me from doing it. I made some mighty foolish trades though."

Again, in a written statement, admitted by the plaintiff to have been written by him, the plaintiff stated, amongst other things, as follows:

"She just wanted a house to put her things in, and I said I would buy her a house, not thinking we would marry or we would not. I meant it, for I had enough money and notes in sight that I could do without at that time, whether we were married or not, and I meant it, and I told her to look out for one and she picked out a \$4,000 house, and I told her I couldn't buy that sort of a house, and we rented one and did get married. Some time in May, 1919, I think, I thought of another money scheme that might come on that was unjust, and I told her I would take the bankruptcy before I would pay it. She says, 'Make it over to me, and I will save it in case it does come, and if it don't I will give it back to you.' So that was about the 15th day of May, I think. So I decided everything over to her and handed them over to her, and she looked at them. I told her to hand them back to me, that I would take care of them until another change took place; and she says, 'Why not me keep them?' and wouldn't hand them back, and laid them on the table. I picked them up and put them in my drawer with my other papers. So I studied about it, and I believed she would take the advantage of me, the way she seemed about it; so I tore my name off the deeds and put them back and dropped the name down there too."

This testimony of the plaintiff clearly demonstrates that the purpose for which this deed was made was to delay, hinder, or defraud the person who had a claim against him for personal injuries; that the plaintiff was mentally capable at the time of making this deed; that it was not made under duress by his wife; and that the same was delivered. This being so, his deed put title to the property in dispute in his wife. She is in possession under his deed. Under the authorities above cited, he cannot attack this

deed on the ground that it was obtained by the fraud of his wife; and equity, under the circumstances, will not cancel the same at his instance, he being mentally capable of making this deed, fully understanding the purpose for which it was made, and the same having been delivered to his wife.

[2, 3] For the above reason, it becomes unnecessary to determine whether any errors were committed by the court in the trial of this case, and in the rendition of the decree therein establishing the title in the wife to the house and lot in dispute, denying the prayers of the plaintiff for cancellation of the two deeds he made to his wife, and refusing to award possession of this property to the plaintiff. Under the verdict rendered and in view of the undisputed facts under which the first deed from the plaintiff to his wife was made, which are fully set out above, a decree in favor of the wife was demanded. If the second deed from the husband to the wife was obtained by undue influence, its cancellation will not, for that reason, help the plaintiff in any way. The cancellation of the second deed would be a vain thing, as such cancellation will not restore to the plaintiff title, the right to the possession, and possession of the house and lot in dispute. Courts will not do a vain thing. The refusal of the court to cancel the second deed, on the ground that the same was obtained by the wife from the husband by undue influence, as the jury found, if erroneous, was entirely harmless. The conclusion reached and expressed in the decree was right and proper, and should not be disturbed.

The judgment on the main bill of exceptions is affirmed; and the cross-bill of exceptions is therefore dismissed.

All the Justices concur.

(153 Ga. 329)

**GEORGIA RY. & POWER CO. et al. v.
TOWN OF DECATUR.**

SAME v. MAYOR AND COUNCIL OF COLLEGE PARK.

(Nos. 3019, 3081.)

(Supreme Court of Georgia. April 29, 1922.)

(Syllabus by the Court.)

1. Judgment \S 642—Granting or refusal of temporary injunction on question of law is final adjudication when affirmed.

A judgment of a trial court granting or refusing an injunction, where the same depends upon a question of law, is, upon its affirmance by the Supreme Court, a final adjudication of such question.

2. Appeal and error \S 1195(1)—Rulings in affirming interlocutory order granting injunction are the law of the case.

The rulings of the Supreme Court, upon the interlocutory order of the trial judge granting an injunction, became the law of the case as to the particular case.

3. Appeal and error \S 1194(2)—Affirmance of order granting an injunction is ruling on all questions involved, though not mentioned in opinion.

An affirmance by the Supreme Court of the order of the lower court granting a temporary injunction is a ruling upon all questions of law involved, though the legal contentions may not have been specifically enumerated or mentioned in the opinion of the court.

No. 3019:

Error from Superior Court, De Kalb County; Jno. B. Hutcheson, Judge.

No. 3081:

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Separate actions by the Town of Decatur and by the Mayor and Council of College Park against the Georgia Railway & Power Company and others. Judgments for plaintiffs, and defendants bring error. Affirmed.

No. 3019:

J. Prince Webster, Rosser, Slaton, Phillips & Hopkins, and Colquitt & Conyers, all of Atlanta, for plaintiffs in error.

Harwell, Fairman & Barrett and Frank Harwell, all of Atlanta, and J. Howell Green, of Decatur, for defendant in error.

No. 3081:

Colquitt & Conyers, J. Prince Webster, and Rosser, Slaton & Hopkins, all of Atlanta, for plaintiffs in error.

Geo. P. Whitman, of Atlanta, for defendant in error.

WRIGHT, Special Judge. The present case comes up upon the final hearing in the court below. The exceptions are to the rulings sustaining the general demurrers, the declination of certain requests to charge, and the direction of a verdict in favor of a permanent injunction, and the final decree thereon. The case thus comes before the court the second time for review. The first appeal was from the interlocutory order of the trial judge granting a temporary injunction against the plaintiffs in error. A decision therein was rendered September 27, 1921. 152 Ga. 143, 108 S. E. 615. Upon the hearing of this first appeal the court held that the decision of the court in the mandamus case, Georgia Ry., etc., Co. v. Railroad Commission of Georgia, 149 Ga. 1, 98 S. E. 696, 5 A. L. R. 1, was controlling upon the questions then under consideration, and

a request for a review of the mandamus case was refused by this court; and immediately following the refusal to review the mandamus case the court held:

"And the court is further of the opinion that, independently of this ruling as to the case we are asked to review, the Georgia Railway & Power Company was without authority to fix the rate which the plaintiffs in the court below sought to enjoin; and consequently the court did not err in granting the interlocutory injunction."

The effect of this ruling was that not only the law in the mandamus case was controlling, but that independently, under the questions of law presented in the appeal then under review, the ruling of the trial judge was without error.

While the plaintiff in error now insists that some ten distinct points of attack upon the validity of the contract are made in the present appeal that were not made in the mandamus case (149 Ga. 1, 98 S. E. 696, 5 A. L. R. 1), it is not and cannot be insisted that the identical questions of law were not involved upon the first hearing of the interlocutory injunction (152 Ga. 143, 108 S. E. 615) as are now involved upon this second appeal.

But it is insisted by plaintiff in error that one question of constitutional objection to the contract, to wit, that it was violative of section 6389 of the Civil Code (Const. art. 1, § 3, par. 2), "was not raised or pleaded when the case at bar was before this court, * * * and, though discussed in argument, was not considered in the opinion, presumably because it was not then properly before the court." The question raised upon this constitutional objection, if not clearly stated in the pleadings, was certainly argued fully and exhaustively before the court. Supplemental briefs and reply briefs were filed upon the effect of the constitutional question involved in section 6389 of the Civil Code, and the ruling in the case of *City of San Antonio v. San Antonio Public Service Corporation*, 255 U. S. 547, 41 Sup. Ct. 428, 65 L. Ed. 777, now cited in support of this very constitutional objection, was then cited and was considered by this court in its ruling.

Upon a careful inspection of the entire record, we are unable to find a question of law or fact that was not involved in the former hearing upon the interlocutory order granting the injunction, or in the mandamus case. The same questions of law are reiterated by amendment, reclothed, and elaborated; but it is not difficult, upon a careful inspection, to find that we have met them before.

[1] 1. This entire litigation, so often before the courts, has revolved continuously around the single question as to whether the contract between the Georgia Railway & Power Company and the town of Decatur

was a valid, subsisting contract. This question has twice been definitely ruled in favor of the validity of the contract; and the last ruling (152 Ga. 143, 108 S. E. 615) is clearly *res judicata*, in our opinion, of the present case.

In the case of *Ingram v. Mercer University*, 102 Ga. 226, 228, 229, 29 S. E. 273, Chief Justice Simmons delivering the opinion, this court reaffirmed the decision in the case of *City of Atlanta v. Methodist Church*, 83 Ga. 448, 10 S. E. 231, holding that—

"A judgment of a trial court granting or refusing an injunction, when the same depends entirely upon a question of law, is, upon its affirmance by the Supreme Court, a final adjudication of such question."

The court in the case of *Ingram v. Mercer University*, *supra*, said:

"Under the equity practice which has prevailed in this state since the passage of the act of October, 1870 (Civil Code, §§ 5540, 5558), we think that decision is sound and proper. Under that act many cases are brought to each term of this court which involves no questions but those purely of law. The trial judge passes upon the same, and either grants or refuses an injunction. For a speedy determination of the matter, the law provides a 'fast' writ of error to this court, and further provides that this court shall advance the same upon its dockets, when requested so to do by either party. This has been the practice since 1870; and, as far as we know or can ascertain from consulting our reports, the decisions of this court made upon pure questions of law, upon interlocutory injunctions, have been always regarded as final and controlling upon the trial judge on the final trial before a jury. If it were not so, a great burden has been unnecessarily placed upon this court. A great many of the cases upon these fast writs of error are brought here upon questions purely legal, and this court spends hours, days, and even weeks in investigating these questions; and to say that after all of this labor a decision made in such a case is merely advisory and does not bind the trial judge or this court in the subsequent litigation between the same parties seems to us to be absurd. During this term of court a case was brought here from the city of Augusta, involving the acts and contracts of the city and of a street railway company in that city, under the charter of the city and of the railway company, and certain contracts entered into by the city, the street railway company and certain steam railroad companies whose lines ran into the city, involving only the construction of these charters and of these contracts, matters not of fact, but of pure law. The decision of these questions occupied this court for days, in order to arrive at the proper construction of the law upon the charters and contracts. According to the contention of counsel for plaintiffs in error, when this case is called for final decree in the superior court, the judge thereof can treat this decision as a nullity, and if the case be brought again to this court, the same grounds may be insisted upon, and we will not be bound by the law as declared in that case."

The City of Augusta Case, above referred to in the quoted opinion, as an illustration of the reason for the ruling stated, is, upon inspection, a case remarkably similar to the one decided by this court (152 Ga. 143, 108 S. E. 615), and now for review upon a second appeal. Note, in connection with the decision in the 102 Ga. 226, the citations of similar authority as to the rulings upon interlocutory injunctions becoming adjudicata upon the second appeal. *Guess v. Stone Mountain Granite, etc., Co.*, 67 Ga. 215; *Iverson v. Saulsbury*, 68 Ga. 790; *Id.*, 73 Ga. 733; *Bailey v. Ross*, 68 Ga. 735, *Id.*, 71 Ga. 771; *Conyers v. Gray*, 67 Ga. 329; *Id.*, 70 Ga. 349; *Smith v. Hornesby*, 58 Ga. 529; *Smith v. Hornsby*, 70 Ga. 552; *Mayor, etc., v. Simmons*, 96 Ga. 477, 23 S. E. 508; *Id.*, 99 Ga. 400, 27 S. E. 710; *National Bank of Athens v. Carlton*, 96 Ga. 469, 23 S. E. 388. See, also, *Savannah, etc., Railway v. Mayor, etc., of Savannah*, 115 Ga. 137, 41 S. E. 592; *Collins v. Carr*, 116 Ga. 39, 42 S. E. 373; *Peak v. Simmons*, 119 Ga. 63, 45 S. E. 698.

[2] 2. The rulings of the court upon an interlocutory grant of injunction become the "law of the case" upon the final hearing. In the opinion in *Ingram v. Mercer University*, supra, this court said:

"In the case of *Iverson v. Saulsbury, Respass & Co.*, 68 Ga. 790, it appeared that Iverson, as trustee for his wife and her children, obtained an order from the judge at chambers allowing him to mortgage the trust property for the purpose of supporting and maintaining the cestuis que trust. When it was sought to foreclose this mortgage, the cestuis que trust filed a bill asking an injunction against the foreclosure, upon grounds therein set out. Upon a demurrer the bill was sustained, the case was brought to this court, and a majority of this court held, Jackson, C. J., dissenting, that 'while a chancellor sitting at chambers, on full notice to all parties, may order a sale of trust property, he has no power to grant authority to a trustee to mortgage a trust estate, and a mortgage so given will not bind the cestuis que trust.' When the case came on for final trial in the superior court, the trial judge followed the ruling of this court. The case was again brought here on that and other matters; and this court held that it was bound by the former decision; that, 'although the present bench disapprove of the majority decision stated, it is binding in this case.' In the opinion it was said: 'Whether this decision be right or wrong, it is the law of the case; it is *res adjudicata*.' The ruling in the previous case was declared to be the law of the case, although in *Weems v. Coker*, 70 Ga. 746, the court had disapproved and expressly overruled the principle laid down in 68 Ga. 790. While it was not the law of the state at the time the second case (*Saulsbury*,

Respass & Co. v. Iverson, 73 Ga. 733) was decided, yet it shows that this court felt bound to enforce the law as decided when the case was first here on the injunction. They ruled that while not the law generally, it was the law of that particular case."

See, also, *Southern Bell Tel., etc., Co. v. Glawson*, 140 Ga. 507, 79 S. E. 136.

[3] 3. As before stated, the sole question at issue upon the former hearing of this case was whether or not the contract between the Georgia Railway & Power Company and the town of Decatur was a valid, subsisting contract. Its validity was attacked in a number of ways, and many constitutional objections were raised thereto; but when this court reaffirmed the ruling in the mandamus case and held that, independently of the mandamus order, the trial court did not err in granting the interlocutory order, it was an adjudication of every attack upon the validity of the contract in question, even though the numerous objections may not have been specifically ruled upon in the opinion of the court. See, in this connection, *McWilliams v. Walthal*, 77 Ga. 7; *Savannah, etc., Railway v. Savannah*, 115 Ga. 137, 41 S. E. 592; 1 A. L. R. 725; *Hughes v. Morrison*, 141 Ga. 476, 81 S. E. 202; *State of New Mexico v. County Commissioners*, 22 N. M. 562, 166 Pac. 906, 1 A. L. R. 720.

In the light of the rulings above stated, we are convinced that this case has had its day in court. The validity of this contract was attacked in the mandamus case heretofore referred to, and in the now case at bar. It has had its day in court, and the ruling in 152 Ga. 143, 108 S. E. 615, is not only *res adjudicata* of every issue involved in the present hearing, but is the "law of the case" in the case now under review.

What is said in the foregoing opinion as to the case of *Georgia Railway & Power Co. v. Town of Decatur* is applicable to and controlling in the other case, *Georgia Railway and Power Co. v. Mayor and Council of College Park*.

Judgment affirmed. All the Justices concur.

Judges MELDRIM, of the Eastern Circuit, WRIGHT, of the Rome Circuit, SHEPPARD, of the Atlantic Circuit, and BELL, of the Albany Circuit, were designated by the Governor and presided in these cases in the places of Chief Justice FISH and Associate Justices ATKINSON, HILL, and HINES, who were disqualified. The Justices and Judges presiding all concur in the judgment rendered.

(153 Ga. 216)

LAMAR v. STATE. (No. 2892.)

(Supreme Court of Georgia. April 12, 1922.)

(Syllabus by Editorial Staff.)

1. Criminal law \S 1064(4)—Ground of motion not stating objection to evidence insufficient.

A ground of a motion for a new trial complaining of the admission of evidence, but not showing what objection was made when the testimony was offered, is insufficient.

2. Criminal law \S 762(5)—Instruction that manslaughter not involved and stating form of verdict held not to express opinion.

An instruction that voluntary manslaughter was not involved and that the verdict would either be guilty, guilty with a recommendation to mercy, or not guilty, was not erroneous as an expression and intimation that defendant had committed something more than manslaughter.

3. Homicide \S 307(4)—Instruction that manslaughter was not involved held proper under the facts.

Where the testimony for the state, if true, made a clear case of murder, while defendant's statement tended to show self-defense, an instruction that voluntary manslaughter was not involved was proper.

4. Criminal law \S 758—Instruction concerning defendant's statement held not erroneous.

An instruction that defendant had made a statement in his own behalf, that he was not under oath and not subject to cross-examination, and the jury should give it such consideration as they thought it ought to have, and that they had a right to believe it in preference to the sworn testimony, provided they believed it to be true, was in substantial accord with Pen. Code 1910, \S 1036, and not erroneous as depriving the jury of the right to believe the statement in part.

5. Criminal law \S 958(3)—Ground of motion for newly discovered evidence insufficient when not accompanied by affidavits showing diligence.

Under Civ. Code 1910, $\S\S$ 6085 and 6086, a ground of a motion for new trial for newly discovered evidence was insufficient, where there was no affidavit that movant and his counsel did not know of the evidence before trial and that it could not have been discovered by ordinary diligence.

6. Criminal law \S 921—That defendant wanted to make further statement not ground for new trial when no request made.

That, when defendant made his statement to the jury, he did not understand he was to make a complete statement and wanted to make a further statement, was not ground for a new trial, where permission to make an additional statement was not requested.

7. Criminal law \S 916—That attorneys did not have sufficient time to prepare net ground for new trial when additional time not requested.

That defendant was a poor, ignorant negro, and his attorneys did not have proper time

to study and prepare the case, and his people were poor and ignorant and could not assist them in the short time they had, was not ground for a new trial, where additional time to prepare for trial was not requested.

Error from Superior Court, Fulton County; M. C. Tarver, Judge.

Voge Lamar was convicted of murder, and he brings error. Affirmed.

Chappell & Ray, of Atlanta, for plaintiff in error.

Jno. A. Boykin, Sol. Gen., and E. A. Stephens, both of Atlanta, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

FISH, C. J. Voge Lamar was indicted for the murder of Zora Palmer, by maliciously shooting and killing her with a pistol. There was a verdict of guilty, and he excepted to the refusal of a new trial.

[1] 1. One ground of the motion for new trial complained that the court erred in permitting a witness for the state to testify to the effect that the accused had been visiting the deceased for six or seven months, that they were no kin, that the accused was a married man, and the witness guessed he was living with his wife at the time of the homicide. While it is stated that the movant objected to the testimony, the objection was not specifically stated. The motion recited that—

"Movant alleges that the court erred in allowing this evidence admitted, on the ground that it could have been introduced for the sole purpose of prejudicing the jury against the defendant; and, although the court did give some instructions in regard to it in the charge, still it had the effect of causing the minds of the jury to be prejudiced towards movant."

Evidently this ground was without merit, because, if for no other reason, it did not appear what objection was made to the testimony when it was offered.

[2, 3] 2. Another ground was that the court erred in instructing the jury as follows:

"I charge you that the law of voluntary manslaughter is not involved in this case. Your verdict will be one of three: Either, 'We, the jury, find the defendant guilty,' or, 'We, the jury, find the defendant guilty, and recommend him to the mercy of the court,' or, 'We, the jury, find the defendant not guilty.'"

This instruction was not error for the reason, as alleged, "that it was an expression and intimation on the part of the court that defendant had committed a great crime, something more than manslaughter. It is the duty of the court to charge what the law is in a positive way, and not in a negative way stating what crimes have not been committed," nor because, as contended by movant, under the evidence as a whole the law

of voluntary manslaughter was applicable; nor because, as claimed by movant, that the jury, under the evidence, might have found a verdict of voluntary manslaughter. The testimony of a number of witnesses for the state, who swore they were present and saw the accused shoot and kill Zora Palmer, if true (and its credibility was for the jury), made a clear case of murder against the accused. There was nothing in the evidence tending to show voluntary manslaughter. The statement of the accused to the jury tended to show that he acted in self-defense in shooting the deceased.

[4] 3. Another instruction complained of in the motion was as follows:

"The defendant made a statement in his own behalf. In so doing he was not under oath, and was not subject to cross-examination, and you should give to his statement such consideration as you think it ought to have. You have the right to believe it in preference to the sworn testimony in the case, provided you believe it to be true."

This instruction was in substantial accord with the Penal Code 1910, § 1036, and it was not error for the reason alleged that it deprived the jury of the right to believe a part of the statement if they did not believe it as a whole.

[5] 4. The ground of the motion predicated on alleged newly discovered evidence of a named witness was wholly without merit. Aside from the insufficient character of the evidence, no affidavit was made to show that the movant and his counsel did not know of the existence of such evidence before the trial, and that the same could not have been discovered by the exercise of ordinary diligence. Civil Code 1910, §§ 6085, 6086.

[6] 5. The ground of the motion was without merit which complained that the accused, when he made his statement to the jury, did not then understand that he was to make a complete statement of his case, but thought "that he would have more time later"; and that—

"He wished to tell the jury that there had been trouble before he followed the deceased into the room where the fatal shot was fired, that the witness Irwin there assaulted him, and so the deceased did, and that the deceased hit him before he hit her with the pistol."

The court would doubtless have permitted the accused to make an additional statement had it been requested in the circumstances stated, but no request was made.

[7] 6. Nor was it cause for the grant of a new trial that—

"Attorneys for movant state that movant is a poor, ignorant negro, that they were appointed by the court to defend him, and did not have proper time to study and prepare the case before trial, and that his people are poor and ignorant and could not assist the attorneys as they should have in the short time they had to work on."

It does not appear that any request was made by the attorneys for the accused for additional time to prepare the case for trial.

The court did not err in refusing a new trial.

Judgment affirmed.

All the Justices concur.

(153 Ga. 305)

JENKINS v. STATE. (No. 2992.)

(Supreme Court of Georgia. April 14, 1922.)

(Syllabus by the Court.)

Criminal law \S 824(3), 935(1)—Homicide \S 369(3)—Failure to charge on voluntary manslaughter not error, where issue not raised and instruction not requested; new trial properly denied, when evidence supported verdict.

John Jenkins was convicted of murder for the unlawful and malicious killing of Pearl Butler by shooting him with a shotgun. The defendant's motion for a new trial, which was overruled, was based upon the usual general grounds, that the verdict was contrary to law and the evidence, and without evidence to support it, and on one ground of amendment, complaining that the court erred in failing to instruct the jury as to the law of voluntary manslaughter. The state introduced a number of witnesses whose testimony, if credible, clearly showed that the accused assassinated the deceased. The accused submitted no testimony, but made a statement to the jury. There was nothing in the testimony that authorized an instruction on the law of voluntary manslaughter; and even if there was anything in the statement which would have authorized a charge on that subject, no request was made therefor. The verdict was strongly supported by the evidence, and the refusal of a new trial was not error.

Error from Superior Court, Pike County: W. E. H. Searcy, Jr., Judge.

John Jenkins was convicted of murder, and he brings error. Affirmed.

F. L. Adams and H. A. Rider, both of Zebulon, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(153 Ga. 301)

CROOK v. CITIZENS' BANK OF BLAKELY.
(No. 2971.)

(Supreme Court of Georgia. April 14, 1922.)

(Syllabus by the Court.)

1. Injunction \S 136(2)—Receivers \S 13—
One seeking to assert equitable title or lien
entitled to receiver and temporary injunction.

Where the defendant fraudulently obtained money from the plaintiff and invested it in personal property, the plaintiff, who seeks to assert an equitable title or lien upon the property so purchased with his funds, is entitled to the appointment of a receiver to take charge of such property, and a temporary injunction, where the defendant is insolvent, and there is danger of the loss of such equitable title or lien, by the sale of such property by the insolvent defendant. *Ross v. Fletcher*, 148 Ga. 147, 96 S. E. 1; 23 Ruling Case Law, 20, § 13.

2. Pleadings and evidence held to authorize relief.

Under the pleadings and evidence in this case, the judge did not err in granting an interlocutory injunction and appointing a temporary receiver.

Error from Superior Court, Calhoun County; R. C. Bell, Judge.

Action by Citizens' Bank of Blakely against O. A. Crook. Judgment granting an interlocutory injunction, and appointing a temporary receiver, and defendant brings error. Affirmed.

W. I. Geer, of Colquitt, for plaintiff in error.

Glessner & Collins, of Blakely, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(153 Ga. 215)

GREEN v. STATE. (No. 2846.)

(Supreme Court of Georgia. April 12, 1922.)

(Syllabus by the Court.)

1. Criminal law \S 448(8)—Testimony that spots were blood, not a conclusion.

Testimony that certain spots on the shoes of the accused were "blood," introduced as tending to connect the accused with the commission of the homicide alleged to have been accomplished by striking the deceased on the head with an ax, was admissible over the objection that it was a mere conclusion of the witness.

2. Criminal law \S 417(15)—Declaration of person since deceased that he committed murder charged, not admissible.

The declaration of a person since deceased that he committed the killing for which the accused was on trial was not admissible on behalf

of the latter. *Beach v. State*, 138 Ga. 265, 75 S. E. 139 (2), and citations.

3. Charge authorized by evidence.

The evidence authorized the charge of the law of circumstantial evidence.

4. Homicide \S 340(2)—Inapplicable instruction as to self-defense and reasonable fears not harmful.

The evidence on behalf of the state tended to show that the accused murdered the deceased while in his room at night, by striking him on the head with an ax. The only defense set up by the accused was alibi. In such circumstances the instruction to the jury as to the law of self-defense and reasonable fears, if not applicable to any theory of the case, was not harmful to the accused, and was not therefore cause for a new trial.

5. Criminal law \S 935(1)—New trial properly denied when evidence sufficient.

The evidence was sufficient to authorize the verdict, and there was no error in overruling the motion for new trial.

Error from Superior Court, Fulton County; Jno. D. Humphries, Judge.

Dennis Green was convicted of murder, and he brings error. Affirmed.

Lowndes Calhoun and M. Smith, both of Atlanta, for plaintiff in error.

Jno. A. Boykin, Sol. Gen., of Atlanta, Geo. M. Napier, Atty. Gen., Seward M. Smith, Asst. Atty. Gen., and E. A. Stephens, of Atlanta, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(153 Ga. 261)

DORSEY v. STATE. (No. 2772.)

(Supreme Court of Georgia. April 14, 1922.)

(Syllabus by the Court.)

1. Criminal law \S 828—Failure to charge on confessions not ground for new trial, in absence of proper request.

Where there was evidence tending to show confessions of guilt by the accused, it was not cause for a new trial that the judge failed, in the absence of a timely and proper written request, to instruct the jury as to the law on the subject of confessions. *Thomas v. State*, 150 Ga. 269, 271, 103 S. E. 244; *Jones v. State*, 150 Ga. 628, 104 S. E. 425.

2. Criminal law \S 1064(4)—Ground of motion, not showing objection to evidence or motion to withdraw it, insufficient.

A ground of a motion for new trial by one convicted of the offense of rape was to this effect: "The following evidence was allowed to go to the jury over objection of counsel for the defendant. 'Her dress was torn, and in a bad fix, too. It was right bloody. Showed it to me right there. She didn't show it to him. It was fresh, watery blood.' The clothes, be-

ing in existence and at the home of the girl said to have been raped, was the highest evidence. For this reason the court should have withdrawn this evidence from the jury, and error is hereby assigned on the ruling of the court in this respect." Among the reasons why this ground fails to present any question for decision is it does not appear therefrom what, if any, objection was made to the evidence when it was admitted; nor is it stated that any motion was made by movant to have the evidence withdrawn from the consideration of the jury.

3. Criminal law §935(1)—New trial properly denied, when verdict authorized.

The verdict was authorized by the evidence, and the refusal of a new trial was not error.

Error from Superior Court, White County; J. B. Jones, Judge.

Frank Dorsey was convicted of an offense, and he brings error. Affirmed.

Underwood & Henderson, C. H. Edwards and T. F. Underwood, all of Cleveland, for plaintiff in error.

J. G. Collins, Sol. Gen., of Gainesville, Geo. M. Napier, Atty. Gen., and Seward M. Smith, Asst. Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(153 Ga. 245)

SCHLEY et al. v. WILLIAMSON et al.

CANFIELD et al. v. SCHLEY et al.

(Nos. 2721, 2747.)

(Supreme Court of Georgia. April 14, 1922.)

(Syllabus by the Court.)

1. Wills §634(9)—Remainder held vested as to one-half of estate subject to be enlarged to vested remainder in entire estate.

A testator executed a will in 1874, and died in the same year, having bequeathed and devised, by item 1 thereof, all of his estate, real, personal and mixed, in trust for his wife and daughter, "during the life of my said wife, the income to be equally divided between them, share and share alike; and in case my said wife shall depart this life leaving my said daughter her surviving and unmarried, then the whole of the income of my said estate to go to my said daughter while she continues unmarried; and at and after her death, still being unmarried, then the whole of my said property to be equally divided between my sons, share and share alike, the child or children of a deceased son to take the share to which the parent would have been entitled, if in life, to them and their heirs forever." By item 3 of his will the testator provided that, "if my daughter shall marry after the death of my said wife, then I direct that my estate be equally divided, and that one half shall be turned over to my said daughter in her own right and to her sole and separate use absolutely in fee simple, and that the other half be equally divided between my sons, share and share alike, the

child or children of a deceased son to take the share to which the parent would have been entitled if in life, to them and their heirs forever." The wife and then the daughter died subsequently to the death of the testator, both unmarried. The five sons of the testator were living at the death of testator. *Held*, that testator's wife and daughter took a life estate as provided in the will, and the sons (five) took a vested remainder in one-half of the estate, subject to take the whole estate upon the daughter dying unmarried.

2. Construction of will held erroneous.

The court erred in construing the will as conveying contingent remainders to the five sons at testator's death, instead of vested remainders as held in the first headnote; and also in other rulings based upon the theory that the will conveyed contingent remainders.

3. Remainders §14—Transfer and conveyance of all property of whatsoever kind or nature held to transfer vested remainder interest.

The instrument executed on May 15, 1908, by Dr. James M. Schley, one of the five sons of testator, to his wife, Margaret T. Schley, conveyed his vested interest in his father's estate.

4. Wills §849—Interest of remaindermen dying in life tenant's lifetime held to pass to heirs subject to liens created by remaindermen.

The wives and children of the sons of testator, who died before the death of the life tenant, took by inheritance, as heirs at law of such deceased sons, subject to the liens created by the latter in their lifetime.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by W. W. Williamson and others, executors of James M. Schley, deceased, against Robert Montford Schley and others. Judgment construing the will, etc., and James M. Schley, Jr., and others bring error, and G. C. Canfield and others bring a cross-bill of exceptions. Reversed.

W. W. Williamson and Raiford Falligant, executors, and Leona Guerard Gadsden (formerly Schley), executrix of the last will and testament of James M. Schley, brought a petition for direction, etc., against Robert Montford Schley of Buffalo N. Y., Catherine Schley Hardwicke of Lewiston N. Y., William Sullivan Schley, of Shirley, Mass. (children of William Sullivan Schley, now deceased), Lucy J. Schley, widow of George Schley, of Titusville, Pa., Dr. James M. Schley, of New York City, Katherine Beckwith Variel, of Waterbury, Conn., Margaret Elfrida Harper, of Bonnell, Syosset, L. I., James M. Schley, Jr., of New York City, Henry Spalding Schley, of New York City (the last four named persons being the children of Dr. James M. Schley, of New York City), Leona G. Gadsden, formerly Schley, of Savannah, Ga., Marianne Schley Rogers, of Shreveport, La.,

the widow and daughter, respectively, of John Sullivan Schley, deceased, and George F. Canfield and the Farmers' Loan & Trust Company, both of New York City, the duly appointed and qualified executors and trustees of and under the will of Margaret T. Schley, now deceased, formerly wife of Dr. James M. Schley, of New York City, alleging that they are all of the remaindermen, heirs at law, and claimants under the will of James M. Schley, deceased, and are all sui juris. The prayer of the petition was that the court determine the persons entitled to share in the distribution of said estate, and the proportion to be received by each, etc. Also, that commissioners be appointed to appraise and divide the property of the estate in kind among those entitled thereto, or that plaintiffs be authorized and directed to sell the real and personal properties belonging to the estate and distribute the cash derived therefrom among those entitled thereto under direction of the court. A copy of the will of James M. Schley was attached to the petition, the material portions of which are as follows:

"Item 1. After the payment of my just debts and funeral expenses, I give, devise, and bequeath to my executrix hereinafter named, and to her successors, all of my estate and property, real, personal, and mixed, of whatsoever kind and wheresoever situated, in and upon the following conditions, limitations and trusts, namely, in trust for the sole and separate use, benefit, and behoof of my wife, Marianne A. Schley, and my daughter, Sarah Swan Schley, during the life of my said wife, the income to be equally divided between them, share and share alike; and in case my said wife shall depart this life leaving my said daughter her surviving and unmarried, then the whole of the income of my said estate to go to my said daughter while she continues unmarried, and at and after her death, still being unmarried, then the whole of my said property to be equally divided between my sons, share and share alike, the child or children of a deceased son to take the share to which the parent would have been entitled if in life, to them and their heirs forever.

"Item 2. In case my said daughter shall depart this life being unmarried and leaving my said wife her surviving, then I direct that the whole income of my said estate shall go to the sole use of my said wife during her life, and at and after her death that the whole property shall be equally divided between my sons, share and share alike, the child or children of a deceased to take the share to which the parent would have been entitled if in life, to them and their heirs forever.

"Item 3. If my daughter shall marry after the death of my said wife, then I direct that my estate shall be equally divided, and that one half be turned over to my said daughter in her own right and to her sole and separate use absolutely in fee simple, and that the other half be equally divided between my sons, share and share alike [the child or children of a deceased son to take the share to which] the

parent would have been entitled if in life, to them and their heirs forever.

"Item 4. In case my said daughter shall marry before the death of my said wife, then I direct that an equal half of the income of my said estate shall be paid over to my said daughter during the life of my said wife and after the death of my said wife then my property to be divided as in the third item of this my will; provided, the half hereby devised to my daughter to go to any child or children she may leave, in case after marrying she may depart this life before her mother, share and share alike.

"Item 5. I expressly declare and direct that the foregoing provisions in favor of my wife are in lieu of her right of dower; and I hereby nominate and appoint my said wife, Marianne A. Schley, to be the sole executrix of this my last will and testament, with liberty to appoint her successor by will."

There were other exhibits attached to the petition, those material being as follows:

(1) "In consideration of the sum of one dollar (\$1.00) to me in hand paid and other valuable consideration, I hereby sell, assign, transfer, and convey unto Margaret T. Schley all my property of whatsoever kind and nature, including all my stocks and bonds; and I do hereby irrevocably constitute and appoint the said Margaret T. Schley my attorney, and I vest in her full power to do whatsoever is necessary to vest complete title in her or in any one she may designate, of all my property."

This instrument was dated May 15, 1903, was signed by J. Montford Schley before two witnesses, and acknowledged before a notary public.

(2) A security deed executed by George Schley to J. M. Schley, dated December 1, 1896, to secure a debt of \$11,215.03; the property being "all his right, title and interest, claim and demand whatsoever, in and to the estate of James Montford Schley, late of Savannah, Ga., deceased."

(3) A security deed from Freeman W. Schley to James M. Schley, dated September 29, 1885, to secure a loan of \$500, the property conveyed being "all his right, title, interest, claim or demand whatsoever that he now hath or may hereafter have in the estate of his father, Dr. James M. Schley, Sr., late of the county of Chatham, and state of Georgia, deceased."

The defendants, James M. Schley, Jr., and others, answered the petition, admitting most of the allegations contained therein, and averring that for want of sufficient information they could neither admit nor deny some of the others. They prayed that the court decree that upon the death of the testator each of his sons then living took a vested equitable estate in remainder, only subject to be divested in part if Sarah Swan Schley, the daughter of testator, should marry; and that, Sarah Swan Schley having died unmarried, the estates of George Schley and Freeman W. Schley were conveyed to and are now indefeasibly vested in Dr. J.

M. Schley, by reason of certain conveyances set out above; and that the estates of William S. Schley and John S. Schley passed by their respective wills. Also, that the instrument dated May 15, 1903, if in fact executed by Dr. James M. Schley, did not convey to Margaret T. Schley the remainder interest in realty or personalty of Dr. James M. Schley in the estate of the testator, but, if the court should find that the instrument conveyed a remainder interest in personalty, that the court will adjudge and decree that the remainder interest of Dr. James M. Schley in the realty belonging to the estate of the testator was not thereby conveyed, and that the remainder interest (including the remainder interest of George Schley and Freeman W. Schley conveyed to Dr. James M. Schley by deed to secure debt) is now defeasibly vested in respondents' father, Dr. James M. Schley; that plaintiffs be ordered and directed to sell all real and personal property in their hands at public or private sale in their discretion, and to distribute the proceeds as follows: Three-fifths to Dr. James M. Schley, one-fifth in accordance with the will of William S. Schley, and one-fifth in accordance with the will of John Sullivan Schley. An amendment to the answer was offered, averring in effect that the instrument dated May 15, 1903, does not have the effect in law as contended for by the plaintiffs, but is simply a power of attorney and was intended only as such, and was executed for the purpose of giving to the defendants' mother the right to use what income her husband had in the discharge of his debts and in the management of his affairs, which their father could not manage because of his physical condition.

The petition was also answered by Dr. James M. Schley, who admitted a number of the allegations, including that of the execution of the conveyance from himself to his wife in 1903; but he averred that, because of the result of an X-ray examination made upon his person, he was unable to practice his profession or to manage his own business affairs, and that under these circumstances he and his wife agreed that it was advisable to have the transfer of his property made to his wife in order that she might be in a position to pay his expenses from his own funds, and to change his investments, and to do whatever they might agree upon as necessary or advisable in connection with his personal property, etc. He avers that he has since been advised and believes that upon the death of testator each of testator's sons then living took a vested equitable estate in remainder, subject only to be divested in part by the marriage of Sarah Swan Schley; that on May 15, 1903, there was vested in respondent not only his vested estate under the testator's will, but also the vested estates of his brothers, George and Freeman W. Schley, who had conveyed to respondent

their interest under the will; and that the instrument executed by him to his wife on May 15, 1903, is not sufficient in law to convey to Margaret T. Schley his interest in either the real or personal estate of the testator. But, if the court should hold otherwise, the respondent avers that through a mutual mistake of both himself and his wife, Margaret, the instrument does not express the agreement reached by them and does not effectuate their intention, and should be reformed by inserting between the words "my" and "property" the word "personal." The prayer was that the court decree that upon the death of testator there vested in each of his sons then living an equitable estate in remainder, subject to be divested only in part by the marriage of Sarah Swan Schley, and that the one-fifth share which thus vested in respondent, together with the one-fifth shares which vested in his brothers, George and Freeman W., Schley, are now indefeasibly vested in him, the life estate having terminated and Sarah Swan Schley having died unmarried; that the remaining two-fifths are indefeasibly vested as follows: One-fifth in accordance with the will of William S. Schley, and one-fifth in accordance with the will of John Sullivan Schley; that the instrument of May 15, 1903, did not convey to Margaret T. Schley the vested equitable estate in remainder of respondent, or the vested equitable estates in remainder of George Schley and Freeman W. Schley, either real or personal, but, if the court should hold otherwise, that it decree that the instrument of May 15, 1903, be so reformed as to effectuate the intention of the parties, by inserting between the words "my" and "property" in both places in which they occur the word "personal." By a further amendment Dr. James M. Schley averred that he had no recollection of executing the instrument of May 15, 1903, etc.

Other respondents, Robert Montford Schley et al., the children of William S. Schley, deceased, filed answers in which they prayed that the court adjudge that the interests of George Schley and Freeman W. Schley were contingent equitable estates in remainder when they respectively executed the mortgages and deeds to secure debt, mentioned in the petition, and that the conveyances are void, and that the same be canceled of record, and that the estate of James M. Schley, the testator, is indefeasibly vested: One-third in respondents as the children of William S. Schley, who were living at the time of the death of Sarah Swan Schley; one-third in Marianne Schley, who was living at the time of the death of Sarah Swan Schley; one-third in J. M. Schley, etc.

George F. Canfield and the Farmers' Loan & Trust Company, executors and trustees of Margaret T. Schley, filed an answer and cross-bill, and prayed that the court find

that under the terms of the will of James M. Schley the remainder estate vested absolutely in his sons at the time of the death of the testator as to one-half portion of the remainder interest, and that as to the other one-half portion the court consider the same as a vested interest, subject only to be divested by the happening of a condition subsequent, which did not occur, etc. These defendants also amended their answer by inserting in paragraph c of the prayer between the words "personalty" and "said" the words "vested or contingent."

Marianne S. Rogers, the only child of John Sullivan Schley, deceased, answered the petition and prayed an order of the court adjudging that the interests of George Schley and Freeman W. Schley were contingent equitable estates in remainder when they executed the mortgages and deeds to secure the debt therein mentioned, and that the conveyances are void and of no effect, etc.

The case was submitted to the court upon the pleadings, and upon an agreed statement of facts which was as follows:

"It is agreed between George F. Canfield and the Farmers' Loan & Trust Company, executors and trustees under the will of Margaret T. Schley, on the one hand, and James M. Schley, Jr., Henry Spaulding Schley, and Katherine Schley Variel, on the other hand, as follows: On or about October 14, 1920, Mr. George F. Canfield and Mr. James M. Schley, Jr., visited Dr. James M. Schley at the Buckingham Hotel in New York City, for the purpose of ascertaining whether or not Dr. Schley executed the document signed J. Montford Schley, and dated May 15, 1903, attached as Exhibit C to the bill of direction in this case, and for the purpose of ascertaining what recollection, if any, Dr. Schley had on the execution of the document, the purpose for which it was executed, and the circumstances which surrounded its execution. At that time Dr. Schley recognized and acknowledged his signature to the document, a copy of which is attached to the bill and marked 'Exhibit C,' but stated that he had no recollection of the matter at all, outside of the document itself. Dr. Schley is now in feeble health and has been ill for many years. That: (1) When Dr. James M. Schley, respondent, executed the instrument, he was mentally competent to do so. That he has never been, and is not now, imbecile or lunatic, but his mental condition is such, as a result of invalidism for 25 years and his paralysis for a part of that time, that his memory is not good, and his testimony, if taken in this proceeding, would be of little assistance, if any. (2) In 1898, and while Dr. Schley was engaged in the practice of medicine of New York City, he became permanently disabled and paralyzed as a result of an X-ray examination, and has been in that condition ever since, added to which he has suffered a stroke of paralysis, and, since 1896, has been unable to practice his profession or to manage his own affairs. (3) Dr. Schley's wife, Margaret T. Schley, was a wealthy woman in her own right when Dr. Schley executed the instrument."

Also, a copy of the last will and testament of Sarah Swan Schley, conveying both real and personal property, which will had been probated in the state of New York.

After consideration, the court rendered the following decree:

"The above-entitled cause coming on to be heard before me on the — day of February, 1921, upon the bill of direction and the answers of defendants and proofs submitted; and it appearing that all parties defendant had been properly served and cited to appear according to law: Now, after hearing and considering all evidence produced and the arguments of counsel for the respective parties, and pursuant to the opinion of the court rendered herein on March 7, 1921, it is ordered, adjudged, and decreed as follows: (1) That the remainder estates created and set up under the terms of the will and [of] of the testator, the late John M. Schley, were contingent remainders, and did not vest in the five sons of the testator at his death. (2) That the entire estate, both real and personal, be sold either as a whole or in parcels, by the executors and executrix at public or private sales, at such time or times, and for such prices, as in their good judgment will be to the best interest of the estate, purchasers at such sale or sales not to be required to see to the application or disposition of the proceeds, nor shall such sale or sales be subject to the confirmation of the court; and that the balance of the proceeds of said sale or sales, after payment of debts, if any, of said estate, and the costs of administration and of this proceeding, and of any further costs and expenses incurred in the sale and distribution of said estate, be distributed and paid out as follows: (a) One-third to the children of the said William Sullivan Schley, now deceased, who are Robert M. Schley, Catherine Schley Hardwicke, and William Sullivan Schley. (b) One-third to the personal representatives and trustees of the estate of the late Margaret T. Schley. (c) One-third to Marianne Schley Rogers, only child of John Sullivan Schley, deceased. (3) That the said Lucy J. Schley, widow of the late George Schley, has no interest in said estate of James M. Schley, deceased. Said George Schley having died without issue, the share to which he would have been entitled, had he survived the life tenants, reverted to said estate. (4) That the interest of Dr. James M. Schley, son of the testator, was assigned and transferred to his wife, Margaret T. Schley, on May 15, 1903, by the instrument in writing executed by said Dr. James M. Schley on that date, a copy of which is attached to the petition in this case and marked 'Exhibit C.' (5) That the interest in said estate which would have gone to the said John Sullivan Schley, had he survived the life tenants, vested in his only child, Marianne Schley (now Rogers), to the exclusion of the widow, Leonora G. Schley (now Gadsden), notwithstanding the terms of the will of the said John Sullivan Schley, bequeathing his said widow a life estate in said interest. (6) That the said Freeman W. Schley having died before the life tenants, unmarried and without issue, the interest in said estate to which he would have been entitled, had he survived the life

tenants, reverted to the estate. (7) That the said William Sullivan Schley having died before the termination of the life estates, the share in said estate to which he would have been entitled, had he survived the life tenants, vested in his three children, share and share alike, to-wit, Robert M. Schley, Catherine Schley Hardwicke, and William Sullivan Schley, upon the death of the life tenant. (8) That the deeds to secure debt and mortgages mentioned and described in paragraphs 7 and 13 of said petition as having been made, executed, and delivered by said George Schley and Freeman W. Schley, respectively, to the said Dr. James M. Schley, of New York, or any other deeds to secure debts, mortgages, or liens which may have been given or created during their lifetimes by the said George and Freeman W. Schley, are void and of no effect, and the holders of said deeds to secure debts and mortgages are hereby required to surrender and cancel the same of record. (9) That the case be kept open upon the docket of the court, for the taking of such other orders and decrees as may be necessary in the final winding up of said estate."

To this judgment the plaintiffs in error excepted on the following grounds: (1) Because the remainder interest created by the testator's will was not contingent upon any son's surviving the life estate and upon his leaving a child or children who should survive the life estate, if he did not. (2) Because the remainder interest created by the testator's will was a vested equitable remainder, one-fifth of which vested at the time of the testator's death in each of his five sons. One half of each son's share vested indefeasibly; the other half was subject to be divested by the marriage of the life tenant, Sarah S. Schley, which never occurred, and said half was therefore never divested. (3) Because said vested equitable remainders could be conveyed or assigned by the remaindermen at any time, and said remainder interests of the remaindermen George Schley and Freeman W. Schley were so conveyed to Dr. James M. Schley, in whom there thus became vested a three-fourths interest in the testator's estate. (4) Because the deeds to secure debt and mortgages executed and delivered by George Schley and Freeman W. Schley to James M. Schley are valid and not void. (5) Because the instrument of May 15, 1903, signed by Dr. James M. Schley, and attached to the bill as "Exhibit C," did not pass to Margaret T. Schley the remainder interest of Dr. James M. Schley, for the following reasons: (a) It was not the intention of the parties to the said instrument to convey the said remainder interest. (b) Said instrument was not sufficient in law to convey a vested remainder interest in real estate. (c) If the remainder interest of Dr. James M. Schley on the date of said instrument was contingent and not vested, then said contingent interest could not be conveyed, and said instrument is insufficient in law to convey said contingent interest.

No. 2721:

Lawton & Cunningham, of Savannah, for plaintiffs in error.

Stephens, Barrow & Heyward, Leo A. Morrissey, and Connerat & Hunter, all of Savannah, for defendants in error.

No. 2747:

Satterlee, Canfield & Stone, of New York City, and Connerat & Hunter, of Savannah, for plaintiffs in error.

Stephens, Barrow & Heyward, Leo A. Morrissey, and Lawton & Cunningham, all of Savannah, for defendants in error.

HILL, J. (after stating the facts as above).

[1] The controlling question in this case is whether the remainders created by the testator as set out in the foregoing facts were contingent remainders as held by the trial judge, or whether they were vested remainders under the will. The distinction between a contingent and a vested remainder under given facts is often difficult to ascertain. Our Code defines a "contingent remainder" to be one limited to an uncertain person or upon an event which may or may not happen. Civil Code 1910, § 3676. A "vested remainder" is one limited to a certain person at a certain time, or upon the happening of a necessary event. Civil Code 1910, § 3676. Various tests have been suggested for determining whether in a given case a future estate is a vested or a contingent remainder. One of these tests is given by Fearn, in his work on Remainders, viz.:

"The present capacity of taking effect in possession, if the possession were to become vacant, * * * distinguishes a vested remainder from one that is contingent." Fearn on Con. Remainders, 216.

In Tiedeman on Real Property (3d Ed.) § 297, it is said:

"If the remainder is contingent, there is no definitely ascertained person who can take the legal seisin, which, together with the actual possession of the tenant for years, as his bailee, will constitute the complete and lawful seisin to the land"—citing Co. Lit. 143a; Fearn, Con. Rem. 285; 2 Wash. on Real Property, 538, 543; Williams on Real Property, 252; Doe v. Considine, 6 Wall. 474, 18 L. Ed. 869; Brodie v. Stephens, 2 Johns. (N. Y.) 289; Corbet v. Stone, T. Raym. 151; 2 Black Com. 171.

This same author declares that a vested remainder is capable of alienation by any mode of conveyance which does not require livery of seisin, and even with livery, where the particular estate is not a freehold, and the consent of the tenant to entry upon the land for that purpose is obtained. Section 299. It is also said:

"Wherever there is a doubt as to whether a remainder is vested or contingent, the courts always incline to construe it a vested estate, * * * and very often a remainder will be construed to be a vested estate upon condition

subsequent, liable to be divested by the happening of a contingency, rather than to declare it a contingent remainder." *Id.*, § 301; *Clanton v. Estes*, 77 Ga. 352, 1 S. E. 163.

In a note to *Coke upon Littleton*, by *Butler & Hargraves* (285a, note 2), the distinction between a contingent remainder and one that is vested is thus laid down:

"A remainder is contingent, either where the person to whom it is limited is not in esse; or where the particular estate may determine before the remainder can take place; but that, in every case, where the person to whom the remainder is limited is in esse, and is actually capable or entitled to take on the expiration, or sooner determination, of the particular estate, supposing that expiration, or determination, to take place at that moment, there the remainder is 'vested.'"

In the case of *Almand v. Almand*, 141 Ga. 372, 81 S. E. 228, the third item of testator's will, then under review, was as follows:

"I * * * also will and bequeath that in the event of the death of my son George M. Almand, his portion of the property to go to the balance of my children."

In construing that item of testator's will, it was said:

"We think that the testator had in view the death of his son George, before the death of the life tenant—in that event his share was to go 'to the balance of' his children, as provided in item 3 of his will. In this view, the testator's son George took under the third item of the will a vested remainder in the undivided estate, subject to be divested on his dying before the death of the life tenant.'"

And see *Wiley v. Wooten*, 140 Ga. 16, 78 S. E. 335. In the case of *Sumpter v. Carter*, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274, the facts are somewhat similar to those under consideration. In that case the testator, who died in 1864, left a will in which was the following item:

"I give, bequeath, and devise to my beloved wife, * * * all of my property and effects, * * * during her natural life or widowhood, * * * and in case of my said beloved wife not intermarrying, then and in that event my will is that at her death that my whole estate be then equally divided between my six children" (naming them).

There was a divesting clause in the will by which it was declared that—

"In case either of my said six children should depart this life without leaving issue, then their part of my estate to be equally divided between my other children, to be controlled in the same way as first above directed."

None of the testator's children had married at the time of his death, and his widow did not marry again. It was held:

"That, upon the death of the testator, each of his children took a vested remainder interest, subject to be divested in favor of the tes-

tator's other children, as substituted devisees and remaindermen, upon such child dying during the existence of the life tenancy, without leaving a child who survived the life tenant. That, the son having died before the life tenant, leaving children who survived the latter, his remainder share became indefeasible upon the death of such life tenant. And that therefore, under a deed executed during the life tenancy, by which the son conveyed to another all his interest in described realty which belonged to the testator at the time of his death, the grantee, upon the death of the life tenant, became indefeasibly entitled to the son's remainder share therein."

Divesting clauses, especially of a remainder, operate so as to vest the estate indefeasibly at the earliest possible period. *Sumpter v. Carter*, supra; *Civil Code* 1910, § 3680. Compare *Clanton v. Estes*, 77 Ga. 352, 1 S. E. 163; *Morse v. Proper*, 82 Ga. 13, 8 S. E. 625; *Fields v. Lewis*, 118 Ga. 573, 576, 45 S. E. 437; *Collins v. Smith*, 105 Ga. 525, 528, 31 S. E. 449; *Powell v. McKinney*, 151 Ga. 803, 108 S. E. 231. The case of *Harris v. McDonald*, 152 Ga. 18, 108 S. E. 448, is not in point. In that case the language of the third item of the will of Mrs. Sarah M. Harper is:

"After paying my debts and deducting the property mentioned in the second item of this my last will and testament, I give and bequeath to O. H. Jones in trust for my daughter, Lola N. Harper, two-thirds of my estate for her use during her natural life and at her death to her children should she leave any, and if she should leave no children or descendants of a child or children, then to my brother McCormick Neal, should he be in life, or if he is dead then to his children him surviving share and share alike."

There the language employed contemplates a contingency based upon an event which may not happen, i. e., the life tenant leaving children or descendants of a child or children. In that case there was an uncertainty as to the persons to take in remainder; and it was properly held that the will there under consideration created under our law a contingent remainder. See *Civil Code* 1910, § 3676. In delivering the opinion of the court in that case Mr. Justice George said:

"If the devise had been simply 'and at her death to her children,' the remainder would have been vested in the children as they were born. But the superadded words, 'should she leave any,' made the remainder contingent."

In view of the foregoing authorities, how stands this case? The first item of testator's will devises all of his estate, real and personal and mixed, in trust for the sole benefit of testator's wife, Marianne A. Schley, and his daughter, Sarah Swan Schley, during the life of the wife, the income to be equally divided between them, provided that, in case the wife departed this life leaving the daughter surviving and unmarried, then the

whole of the income of testator's estate was to go to the daughter while she continued unmarried, and at and after her death, she still being unmarried, "then the whole of my said property to be equally divided between my sons, share and share alike, the child or children of a deceased son to take the share to which the parent would have been entitled if in life, to them and their heirs forever." The second item of the will provided that, in case the daughter should die being unmarried and leaving the wife of testator surviving, then it was directed that the whole of the income of the estate should go to the sole use of the wife during her life, and after her death that the whole property "shall be equally divided between my sons, share and share alike, the child or children of a deceased to take the share to which the parent would have been entitled if in life, to them and their heirs forever." By the fourth item of the will it is provided, in case the daughter should marry before the death of testator's wife, that "an equal half of the income of my said estate shall be paid over to my said daughter during the life of my said wife, and after the death of my said wife then my property to be divided as in the third item of this will, provided the half hereby devised to my daughter to go to any child or children she may leave in case after marrying she may depart this life before her mother; share and share alike." The fifth item directed that the foregoing provisions in favor of the wife are in lieu of her right to dower, etc. It appears that the five sons were all in life at the death of the testator. It also appears that the daughter died without having married. In these circumstances we are of the opinion that the remainders provided for in testator's will, after the creation of the life estates, are not limited to uncertain persons, but to certain persons, who are the five sons of the testator who

were in life at his death. These remainders in "the whole of my said property to be equally divided between my sons, share and share alike," are limited upon the event of testator's daughter dying single. She did die single, and we are of the opinion that under the above provisions of the will the five sons, who were in life at the death of the testator, took a vested remainder interest in one-half of testator's estate at his death, subject to be enlarged upon the daughter's dying without having married; and, as it appears that she did die without having married, it follows that the five sons of the testator took a vested remainder interest in the testator's estate.

[2] From what has been said above it follows that the court below erred in holding that the remainders created by testator's will were contingent remainders and not vested remainders, and also in the other rulings based on the theory that the will created contingent remainders.

[3] We are also of the opinion that the interest of Dr. James M. Schley, one of the five sons of the testator, was assigned and transferred to his wife, Margaret T. Schley, on May 15, 1903; and that the instrument conveying his vested interest in his father's estate was a valid transfer of the same, as against any objection made thereto.

[4] We are further of the opinion that the heirs at law of such sons of testator as may have died before the life tenant died would inherit the share or shares of such sons as their heirs at law, respectively.

We are likewise of the opinion that the deeds and mortgages executed and delivered by George Schley and Freeman W. Schley, respectively, to Dr. James M. Schley, or any other deeds, mortgages, or liens which may have been given or created during their lifetime by George Schley and Freeman W. Schley, are not void for the reason that they could not convey a contingent remainder interest in the estate of their father; holding as we do that their interest was a vested and not a contingent remainder interest, and as such being subject to be transferred or assigned.

The other rulings of the court not in conflict with the above are not erroneous for any reason assigned.

Judgment reversed on both main bill and cross-bill of exceptions.

All the Justices concur.

(153 Ga. 259)

SCHLEY v. WILLIAMSON et al. (No. 2722.)

(Supreme Court of Georgia. April 14, 1922.)

(Syllabus by the Court.)

Case controlled by rulings in another case.

The rulings made in the case of Schley v. Williamson, 111 S. E. 917, this day decided, are controlling in this case.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit between J. M. Schley and W. W. Williamson, executor, and others. Judgment for the latter, and the former brings error. Reversed.

Lawton & Cunningham, of Savannah, for plaintiff in error.

Stephens, Barrow & Heyward, Leo A. Morrissey, and Connerat & Hunter, all of Savannah, for defendants in error.

HILL, J. Judgment reversed. All the Justices concur.

(28 Ga. App. 504)

BYRD v. STATE. (No. 13326.)

(Court of Appeals of Georgia, Division No. 1. April 14, 1922. Rehearing Denied May 9, 1922.)

(Syllabus by the Court.)

Indictment and information \Leftrightarrow 192—Rape \Leftrightarrow 53(2)—No conviction for assault, when evidence affirmatively shows rape; evidence held not to show rape so as to prevent conviction for assault.

Under an indictment charging rape, the accused cannot lawfully be convicted of an assault with intent to rape, if the evidence affirmatively shows that the offense charged was committed. Pen. Code 1910, § 19; Welborn v. State, 116 Ga. 522(2), 42 S. E. 773. However, in the instant case the evidence did not demand a finding that the defendant had committed rape, but authorized the verdict of assault with intent to rape. The court, therefore, did not err in overruling the motion for a new trial.

Bloodworth, J., dissenting.

Error from Superior Court, Emanuel County; R. N. Hardeman, Judge.

Frank Byrd was convicted of assault with intent to rape, and he brings error. Affirmed.

Herrington & Durden, of Swainsboro, for plaintiff in error.

Walter F. Grey, Sol. Gen., of Swainsboro, for the State.

BROYLES, C. J. Judgment affirmed.

LUKE, J., concurs.

BLOODWORTH, J. (dissenting). I cannot agree with the majority of the court that the judgment in this case should be affirmed.

In Welborn v. State, 116 Ga. 522(2), 42 S. E. 773, it was held:

"Under an indictment charging a person with rape a verdict finding him guilty of assault with intent to commit a rape is unwarranted, and contrary to the evidence, when it appears that some of the witnesses testified to the full accomplishment of the crime charged, and none of them to an assault not included in the perpetration of the offense. An instruction that the jury might so find in this case was, under the evidence, erroneous."

In Brown v. State, 76 Ga. 625, 626, citing Morris v. State, 54 Ga. 441, the Supreme Court said:

"Penetratio corporis et emissio seminis was required by the old law to be proved, but slight penetration is sufficient."

The person assaulted in the case under consideration testified to "the full accomplishment of the crime charged" (both penetration and emission were shown), and no witness testified "to an assault not included in the perpetration of the offense." As the evidence showed that the crime charged was actually perpetrated, a conviction of an assault with intent to commit the crime was unwarranted (Penal Code, § 19), and the court erred in refusing a new trial.

On Motion for Rehearing.

BROYLES, C. J. The plaintiff in error moves for a rehearing of this case on the ground that this court overlooked the language of the decision in Welborn v. State, 116 Ga. 522 (2), 42 S. E. 773, where it was held that—

"Under an indictment charging a person with rape a verdict finding him guilty of assault with intent to commit a rape is unwarranted, and contrary to the evidence, when it appears that some of the witnesses testified to the full accomplishment of the crime charged, and none of them to an assault not included in the perpetration of the offense."

It is obvious from both the majority and the dissenting opinion in the instant case that the language referred to above was not overlooked by this court. It is well settled that the decision of the reviewing court in a case must be construed in the light of the particular facts of that case. In the Welborn Case the original record (of file in the office of the clerk of the Supreme Court) shows that the female charged to have been raped was 18 years old, and that she testified positively and unequivocally that the defendant, by force and violence, and against her will and consent, had sexual intercourse with her. There were no such material contradictions in her testimony, nor such contradictions between her testimony and the other evidence adduced upon the trial, as would have authorized a finding that only

an assault with intent to rape had been committed upon her; but, on the contrary, her testimony demanded a finding that the defendant had fully accomplished the act of sexual intercourse with her, and that he was guilty of rape. It is also apparent from the record that she was a white woman of at least average intelligence. In that case the evidence for the state demanded a finding that the female had been raped, and the evidence for the defense did not authorize a finding that she had been merely assaulted with intent to rape, and therefore the verdict of assault with intent to rape was not authorized by any evidence in the case. The facts of the case now under review are quite different. To begin with, the female charged to have been raped was a pathetically ignorant child, 12 years of age. She testified that she did not know the name of the county or state in which she lived, and her mother testified that the child was not "bright." It is also apparent from the record that she was a negro girl. While this little girl testified that the defendant raped her, her testimony as to the details of the transaction was so inconsistent and so full of contradictions, and her statement that her private parts had been penetrated by the penis of the defendant was so opposed to the testimony of the physician who made a physical examination of her after the alleged commission of the offense charged, that the jury were amply authorized to find that the defendant had not raped her, but that he had assaulted her with the intent to rape. As examples of the contradictions in her testimony, the girl testified in one breath that the defendant put his penis in her private parts about one inch, and in the next breath she swore that "he put it in all the way as far as it would go," and then she testified:

"No, he didn't put it in all the way it would go; he hurt so bad he couldn't put it in—it hurt so bad he couldn't put it in there all the way."

And in another part of her testimony she swore that the defendant did not hurt her at all. She testified also, on cross-examination, that a physician examined her after this occurrence, and that he told her that she had not been raped, but had been assaulted with intent to rape. She further testified that her mother, without examining her like the doctor did, told her that the defendant had raped her (the girl), and "she told me that I was to say that he raped me." Later on in her testimony she denied having so testified, and swore that her mother did not tell her that the defendant had raped her, and did not tell her that she must say so. She then admitted that she had told Mr. Herrington, counsel for the defendant, that her mother told her that the defendant had raped her, and told her that she must say in court that he had raped her.

The child's mother was sworn as a witness, and admitted that she had told the girl to swear that the defendant raped her. Furthermore, the defendant introduced as a witness the physician who had examined the girl. This witness testified, in substance, that he had minutely examined the girl's private parts and that he found no rupture, and that there did not seem to have been any penetration. The gist of this witness' testimony was that from a careful examination of the girl's private parts there had been, to the best of his knowledge and belief, no rape committed upon her, but merely an assault with intent to rape. The jury were amply authorized to find from this testimony that this little ignorant ducky was mistaken as to the penetration of her private parts, but that an assault with intent to rape had been committed upon her. Furthermore, even if it could be held that the evidence for the state demanded a finding that she had been raped, the evidence for the defense amply authorized a contrary finding, and authorized the jury to find that she had been assaulted with intent to rape.

Rehearing denied.

LUKE, J., concurs.

(28 Ga. App. 424)

SINGER SEWING MACH. CO. v. ROSENBERG. (No. 12804.)

(Court of Appeals of Georgia, Division No. 2.
April 1, 1922. Rehearing Denied May 6,
1922.)

(Syllabus by the Court.)

1. Courts \S 189(4, 15)—Judgment \S 501—Defect in process held amendable nunc pro tunc by attaching signature; judgment not void and open to collateral attack because process attached to original petition not signed; that process served too late for return term did not affect judgment taken at following term; failure to serve copy of order making suit returnable to later term held not to affect judgment.

"Attached to the original petition was the form of a process, but with no signature of the clerk thereto. To the copy of the petition which was served upon the defendant was attached a complete process duly signed." "The defect in the process attached to the original petition was amendable, and might be cured by the clerk's attaching his signature thereto nunc pro tunc." *Myers v. Griner*, 120 Ga. 723 (2), 725, 48 S. E. 113. In the instant case the sole question, under the agreement of counsel, was whether the previous judgment pleaded by the defendant and collaterally attacked by the plaintiff was "a legal and binding judgment as it stood." It is controlled by the case cited above. Even could the petition in the former case have been dismissed pending that proceeding, as was done in *Rowland v. Towns*, 120 Ga. 74, 47 S. E. 581, and even could the for-

mer judgment have been set aside in a proper proceeding instituted for that purpose, the instant attack upon that judgment is not such a motion or proceeding. The defect in the original process being curable by amendment, the former judgment was not void on its face, but "as it stood" was legal and binding.

(a) The fact that the original and copy process, although made returnable to the September B term of the municipal court of Atlanta, beginning the third Monday in September, was directed by the court to be amended and made returnable to the October A term, beginning the first Monday in October, and that such process was not served on the defendant until October 1, or less than the required number of days before the October A term, did not render void the judgment subsequently taken against the defendant on October 26, during the following October B term, beginning the third Monday in October. "Service effected too late for a particular term shall be good for the next succeeding term thereafter." Act Creating Municipal Court of Atlanta, § 36 (Ga. Laws 1913, p. 162); Civ. Code 1910, § 5570. See, also, *Baker v. Thompson*, 75 Ga. 164, in which the facts relating to process and service were similar. The failure to serve the defendant with a copy of the court's order, making the original suit and process returnable to a later term, was a mere irregularity not affecting the validity of the judgment as it stood.

2. Sustaining of certiorari held error.

For the reasons stated, it was error to sustain the certiorari from the ruling of the municipal court sustaining the plea of *res judicata*, which set up the former judgment as a bar to plaintiff's recovery in the instant case.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Mrs. S. Rosenberg against the Singer Sewing Machine Company. Judgment for defendant and certiorari sustained by the superior court, and defendant brings error. Reversed.

The vendor in a conditional sale of a sewing machine brought trover for it against the vendee, in the municipal court of Atlanta. The petition was filed August 26, 1920, and a form of original process was annexed, purporting to bear test in the name of the judge, and requiring the defendant to appear on the third Monday in September following; but the original process was unsigned by the clerk or his deputy. On September 20, 1920, the judge passed an order providing that, as "process has never been served on the defendant in the above-stated case as required by law, to the term to which the suit and process was made returnable, to wit, third Monday in September, 1920, September B term, * * * said suit and process be and the same is hereby amended and made returnable to the first Monday in October, 1920, October A. term thereof," and that defendant be served with "a copy of said suit and process, and also a copy of this order."

On October 1, 1920, the marshal of the court entered his return showing that on that date he had served the defendant "personally with a copy of the within petition and process," and showing the seizure of the property. It was admitted in open court, or shown without dispute, that "a copy process duly signed by the clerk of the court, dated August 26, 1920, returnable to the third Monday in September, 1920, had been in fact served upon the defendant," but that "no copy of the order extending the time for service and making the case returnable to a later term of court had ever been served upon her." Defendant neither pleaded nor made any appearance in this suit. On October 26, 1920, during the October B term of the court beginning the third Monday in October, the plaintiff vendor, electing to take a judgment for the property, obtained judgment therefor, but not for any amount as hire. On November 3, 1920, the vendee defendant in the trover proceeding filed in the same court a new suit against the vendor, to recover \$34 upon open account, on the theory that, as the vendor had rescinded the contract of conditional sale by retaking possession of the property, and as the judgment rendered against her in the trover proceeding was illegal and void because of the defective original process and service, she was entitled to a refund of all cash payments made to the vendor on the contract of purchase. The vendor defendant in the present suit, by its plea and answer or in open court, admitted its receipt from the plaintiff of the alleged payments and its possession of the property, but claimed a larger amount as set-off or recoupment for the use and hire of the property while in the plaintiff's possession and for deterioration in the value by such use. But as its main defense the defendant pleaded as *res judicata* the former trover suit and judgment against the plaintiff. It was agreed by counsel in open court that this former proceeding "constituted *res adjudicata* to the present action, provided that the said former judgment was a legal and binding judgment as it stood." The trial judge having sustained this plea, the plaintiff sued out certiorari, upon the grounds that there was no *res judicata*, for the reason that the former judgment was void and not merely voidable, and that, as the defendant had admitted its possession both of the property and of the money payments, the plaintiff was entitled to a recovery of the latter. Error is assigned on the sustaining of the certiorari.

H. C. Holbrook, of Atlanta, for plaintiff in error.

Morris Macks and Saml. A. Massell, both of Atlanta, for defendant in error.

JENKINS, P. J. Judgment reversed.

STEPHENS and HILL, JJ., concur.

(28 Ga. App. 502)

MILLS v. STATE. (No. 13265.)(Court of Appeals of Georgia, Division No. 1.
April 14, 1922.)*(Syllabus by the Court.)*

1. Indictment and Information \S 125(3)—Larceny \S 28(1), 32(1)—Receiving stolen goods \S 7(1,5)—Accusation not subject to demurrer for duplicity, defective allegation of ownership, or on ground that no offense was charged.

The demurrer to the indictment is without merit.

2. Criminal law \S 922(5)—Instruction as to presumption from possession of recently stolen goods harmless.

Exception is taken to the following charge: "I charge you that any person found in possession of recently stolen goods, the presumption is that he stole it." Immediately following this, the judge added, "although that presumption may be rebutted by competent testimony." Even if this charge was error, under the particular facts of the case it does not require a new trial, for the defendant made no explanation as to how the property, which had been recently stolen, came into his possession. Moreover, the state did not rely entirely on the evidence as to recent possession (as is usually the case when a new trial is granted on such a charge), but it proved a confession by the defendant that he stole the property in question. This was direct and not circumstantial evidence, and, outside of the evidence as to recent possession, was corroborated by proof of the corpus delicti.

3. No error shown by other grounds.

None of the other grounds of the amendment to the motion for a new trial show error.

4. Sufficiency of evidence.

The verdict was amply authorized by the evidence.

Error from City Court of Dublin; S. W. Sturgis, Judge.

Tom Mills was convicted of offenses, and he brings error. Affirmed.

The accusation charged defendant with the offense of misdemeanor, for that he unlawfully, wrongfully, and fraudulently took and carried away one certain wooden buggy wheel, painted red, of the property of the Lovett Mercantile Company, of the value of \$5, with intent to steal it, and further charged him with the offense of misdemeanor for that, at the same time and place, he unlawfully bought and received from some person unknown the same wheel, it having been stolen from the Lovett Mercantile Company by such unknown party, and defendant knowing at the time that it was stolen. It seems to have been signed by S. F. Glover, prosecutor, and by the solicitor general. Defendant demurred, on the ground that no offense was set out charging defendant with a crime under the laws of the state, that the accusation was not signed and was null and void, and that the accusation did not set out whether the mercantile company was an individual, corporation, or partnership. He further demurred and asked that the state elect which charge would be tried first, on the ground that the accusation charged two separate and distinct offenses of simple larceny and the receiving of stolen goods.—Statement by editor.

Chas. S. Loden, of Macon, and W. A. Dampier, of Dublin, for plaintiff in error.

Wm. Brunson, Sol., of Dublin, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, C. J., and LUKE, J., concur.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

END OF CASES IN VOL. 111

